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RATEPAYERS APPEAL OF THE	§	PUBLIC UTILITY COMMISSION
DECISION BY WINDERMERE OAKS	§	
WATER SUPPLY CORPORATION TO	§	OF TEXAS
CHANGE WATER AND SEWER	§	
RATES	§	

**RATEPAYERS' REPLY TO WINDERMERE'S RESPONSE TO
MOTION TO REOPEN THE RECORD AND ADMIT EVIDENCE
OF WINDERMERE'S POST-HEARING RECEIPT OF \$678,812.05 IN CASH
FROM ALLIED WORLD SPECIALTY INSURANCE**

TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

The Ratepayer Representatives ("Ratepayers") of Windermere Oaks Water Supply Corporation ("Windermere") file this REPLY to WINDERMERE'S RESPONSE to RATEPAYERS' MOTION TO REOPEN THE RECORD AND ADMIT EVIDENCE OF WINDERMERE'S POST-HEARING RECEIPT OF \$678,812.05 IN CASH FROM ALLIED WORLD SPECIALTY INSURANCE and would show as follows:

I. Procedural History

Ratepayers received Windermere's Response on September 29, 2023. Commission Rule § 22.78(a) provides that responsive pleadings shall be filed within five working days after receipt of the pleading to which the response is made. Accordingly, this Reply is timely filed.

II. Discussion

Ratepayers are both thrilled with and relieved by the news that Windermere has received \$678,82.05 from Allied World Specialty Insurance (Allied) to reimburse Windermere's legal defense expenses. That decision to pursue Allied was a gamble; that it turned out well is a great relief.

Likewise, Ratepayers are pleased that Windermere's hearing representatives and legal counsel have finally acknowledged the Allied settlement payment and have stopped spending corporate resources on efforts to conceal it from the Commission and exclude it from the record

in this appeal. By Windermere's own admission, the settlement payment reimbursed, to the penny, Windermere's legal costs "related to defending the civil suits"¹ and for pursuit of the claims against Allied, plus a windfall of more than \$148,000 in statutory penalties and interest. The fact of the settlement payment and its positive impact on Windermere's "financial integrity" are undeniable.

Even as Windermere finally joins its ratepayers in acknowledging the corporation's good fortune, however, its Response raises two important matters that require clarification.

First, it is important to remember that, but for reckless and self-interested decision-making by Windermere's board and its legal advisors, Windermere would not have paid or incurred enormous "outside legal costs related to defense of civil suits"² and would not have been exposed for the risk and expense of litigation with Allied.

Windermere had no obligation whatsoever to pay legal fees for directors named as defendants in litigation. To the contrary, Windermere's governing documents prohibit the use of corporate funds and credit for any purpose other than the provision of water and wastewater services to its members.³ Windermere did not have sufficient resources on hand both to pay unlimited legal costs for the directors⁴ and to provide water and wastewater services to its members. Allied had made clear it would not pay those costs without a potentially lengthy and expensive legal battle.

Under those circumstances, no prudent motivated board would have voted for the corporation to spend "whatever it takes"⁵ to pay for legal services for the directors. The

¹ \$411,616.43 in "defense" costs for the directors and \$5,000 in "defense" costs for Windermere.

² See HOM1 Tr. Day 1 at 228 lines 16-19; 229, lines 24-25; 230 lines 1-25; 231 lines 1-12. (Nelson Cross)(Dec.1 2021), Y-E 2019 - Ratepayers HOM2 125 at p. 3, Y-E 2020 - Ratepayers HOM2 118 at p. 3, Y-E 2021 - Ratepayers HOM2 124 at p. 7

³ This is the same board majority that claims to have concluded months earlier that the corporation could not afford to spend \$100,000 to pursue recovery of its misappropriated land from an unfaithful fiduciary voted.

⁴ Windermere did, however, have the wherewithal to pay \$5,000 for Windermere's own defense costs without interfering with the provision of services.

⁵ HOM1 Tr. at pg. 274, lines 16-25, and pg. 275 lines 1-7 (Gimenez Cross)(Dec. 2, 2021)

corporation would not have faced the prospect of gambling even more of its resources to seek reimbursement from Allied.

Nevertheless, it is undeniable that a majority of the board ⁶ voted to require the corporation to pay unlimited (and unrecoverable) legal costs for the benefit of themselves and the other directors named as individual defendants. Equally self-interested law firms, including Windermere's general counsel, allegedly agreed⁷ to finance this arrangement with unlimited corporate debt.⁸

21	Q	Because the board is paying anything the law
22		firm bills -- I'm sorry. Let me back up.
23		The board is authorizing and committing
24		the Company to pay anything that the law firms bill in
25		connection with these lawsuits. Correct?

275

1	A	Yes, ma'am.
2	Q	And it has done that throughout. Isn't that
3		right?
4	A	Yes, ma'am. We pay our obligations.
5	Q	Well, you haven't paid them yet, have you?
6	A	We are working every day to pay them as we can,
7		the best we can.

The individual defendants and the law firms benefitted more than anyone from these

⁶ Windermere's representatives insist this is true, even though no such arrangement was ever approved by majority vote of the board or documented in any way.

⁷ See HOM1 Tr. Day 2 pg. 274, lines 16-25, pg. 275 lines 1-7. (Gimenez Cross)(Dec. 2, 2021)

⁸ HOM1 Tr.at 71, line 13-25; 72 lines 1-9 (Nelson Cross) (Dec. 1, 2021).

13	Q	Is it fair to say that none of the legal
14		expenses that were incurred and included in these rates
15		were used for purposes of operating the water and
16		wastewater system?
17	A	Could you repeat that, please?
18	Q	Yes, sir. Is it fair to say that the legal
19		expenses that we're here about today that were included
20		in this rate increase, none of those legal expenses --
21		excuse me -- were used for purposes of, for example,
22		making more water flow through the system?
23	A	That's correct.

Those actions were reckless at their best. The corporation dodged a bullet when Allied agreed to settle, but neither Windermere nor its ratepayers should ever have been in that position.

Second, Windermere's Response suggests it may be changing its position yet again concerning the design of the appealed rates and the costs they were intended to recover.⁹ Up to now, Windermere had sponsored at least a half dozen versions, pivoting each time the irrationality of its position was revealed. That strategy has made it virtually impossible to identify, obtain and properly analyze relevant cost data under applicable legal standards. Here we go again.

For most of this proceeding, Windermere insisted the appealed rates were designed to recover, at most, \$171,000 in outside legal costs, based on the TRWA rate sheet and Windermere's 2019 year end financials.¹⁰ Windermere produced invoices for the outside legal costs reported on

⁹ Based on Windermere's response, the current version is that the appealed rates were designed to generate increased monthly cash flow to create a "war chest" to fund whatever legal services the board desired at the time. See Ratepayers HoM 2 Ex. 150 at 36, email from Joe Gimenez to John Delucca with CoBank "But the current Board members have already indicated a more realistic world view than that of the 2018 Board by budgeting \$250,000 for legal expenses in 2020. Developing a war-chest for future legal bills seem the best possible route given the litigiousness of the plaintiffs and their friends in the neighborhood."

¹⁰ See Ratepayers' Exhibit HoM2 140 at Bates Ratepayers Page 8-9.

its 2019 year end financials (but not for all of its outside legal costs, even the costs it failed to report for 2019) and insisted that nothing else was relevant or discoverable.¹¹

As a result, only a small fraction of Windermere's outside legal costs has ever been reviewed for compliance with the "just and reasonable" standards.¹² The only witness qualified to analyze and to opine about them¹³ concluded those costs did not meet the standards and should be excluded.

Remarkably, Windermere's Response claims that more than five years' worth of outside legal costs have now been paid in full using some unspecified combination of increased revenue from the appealed rates and money from the Allied settlement. There is no way to know how much rate revenue was appropriated for this purpose. There is no basis on which to presume those costs meet the "just and reasonable" standards; the subset that has been reviewed by a qualified witness clearly did not. Discretionary "war chest funding"¹⁴ is not an acceptable rate design. This case illustrates graphically why it is not.

Just as remarkably, Windermere's Response suggests that at least some of the increased revenue from the appealed rates should be used to pay its costs for this rate appeal. As one would expect, none of Windermere's competing versions of its rate design include rate appeal expenses.

¹¹ See Windermere's Response to Ratepayers Motion to Compel May 20, 2021, "Ratepayers continue to belabor Issues which are outside the scope of this proceeding, per the Commission's Preliminary Order. cont. Ratepayers make assertions that are not limited to the issues provided by the Commission, and seek to interject their own personal opinion regarding matters outside the relevant matter regarding the approval of the rate study effective March 23,2020. Present or future litigation expenses which were not used to develop the rates adopted in 2020 are irrelevant to this proceeding as this proceeding is focused on the reasonableness and appropriateness of the rates ineffective March 23,2020. Ratepayers harassing requests to obtain information regarding a 2021 civil case has no bearing on the rates which were effective in 2020."

¹²None of the Shidlofsky Law Firm's legal expenses have ever been reviewed under the "just and reasonable" standards or any other standards.

¹³ PUC Staff witness Maxine Gilford is the only qualified witness who actually reviewed and analyzed these invoices.

¹⁴ See Ratepayers HoM 2 Ex. 150 at 36. email from Joe Gimenez to John Delucca with CoBank "But the current Board members have already indicated a more realistic world view than that of the 2018 Board by budgeting\$250,000 for legal expenses in 2020. Developing a war-chest for future legal bills seem the best possible route given the litigiousness of the plaintiffs and their friends in the neighborhood."

There is no evidence suggesting those expenses were even contemplated (much less known and measurable) at the time of the rate increase.

Even where recovery of appeal case expenses is allowed,¹⁵ those expenses typically aren't recovered through rates or paid with rate revenue. While Windermere's appeal case expenses have been the subject of artificially limited review¹⁶ under a procedural rule that is not applicable to retail public utilities, they have not been scrutinized under the "just and reasonable" standards. As a result, this record is devoid of evidence suggesting that Windermere's appeal case expenses meet the "just and reasonable" standards.

The creation of an unlimited "war chest"¹⁷ in perpetuity that can be disbursed by the board for any purposes it sees fit is not an accepted rate design methodology. This case graphically illustrates why it is not.

There is likewise no evidence suggesting that Windermere will not be able to pay its attorneys without the increased revenue from the appealed rates, or that this may somehow jeopardize the company's "financial integrity." However, if it were true that Windermere's legal spending for this appeal proceeding has jeopardized the company's financial integrity, then no one but Windermere's board is to blame for that.

Windermere's recent experience should make its board acutely cognizant of the repercussions that arise when self-interested directors obligate the corporation to pay all of the fees

¹⁵ The many reasons why Windermere should not be allowed to recover any appeal case expenses are well-documented in Ratepayers' prior discovery motions and briefing, and will not be repeated here.

¹⁶ The ALJs purport to rely on Rule § 24.24 for "guidance," but refused to allow cross-examination on any of the more substantive criteria set forth in that Rule. By way of illustration, Ratepayers were not allowed to cross-examine Ms. Mauldin concerning whether Windermere's positions had any reasonable basis in law, policy or fact [(c)(4)], whether the expenses were disproportionate, excessive or unwarranted [(c)(5)] and whether the utility had been candid and forthcoming with the tribunal [(c)(6)].

¹⁷ See Ratepayers HoM 2 Ex. 150 at 36. email from Joe Gimenez to John Delucca with CoBank "But the current Board members have already indicated a more realistic world view than that of the 2018 Board by budgeting \$250,000 for legal expenses in 2020. Developing a war-chest for future legal bills seem the best possible route given the litigiousness of the plaintiffs and their friends in the neighborhood."

outside counsel wishes to bill. That is not prudent financial management by anyone, least of all by a small nonprofit water supply company whose board is already in hot water for that very thing.

Windermere's board has a long and distinguished track record of financial mismanagement.¹⁸ Its ratepayers can no longer be required to pay the price.

One cannot help but draw an analogy to a seemingly empty pail. Windemere led this Commission to believe that its metaphorical pail was near empty, a state which purportedly threatened its very solvency. In truth, however, Windemere discreetly replenished this pail with a substantial volume of cash, namely the \$678,812.05 Allied settlement payment. Though its pail was full to the brim, Windermere nonetheless maintained the narrative of an empty pail.

Windermere received \$678,812.05 from Allied at least seven weeks ago and failed to disclose this to the Commission. To the contrary, Windermere acted as though the settlement never happened and continued to insist that Staff's recommended rates would negatively impact Windermere financial integrity and eventually result in the financial demise of the corporation. It was not until Ratepayers called Windermere on its lack of candor that Windermere begrudgingly acknowledged the substantial payment. Even now, however, Windermere refuses to admit that to the extent the appealed rates were ever sustainable (which they were not), they certainly cannot continue.

One cannot help but draw an analogy to a seemingly empty pail. Windemere, in its submissions, have led this Commission to believe that its metaphorical pail – representing its legal financial obligations – was near empty, a state which purportedly threatened its very solvency. Yet, recent revelations suggest that Windemere discreetly replenished this pail with a substantial volume of water, namely the \$678,812.05 Allied settlement payment, while maintaining the

¹⁸ .HOM2 Tr. at pg. 781 lines 11-25, pg., 782-785 lines 1-25 and pg. 786 lines 1-22 (Gimenez Cross) (Mar. 22, 2023)

narrative of an empty pail when in fact the pail was full to the brim with water. Such a material disclosure, one would argue, ought to have been immediately apprised to this Commission.

This incongruence becomes glaringly apparent when juxtaposed against Windemere's previous arguments. For example, Windemere strenuously contended that the non-recovery of legal fees, as recommended by the Staff, would negatively impact Windemere financial integrity and eventually the financial demise of the corporation. Notably, while advancing these assertions, Windemere had been in possession of the \$678,812.05 check from Allied for a minimum of seven weeks, which the parties and the Commission have now learned has allowed them to zero out its defense legal debt. One cannot wonder why Windemere did not disclose this in any of its recent filings or at least the likelihood of retiring this debt within the month with the Allied payment. The deliberate omission not only undercuts the veracity of its claims but also indicates an unsettling intent to deceive the ALJ, Commission Staff, and the Ratepayers.

III. Conclusion

Ratepayers have satisfied each of the four criteria the Commission should consider in determining this Motion. Windemere has finally withdrawn its objections to Ratepayers' Post-Hearing Exhibits 1 and 2 and has admitted that all "outside legal expenses related to defending civil suits," which were the stated basis for the rate increase, have been fully reimbursed by Allied and all balances for those outside legal expenses have been paid in full. This important information should be included within the evidentiary record for this appeal proceeding.

WHEREFORE, premises considered, Ratepayers respectfully request to that this Motion be granted, that the evidentiary record be reopened and that Ratepayers' Post-Hearing Exhibits 1 and 2 and Windemere's admissions described above be admitted into evidence, and that Ratepayers be awarded such other and further relief, at law or in equity, to which they may show themselves to be justly entitled.

Respectfully Submitted,

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Certificate of Service

I hereby certify that, unless otherwise ordered by the Presiding Officer, notice of this filing was provided to all parties of record via electronic mail on October 6, 2023.

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