



Control Number: 50788



Item Number: 42

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SOAH DOCKET NO. 473-20-4071.WS  
PUC DOCKET NO. 50788



**RATEPAYERS APPEAL OF THE  
DECISION BY WINDERMERE OAKS  
WATER SUPPLY CORPORATION TO  
CHANGE WATER AND SEWER  
RATES**

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**BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS**

**WINDERMERE OAKS WATER SUPPLY CORPORATION'S  
MOTION TO COMPEL FIRST REQUEST FOR INFORMATION**

COMES NOW, Windermere Oaks Water Supply Corporation (WOWSC) and files this Motion to Compel First Requests for Information (RFI) to Ratepayers of Windermere Oaks Water Supply Corporation (Ratepayers). On September 9, 2020, WOWSC filed and served its First RFI, seeking documents and other items in this matter. On September 21, 2020, Ratepayers filed their Motion for Extension of Time to File Objections to WOWSC's First RFI (Ratepayers' Motion for Extension).<sup>1</sup> On September 22, 2020, WOWSC filed its Response to Ratepayers' Motion for Extension. On September 23, 2020, Ratepayers filed their Objections to WOWSC's First RFI (Ratepayers' Objections).<sup>2</sup> Pursuant to 16 Texas Administrative Code (TAC) § 22.144(e), this Motion to Compel is timely filed. In support of its Motion to Compel, WOWSC provides the following arguments:

**I. INTRODUCTION**

Ratepayers have once again misrepresented the nature of the parties' attempts to resolve objections prior to filing.<sup>3</sup> The Ratepayers have claimed that they "have communicated in good faith with WOWSC Counsel to clarify some ambiguities with some [sic] the WOWSC RFI's,"<sup>4</sup> as

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<sup>1</sup> Ratepayers' Representatives Objection to Windermere Oaks Water Supply Corporations First Request for Information (Sept. 21, 2020) (Ratepayers' Motion for Extension).

<sup>2</sup> Ratepayers' Representatives Objections to Windermere Oaks Water Supply Corporation's First Request for Information (September 23, 2020) (Ratepayers' Objections).

<sup>3</sup> See WOWSC's Response to Ratepayers' Motion to Compel at 2 (Sept. 22, 2020) (WOWSC refuted Ratepayers' claim that WOWSC did not attempt to resolve its objections by email, prior to filing objections, whereas WOWSC's Exhibit B in its Response showed differently).

<sup>4</sup> Ratepayers' Objections at 2.

if it attempted to resolve the objections in its filings. However, Ratepayers sent two separate emails, making very minimal effort to clarify the meaning of only RFI Nos. 1-1 and 1-15.<sup>5</sup> In both circumstances, WOWSC promptly responded by email, clarifying the RFIs, and neither of these objections are included in the filing. **Ratepayers never made any attempt to contact WOWSC by phone, email, nor any other form of communication, to resolve any of the objections included in its filing.**

Ratepayers' failure to contact WOWSC regarding its objections should not be given the leniency that some non-attorney parties are given when they are unfamiliar with Public Utility Commission (Commission) rules or the applicable statutes. Ratepayers themselves, in their Motion to Compel, filed just two weeks prior to their Objections, accused WOWSC of not complying with precisely the same Commission rule that they failed to comply with now.<sup>6</sup>

While this may seem like a simple procedural violation, Ratepayers' failure to attempt resolution of its objections prior to its filing has serious implications, contributing to issues that are at the heart of this case: attorneys' fees. Many of Ratepayers' objections could have been resolved by simply discussing the issues with WOWSC Counsel. Instead, not only is WOWSC forced to respond to misrepresentations and the untimeliness of Ratepayers' objections filing, but WOWSC must spend additional time and expense drafting a written response to objections that potentially could have been resolved otherwise.

Ratepayers' Objections were filed three days after the deadline for such objections, and two days after their late-filed Motion for Extension.<sup>7</sup> Although Ratepayers cite 16 TAC § 22.4(b) as the authority for the Commission to permit deadlines to be extended upon a showing of good cause, Ratepayers fail to mention the wording of the section requiring such a motion for extension of time to be filed *prior* to the expiration of the applicable time period.

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<sup>5</sup> See Exhibit A.

<sup>6</sup> WOWSC Ratepayers Representatives Motion to Compel Windermere Oaks Water Supply Corporation to Ratepayers First Request for Information at 2 (Sept. 15, 2020) (Ratepayers' Motion to Compel).

<sup>7</sup> Ratepayers' Objections; See 16 Texas Administrative Code (TAC) § 22.144(b)(2).

As WOWSC pleaded in its Response to Ratepayers' Motion for Extension, WOWSC now re-emphasizes the necessity for adherence to the Commission's rules. Ratepayers' contentions in this case have serious implications for WOWSC's financial integrity, and Ratepayers should be held to the same standards as WOWSC or any other party before the Commission and the State Office of Administrative Hearings (SOAH).

Therefore, WOWSC respectfully requests that the Administrative Law Judge (ALJ) overrule Ratepayers' objections for not complying with the prerequisites for filing objections under 16 TAC § 22.144(d).

Further, the party who seeks to limit discovery by asserting a privilege has the burden of proof.<sup>8</sup> In each instance where Ratepayers have claimed privilege, they have failed to satisfy their burden of proof or even specify which privilege applies.

The attorney-client privilege claimed under Tex. R. Civ. Evid. 503 requires the communication be with a lawyer who is authorized to assist in the rendition of professional legal services.<sup>9</sup> Ratepayer Representatives are not attorneys. Therefore, unless an attorney representing the Ratepayers was included on the alleged privileged documents withheld under Tex. R. Civ. Evid. 503, the Ratepayers may not claim attorney-client privilege. However, because the Ratepayers cite to several statutes and rules, but claim generally that information responsive to that request "may contain privileged information," it is impossible to distinguish under which privilege the documents are being claimed. By providing this blanket objection and claim of privilege, without any further description or argument, it is impossible to determine if Ratepayers have even satisfied their burden of proof that the documents are, in fact, privileged.

WOWSC will make specific arguments on the specific RFIs where privilege was claimed, but WOWSC notes that, generally, Ratepayers abused their claims of privilege in their objections.

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<sup>8</sup> *In re E I DuPont de Nemours & Co*, 136 S.W.3d 218, 223 (Tex. 2004); *Jordan v. Fourth Court of Appeals*, 701 S.W.2d 644, 648-649 (Tex.1985).

<sup>9</sup> *See* Tex. R. Civ. Evid. 503.

## **II. ARGUMENT**

### **A. Generally Applicable Arguments**

Under 16 TAC § 22.144(d)(1), “the specific grounds for the objection shall be separately listed for each question,” and “[a]ll arguments upon which the objecting party relies shall be presented in full in the objection.” Ratepayers make several objections by citing a statute or Commission rule, but without making any attempt to make an argument or lay a foundation for how WOWSC’s request is objectionable. Because Ratepayers have not satisfied their burden of proof on many of their objections, WOWSC respectfully requests the ALJ overrule any objections by Ratepayers that fail to satisfy the requirements of 16 TAC § 22.144(d)(1), and order Ratepayers to respond to WOWSC’s RFIs.

Additionally, Ratepayers have made several baseless, bad-faith relevance objections pursuant to 16 TAC § 22.144(d)(2) and (3) in order to bypass the requirement to provide a voluminous index. While Ratepayers filed a privilege index on September 25, 2020, it appears that the index does not include all documents for which Ratepayers claim privilege.<sup>10</sup> It is also impossible to determine for which RFIs the privilege index was provided. WOWSC requests that the ALJ order the production of a voluminous index of any privileged documents and require Ratepayers to provide privileged documents to the ALJ for inspection. Blanket claims of privilege are not acceptable without a privilege index identifying each document to be withheld and further identifying information.

### **B. WOWSC RFI No. 1-2**

Ratepayers object to the RFI on the basis that WOWSC has superior right of possession or control of the documents. WOWSC will provide all relevant Public Information Act (PIA) requests in its direct testimony.

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<sup>10</sup> Ratepayers’ Representatives Privilege Index in Support of its Objections to Windermere Oaks Water Supply Corporation First Request for Information (Sept. 25, 2020) (Ratepayers’ Privilege Index).

**C. WOWSC RFI No. 1-3**

Ratepayers object to this RFI on the basis that it is not relevant and that it “seeks information that will not be helpful to determining any fact at issue in this proceeding.” Ratepayers make no additional argument to describe the basis for their objection.

This RFI is relevant to this proceeding because the responses could indicate Ratepayers’ motives for bringing an excessive number of Public Information Act requests and several civil lawsuits against WOWSC. Such actions have caused WOWSC to incur legal fees, which it intends to collect through its rates. WOWSC has reason to believe that Ratepayers are motivated to receive service from an investor-owned utility and responses to this RFI could show connections between Ratepayers and investor-owned utilities that could have motivated Ratepayers to hurt WOWSC’s financial integrity and bring legal actions against WOWSC. If such connection between Ratepayers and an investor-owned utility exists, it would support (1) WOWSC’s incurrence of legal fees and recovery of such legal fees in its rates, and (2) Ratepayers’ repeated efforts to harm WOWSC via litigation.

Additionally, Ratepayers object that this RFI will confuse the issues, mislead the jury, or cause prejudice. For the reasons discussed above, WOWSC has legitimate relevant reasons for requesting this information. The request is not meant to confuse the issues, mislead the ALJ, or cause prejudice; it is meant to provide insight into the Ratepayers’ motive for its actions, and to substantiate WOWSC’s legal fees included in its rates.

**D. WOWSC RFI No. 1-4**

Ratepayers objected to this RFI on the basis that it is not relevant and that it “seeks information that will not be helpful to determining any fact at issue in this proceeding.” Ratepayers make no additional argument to describe the basis for their objection.

Please see WOWSC’s argument above, regarding RFI No. 1-3, for why RFI No. 1-4 is relevant and meant to prove Ratepayers’ motive.

Additionally, Ratepayers objected to this RFI “as disproportional to the needs to this case, as the likely benefit from discovery of the information is very small compared with the burden and expense of producing the information.”

If Ratepayers have communications with Aqua Texas representatives, WOWSC would find that information very important to this case for the reasons specified above. Further, if producing responsive documents would cause Ratepayers great burden and expense, the magnitude of such a response would support WOWSC’s argument that there is a strong connection between Ratepayers and an investor-owned utility. This would support WOWSC’s argument regarding Ratepayers’ bias and motive for its continued legal action against WOWSC.

**E. WOWSC RFI No. 1-6**

Ratepayers objected to this RFI on the basis that it is not relevant, that it “seeks information that will not be helpful to determining any fact at issue in this proceeding,” and that it is will confuse the issues, mislead the jury or cause prejudice.

This RFI is relevant to this proceeding because the responses could show a connection between named plaintiffs in Cause No. 48929 and Ratepayer Representatives. WOWSC is being sued in district court and WOWSC seeks to determine whether there is a collateral effort between plaintiffs and Ratepayer Representatives to seek privileged documents through this PUC proceeding. If plaintiffs and Ratepayer Representatives are communicating about PIA requests and other litigation, then these communications are directly relevant to legal fees. This lawsuit has caused WOWSC to incur legal fees, which it intends to collect through its rates. Such communications would support (1) WOWSC’s incurrence of legal fees and recovery of such legal fees in its rates, and (2) Ratepayers’ repeated efforts to harm WOWSC via litigation.

Additionally, Ratepayers object to this RFI on the basis that responsive information is privileged. Ratepayers make no additional argument to describe the basis for their objection.

Communications between Ratepayer Representatives and the named plaintiffs in Cause No. 48929 should not be privileged unless the communication includes legal counsel for Cause No. 48929.

Further, Ratepayers have not met their burden to establish a privilege objection. Ratepayers merely state that they object on the grounds of privilege and that “communications between the Representatives and Ratepayers *may* contain privileged information.”<sup>11</sup> It is unclear which privilege Ratepayers claim in this objection because they cite to several rules but do not make any attempt to explain. Such statement cannot be construed to satisfy their burden.

Ratepayer Representative Patti Flunker is related by marriage to and/or is a member of the same household as Danny Flunker. As mentioned in detail in WOWSC’s Motion to Abate, Danny Flunker is closely related to multiple lawsuits against WOWSC.<sup>12</sup> Because Patti and Danny are closely related, there is a high likelihood that any documents that are privileged would be waived due to their exposure to third parties, such as Danny Flunker.

Regardless, Ratepayers’ relevance objection abuses the discovery process and exceptions to providing a privilege log. While Ratepayers filed a privilege index on September 25, 2020, it appears that the index does not include all documents for which Ratepayers claim privilege.<sup>13</sup> It is also impossible to determine for which RFIs the privilege index was provided. The RFI is clearly relevant, therefore, Ratepayers should be ordered to provide a privilege log for these communications as soon as possible for the ALJ and WOWSC to review.

#### **F. WOWSC RFI No. 1-7**

Ratepayers objected to this RFI on the basis that it is not relevant and that it “seeks information that will not be helpful to determining any fact at issue in this proceeding,” and that it is will confuse the issues, mislead the jury, or cause prejudice.

Again, Ratepayers have abused the discovery objections for relevance in order to avoid the privilege log requirements. This RFI is undeniably relevant to this proceeding. As Ratepayers explained in their objection, one of the issues on appeal is whether the water and sewer rates are just and reasonable. Another issue to be addressed in this proceeding is whether WOWSC’s

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<sup>11</sup> Ratepayers’ Objections at 5.

<sup>12</sup> See WOWSC’s Motion to Abate Proceeding at 2-6 (Sept. 28, 2020) (WOWSC’s Motion to Abate).

<sup>13</sup> Ratepayers’ Privilege Index.



revenue requirement gives the utility sufficient funds to provide adequate water and sewer service to its members. In order to prepare an adequate defense, and because of the ongoing litigation and the legal fees incurred due to the ongoing litigation, WOWSC needs to determine how Ratepayers were organized, who led them and what was discussed about WOWSC's rates. Particularly relevant is any communication that might show that Ratepayer Representatives connected the ongoing litigation and arguments surrounding privileged documents to this rate appeal.

Ratepayers are a party and are subject to discovery under the Commission's rules. WOWSC's rate increase has been appealed and it has the right to ask RFIs of the group who brought the appeal. The RFI is clear and requests information with reasonable particularity.

Additionally, Ratepayers object to this RFI on the basis that responsive information is privileged. Ratepayers make no additional argument to describe the basis for their objection.

Ratepayers have not met their burden to establish a privilege objection. Ratepayers merely state that they object on the grounds of privilege and that "communications between the Representatives and Ratepayers *may* contain privileged information."<sup>14</sup> Such statement cannot be construed to satisfy their burden.

Regardless, Ratepayers' relevance objection abuses the discovery process and exceptions to providing a privilege log. While Ratepayers filed a privilege index on September 25, 2020, it appears that the index does not include all documents for which Ratepayers claim privilege.<sup>15</sup> It is also impossible to determine for which RFIs the privilege index was provided. The RFI is clearly relevant, therefore, Ratepayers should be ordered to provide a privilege log for these communications as soon as possible for the ALJ and WOWSC to review.

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<sup>14</sup> Ratepayers' Objections at 5-6.

<sup>15</sup> Ratepayers' Privilege Index.

**G. WOWSC RFI No. 1-8**

Ratepayers objected to this RFI on the basis that it is not relevant and that it “seeks information that will not be helpful to determining any fact at issue in this proceeding,” and that it is will confuse the issues, mislead the jury, or cause prejudice.

Again, Ratepayers have abused the discovery objections for relevance in order to avoid the privilege log requirements. This RFI is undeniably relevant to this proceeding. As Ratepayers explained in their objection, one of the issues on appeal is whether the water and sewer rates are just and reasonable. WOWSC’s “operations, services, litigation fees, Ratepayer Representative nominations, and rates from 2017 to present” are all part of the analysis of whether WOWSC’s rates are just and reasonable during a rate appeal proceeding.

Additionally, Ratepayers objected on the grounds that responsive information is privileged as work product and “may contain privileged information,” without any further explanation.

Ratepayers have not met their burden to establish their privilege objections. Ratepayers merely state that they object on the grounds of “work product and communication between the Representatives and Ratepayers *may* contain privileged information.”<sup>16</sup> Such statements cannot be construed to satisfy their burden of proof.

Regardless, Ratepayers’ relevance objection abuses the discovery process and exceptions to providing a privilege log. While Ratepayers filed a privilege index on September 25, 2020, it appears that the index does not include all documents for which Ratepayers claim privilege.<sup>17</sup> It is also impossible to determine for which RFIs the privilege index was provided. The RFI is clearly relevant, therefore, Ratepayers should be ordered to provide a privilege log for these communications as soon as possible for the ALJ and WOWSC to review.

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<sup>16</sup> Ratepayers’ Objections at 5-6.

<sup>17</sup> Ratepayers’ Privilege Index.

#### **H. WOWSC RFI No. 1-9**

Ratepayers objected to this RFI on the basis that it is not relevant and that it “seeks information that will not be helpful to determining any fact at issue in this proceeding,” and that it is will confuse the issues, mislead the jury, or cause prejudice.

This RFI is undeniably relevant to this proceeding. As Ratepayers explained in their objection, one of the issues on appeal is whether the water and sewer rates are just and reasonable. Any drafts of surveys sent to WOWSC members regarding WOWSC’s “operations, services, and rates” are of interest to WOWSC in building its defense of whether its rates are just and reasonable.

#### **I. WOWSC RFI No. 1-12**

Ratepayers objected to this RFI on the grounds that “it can only be required to produce documents to which it is in that person’s constructive or actual possession, custody, or control,” without making any attempt to explain how Petitioners’ social media posts are not within the Petitioners’ possession. Surely each petitioner has control over their own social media posts. In order to post on social media, the petitioners must have control over the account and the content posted. Ratepayers’ objection is merely an attempt to avoid fully responding to WOWSC’s RFI.

Ratepayers also objected on the basis that it is not relevant, that it “seeks information that will not be helpful to determining any fact at issue in this proceeding,” and that it is will confuse the issues, mislead the jury, or cause prejudice.

This RFI is undeniably relevant to this proceeding. As Ratepayers explained in their objection, one of the issues on appeal is whether the water and sewer rates are just and reasonable. Another issue to be addressed in this proceeding is whether WOWSC’s revenue requirement gives the utility sufficient funds to provide adequate retain water and sewer service to its members. In order to prepare an adequate defense, and because of the ongoing litigation and the legal fees incurred due to the ongoing litigation, WOWSC needs to determine how ratepayers were organized, who led them and what was discussed about WOWSC’s rates.

Social media posts by Petitioners “regarding WOWSC, its Board members, operations, services, and rates from 2017 to present” may produce evidence of Ratepayer discussions about

whether WOWSC's rates are just and reasonable. WOWSC is not attempting to mislead the ALJ or cause prejudice, but to discover documents and information that can provide a defense in this rate appeal. For example, WOWSC has seen social media posts by Petitioners, specifically YouTube videos filming interactions at WOWSC Board Meetings. Such interactions are undoubtedly relevant to show Ratepayers' motives and positions regarding WOWSC's Board members, operations, service, and rates, all of which are at issue in this proceeding.

**J. WOWSC RFI No. 1-14**

Ratepayers objected on the grounds that "the information responsive to this request as communication and work product between the Representatives and may contain privileged information," without any further explanation.

Ratepayers have not met their burden to establish their privilege objections. Ratepayers merely state that they object on the grounds of "communication and work product" privilege and that "communication and work product between the Representatives and *may* contain privileged information."<sup>18</sup> Such statements cannot be construed to satisfy their burden of proof.

While Ratepayers filed a privilege index on September 25, 2020, it appears that the index does not include all documents for which Ratepayers claim privilege.<sup>19</sup> It is also impossible to determine for which RFIs the privilege index was provided. Therefore, Ratepayers should be ordered to provide a privilege log for these communications as soon as possible for the ALJ and WOWSC to review.

Ratepayer Representative Patti Flunker is related by marriage to and/or is a member of the same household as Danny Flunker. As mentioned in detail in WOWSC's Motion to Abate, Danny Flunker is closely related to multiple lawsuits against WOWSC.<sup>20</sup> Because Patti and Danny are closely related, there is a high likelihood that any documents that are privileged would be waived due to their exposure to third parties, such as Danny Flunker.

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<sup>18</sup> Ratepayers' Objections at 5-6.

<sup>19</sup> Ratepayers' Privilege Index.

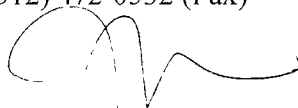
<sup>20</sup> See WOWSC's Motion to Abate at 2-6.

### III. CONCLUSION AND PRAYER

For the foregoing reasons, WOWSC requests the Administrative Law Judge overrule Ratepayer' objections, and compel Ratepayers to provide responses to WOWSC's RFIs. Further, WOWSC respectfully requests that the ALJ reject Ratepayers' abuse of the exception to providing a complete privilege log provided by 16 TAC § 22.144(d)(3), and order Ratepayers to provide a complete privilege log as soon as possible for the ALJ and WOWSC to review.

Respectfully submitted,

**LLOYD GOSSELINK**  
**ROCHELLE & TOWNSEND, P.C.**  
816 Congress Avenue, Suite 1900  
Austin, Texas 78701  
(512) 322-5800  
(512) 472-0532 (Fax)



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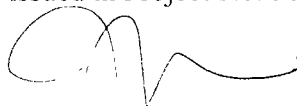
JAMIE L. MAULDIN  
State Bar No. 24065694  
[jmauldin@lglawfirm.com](mailto:jmauldin@lglawfirm.com)

W. PATRICK DINNIN  
State Bar No. 24097603  
[pdinnin@lglawfirm.com](mailto:pdinnin@lglawfirm.com)

**ATTORNEYS FOR WINDERMERE OAKS  
WATER SUPPLY CORPORATION**

### CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on September 30, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.



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JAMIE L. MAULDIN

**Jessica Shipley**

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**From:** Josie Fuller <ratepayersrepjosiefuller@gmail.com>  
**Sent:** Monday, September 21, 2020 9:27 PM  
**To:** Jamie Mauldin  
**Subject:** Question to RFI

Jamie,

We are filling some objections to WOWSC RFI's submitted on September 9, 2020 and wanted to clarify a few of the requests.

RFI #1 states "Admit or deny that Ratepayer Representative Patti Flunker resides in the same house as Daniel Flunker, former registered principal of TOMA Integrity, Inc., the entity that sued WOWSC in Travis County District Court".

Please clarify what case this is.

Thanks,

Josie and Patti

**Jessica Shipley**

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**From:** Josie Fuller <ratepayersrepjosiefuller@gmail.com>  
**Sent:** Monday, September 21, 2020 9:31 PM  
**To:** Jamie Mauldin  
**Subject:** Additional RFI Question

Jamie,  
Additionally, we need some clarification to RFI 1-15

RFI 1-15 states "Admit or deny that Ratepayer Representatives petitioned to remove Joe Giminez from the Board of Directors of WOWSC in 2019".

Please be more descriptive in this question.

Thanks,

Josie and Patti