



Control Number: 50788



Item Number: 85

Addendum StartPage: 0

SOAH NO. 473-20-4071.WS

PUC DOCKET NO. 50788

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<b>RATEPAYERS APPEAL OF THE DECISION BY WINDERMERE OAKS WATER SUPPLY CORPORATION TO CHANGE WATER AND SEWER RATES</b>	§ § § § § § §	<b>BEFORE THE STATE OFFICE  OF  THE ADMINISTRATIVE  HEARINGS</b>
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**RATEPAYERS REPRESENTATIVES REQUEST FOR ADMINISTRATIVE LAW  
JUDGE REVIEW AND RULING OF CURENT WINDERMERE OAKS WATER  
SUPPLY CORPORATION DIRECTOR REPRESENTATIVE APPEARANCES  
UNDER TAC § 22.101(a)**

COMES NOW, Ratepayers Representatives (Representatives) and hereby submits this Request for Review by the Administrative Law Judge (ALJ) regarding the Windermere Oaks Water Supply Corporation Board of Directors Representative Appearance Authority under 16 TAC §22.101(a).

**I. BACKGROUND**

On April 27, 2020, Josephine Fuller, individually and on behalf of the Ratepayers of the Windermere Oaks Water Supply Corporation filed a petition under Texas Water Code (TWC) §13.043(b) appealing the decision by the Windermere Oaks Water Supply Corporation (WOWSC) to change its water and sewer rates. On July 7, 2020 Ratepayer Representative (Representative) filed a Notice of Additional Representation, including Patti Flunker as a Co-Ratepayer Representative. On July 10, 2020 WOWSC filed an Objection to Ratepayers Notice of Additional Representation and on July 16, 2020 the Representative filed a Second Notice of Additional

Representation for Ratepayers of the Windermere Oaks Water Supply Corporation rectifying and deficiencies in the original filing.

## II. FACTS

### WOWSC Annual Meeting and Director Election Dates

Windermere Oaks Water Supply Corporation (WOWSC) is a retail public utility operating under the provisions of Texas Water Code Chapter 67 and the Texas Nonprofit Business Corporation Act according to Article 2 of the WOWSC Bylaws<sup>1</sup>. WOWSC Bylaws, Article 7, § 2, sets forth the Annual Members Meeting and Director Election date, "*The annual meeting of members for the election of directors and for the transaction of all other business which may come before the meeting shall be held on the first Saturday in February of each year.*"<sup>2</sup> **[Emphasis Added]**. The date set forth in the WOWSC Bylaws is mandatory, it is not a variable date. Furthermore, any language in the Bylaws referring to the Annual Meeting being held between January 1 and May 1, reiterates the statutory requirement that the Annual Meeting must be held between these two dates, Tex. Water Code § 67.007(a). It does not give the Board the discretion to select an Annual Meeting and Director Election date other than the uniform date determined by the Bylaws, choosing a date outside the required Bylaw date exceeds their scope of their authority<sup>3</sup>. This year the WOWSC, after they were made aware of the February 6, 2021 Annual Meeting date prescribed by the Bylaws<sup>4</sup> opted to take a different direction and disregarded this call to action and eventually called the WOWSC Annual Members Meeting and Director Election for March 27, 2021. There is no legitimate reason why the board delayed the Annual Meeting and Director Election. This action by the WOWSC Board not only exceeded their scope of authority but also

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<sup>1</sup> [https://www.wowsc.org/documents/778/WOWSC BYLAWS - rev approved 2.1.20.pdf](https://www.wowsc.org/documents/778/WOWSC_BYLAWS_-_rev_approved_2.1.20.pdf), page 1

<sup>2</sup> *id* page 3

<sup>3</sup> See Aldrich v. State Ex Rel. Cox, 658 S.W.2d 323 (Tex. App. 1983) Conclusions of Law

<sup>4</sup> See Exhibit A

impacted three directors term limits, that is allowing three directors to hold over in their positions as directors beyond their two-year term limit.<sup>5</sup>

In 2012 the WOWSC Board recognized their failure to follow the newly enacted legislation affecting Water Supply Corporations annual meetings<sup>6</sup> and director elections, so accordingly they delayed the meeting that year to be compliant with the new provisions in T.W.C. Chapter 67. As a side note, prior 2012 all annual members meetings and elections were held on the first Saturday in February each year as required in the Bylaws<sup>7</sup>. Since 2013 there has been no consistency in adhering to the WOWSC Bylaws Annual Meeting and Director Election dates required by the Bylaws. Beginning in 2014 and up until 2020, it appears WOWSC Boards have randomly chosen an Annual Meeting and Director Election date that works with their individual agendas and not in compliance with the WOWSC Bylaws. However, at an October 26, 2019 WOWSC Board Meeting, Board President, Joe Gimenez, recognized this failure by previous boards and acknowledged the significance of following the Bylaws. Mr. Gimenez even stated publicly in the board meeting *“Previous WOWSC Board election practices did not always follow our WOWSC Bylaws. Present Board has been working to follow our WOWSC Bylaws.”*<sup>8</sup> **[Emphasis Added]** Following his public declaration to adhere to our governing documents, specifically holding the Annual Members and Director Election Meeting on the first Saturday in February, Mr. Gimenez called the 2020 Annual Meeting for February 1, 2020, which reflects the first Saturday in February prescribed by the Bylaws<sup>9</sup>. Clearly by Mr. Gimenez’ actions demonstrated that he acknowledged the required WOWSC Annual Members Meeting and Director Election Date and his comprehension of being compliant with the WOWSC Bylaws.

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<sup>5</sup> [https://www.wowsc.org/documents/778/WOWSC\\_BYLAWS\\_-\\_rev\\_approved\\_2.1.20.pdf](https://www.wowsc.org/documents/778/WOWSC_BYLAWS_-_rev_approved_2.1.20.pdf),

<sup>6</sup> [https://www.wowsc.org/documents/778/2012-4-28\\_WOWSC\\_Annual\\_Meeting.pdf](https://www.wowsc.org/documents/778/2012-4-28_WOWSC_Annual_Meeting.pdf)

<sup>7</sup> [https://www.wowsc.org/documents/778/WOWSC\\_BYLAWS\\_-\\_rev\\_approved\\_2.1.20.pdf](https://www.wowsc.org/documents/778/WOWSC_BYLAWS_-_rev_approved_2.1.20.pdf),

<sup>8</sup> [https://www.wowsc.org/documents/778/2019-10-26\\_WOWSC\\_Board\\_Meeting\\_Minutes\\_Approved.pdf](https://www.wowsc.org/documents/778/2019-10-26_WOWSC_Board_Meeting_Minutes_Approved.pdf) Item 2(6) page 2

<sup>9</sup> See Exhibit B

### Facts - Election of Directors in 2019

Mr. Gimenez, along with two additional candidates were elected for two-year terms at the March 9, 2019 WOWSC Annual Meeting and Director Election<sup>10</sup>. As stated earlier, Mr. Gimenez publicly voiced his concerns of adhering to the WOWSC Bylaws, specifically the importance of strict compliance with holding the Annual Members Meeting and Director Election on the prescribed date required in WOWSC Bylaws. It is important to point out that the WOWSC's prescribed date of the first Saturday in February for the Annual Members Meeting and Director Election directly aligns the WOWSC Bylaws, Article 8, § 2, Number of Directors which specifies that "*all directorships shall be for two year terms expiring on alternating years.*"<sup>11</sup> **[Emphasis Added]** This would stand to reason why the Annual Members Meeting date is fixed, why a director's two-year term expires twenty-four months after the director has been elected, which is the first Saturday in February. The WOWSC Bylaws are not ambiguous when defining the director term – two years. This time is fixed and definitive, and there is no exception to this time frame or additional language "or until their successors are elected"<sup>12</sup>. More importantly the WOWSC Bylaws do not provide an exception to extend a director's term beyond two years. Tx. Gov't Code Chapter 311, § 311.005(12) defines year as "12 consecutive months"<sup>13</sup> when applying this definition to the WOWSC's two-year term for a director position on the board, the term does not exceed twenty-four months. When applying these provisions from our Bylaws, WOWSC Directors Mr. Gimenez, Mr. Nelson and Mr. Schaeffer can no longer occupy a director position on the WOWSC board, their term expired on March 10, 2021 and therefore in order to be considered a Representative in the PUC Rate Appeal, the directors should submit proof of their

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<sup>10</sup> [https://www.wowsc.org/documents/778/2019-3-9\\_Y2019\\_WOWSC\\_Annual\\_Member\\_Meeting\\_Minutes\\_Approved.pdf](https://www.wowsc.org/documents/778/2019-3-9_Y2019_WOWSC_Annual_Member_Meeting_Minutes_Approved.pdf)

<sup>11</sup> [https://www.wowsc.org/documents/778/WOWSC\\_BYLAWS\\_-\\_rev\\_approved\\_2.1.20.pdf](https://www.wowsc.org/documents/778/WOWSC_BYLAWS_-_rev_approved_2.1.20.pdf), page 6

<sup>12</sup> *id.* pg. 6

<sup>13</sup> <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.311.htm>

authority to appear on behalf of the WOWSC. It appears even after being informed of their expiration of their term in a December letter to the WOWSC and their attorneys<sup>14</sup>, the WOWSC did nothing to mitigate these issues raised.

On July 10, 2020 in Docket 50788 and SOAH 473-20-4071.WS the WOWSC filed #15 *Windermere Oaks Water Supply Corporation`s Objection to Ratepayers Notice of Additional Representation*<sup>15</sup> challenging the authority of the additional Ratepayer Representative, Patti Flunker Under 16 TAC § 22.101(a)<sup>16</sup>, requesting the presiding officer to require this additional representative submit proof of his or her authority to appear on behalf of another person. The Representatives complied with this request and submitted the additional proof to validate the Additional Representative and her authority to represent the Ratepayers<sup>17</sup>. Appropriately, the Representatives' request that considering Mr. Gimenez, Mr. Nelson, and Mr. Schaeffer two-year terms have expired on March 10, 2021, their authority to be involved with this rate appeal should be verified and validate. The Representatives understand that Mr. Gimenez and Mr. Nelson have been selected by the board to be the "legal subcommittee" on behalf of the WOWSC in this Rate Appeal and it with great concern that anyone who is involved with this Rate Appeal has the legal authority to represent the parties.

Accordingly, the Representatives requests the ALJ require the WOWSC to file the proof of authority that Mr. Gimenez and Mr. Nelson are the legal and official directors of the WOWSC under 16 TAC § 22.101(a).

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<sup>15</sup> [https://interchange.puc.texas.gov/Documents/50788\\_15\\_1074793.PDF](https://interchange.puc.texas.gov/Documents/50788_15_1074793.PDF)

<sup>16</sup> <https://texreg.sos.state.tx.us/public/>

<sup>17</sup> [https://interchange.puc.texas.gov/Documents/50788\\_17\\_1075750.PDF](https://interchange.puc.texas.gov/Documents/50788_17_1075750.PDF)

### III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Ratepayers requests that the ALJ sustain Ratepayers position that Mr. Gimenez and Mr. Nelson terms have expired and deny their representative authority in this Rate Appeal. The Ratepayers also requests any other relief to which it may show itself justly entitled.

Respectfully submitted,

*Josephine Fuller*

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Josephine Fuller, Ratepayer Representative  
328 Coventry Road  
Spicewood, Texas 78669  
(512) 743-2553  
[ratepayersrejosiefuller@gmail.com](mailto:ratepayersrejosiefuller@gmail.com)

*Patti Flunker*

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Patti Flunker, Ratepayer Representative  
307 Coventry Road  
Spicewood, Texas 78669  
(512) 699-1082  
[ratepayersrejosiefuller@gmail.com](mailto:ratepayersrejosiefuller@gmail.com)

**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 email on March 12, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

*Josephine Fuller*

\_\_\_\_\_  
Josephine Fuller, Ratepayer Representative

*Patti Flunker*

\_\_\_\_\_  
Patti Flunker, Ratepayer Representative



**EXHIBIT A**

----- Original message -----

From: patti flunker <[patriciaflunker@yahoo.com](mailto:patriciaflunker@yahoo.com)>

Date: 12/3/20 2:53 PM (GMT-06:00)

To: Joseph Gimenez III <[1129jig@gmail.com](mailto:1129jig@gmail.com)>, Patricia Gerino <[pgerino@gmail.com](mailto:pgerino@gmail.com)>, Dorothy Taylor <[dtaylor27@me.com](mailto:dtaylor27@me.com)>, Brownsandniners <[brownsandniners@aol.com](mailto:brownsandniners@aol.com)>, "Richard T. Schaefer" <[richard.t.schaefer@gmail.com](mailto:richard.t.schaefer@gmail.com)>, George Burriss <[watermgmt@yahoo.com](mailto:watermgmt@yahoo.com)>, [tbrewer@lglawfirm.com](mailto:tbrewer@lglawfirm.com)

Subject: WOWSC Annual Meeting

Board Members,

While pursuing the Internet I came across TRWA's recent posting on their website with regard to holding Water Supply Corporations' annual meetings in compliance with their bylaws.

Trent Hightower, attorney for TRWA who is the author of this article/letter is highly respected in the water industry as the expert on water supply corporations and which I hold in high esteem.

I hope you find his advice helpful when organizing our annual meeting which we be held on February 6, 2021. Please click on the attached link for more information <https://www.trwa.org/blogpost/1539239/361428/WSC-Annual-Meetings-During-COVID-19>.

Regards,

Patti Flunker

WOWSC Member

**EXHIBIT B**

Mr. Jose de la Fuente  
December 29, 2020  
Page 1

## The Law Office of Kathryn E. Allen, P.L.L.C.

114 W. 7<sup>th</sup> Street, Suite 1100  
Austin, Texas 78734  
512.495.1400 (Office)  
512.499.1499 (Fax)

Kathryn E. Allen  
kallen@keallenlaw.com

*Board Certified – Civil Trial  
Texas Board of Legal Specialization*

December 29, 2020

*Via email to [jdelafuente@lglawfirm.com](mailto:jdelafuente@lglawfirm.com)*

Mr. Jose de la Fuente  
Lloyd Gosselink Rochelle & Townsend, P.C.  
816 Congress Ave., Suite 1900  
Austin, TX 78701

Re: 2021 annual meeting for election of directors – Windermere Oaks Water Supply Corporation (“WSC”)

Dear Joe:

This is to follow up on our conversation last week concerning the WSC’s 2021 annual meeting for election of directors (“Annual Meeting”).

As we discussed, my clients believe the WSC is in violation of the WSC Bylaws and applicable Texas law regarding the Annual Meeting. By way of example:

- It is my clients’ understanding the WSC Board has announced the 2021 Annual Meeting will be held not on the first Saturday in February, as required by Art. 7, § 2 of the Bylaws, but almost 2 months later on March 27, 2021. The date set forth in the Bylaws is mandatory; it is not a “target.” The last sentence of Section 2 merely tracks the statutory requirement that the Annual Meeting must be held between January 1 and May 1. Tex. Water Code § 67.007(a). It does not give the Board discretion to select an Annual Meeting date other than the date established by the Bylaws.

- Art. 8, §4(c) of the Bylaws obligates the corporation to make director candidate application forms available at the corporation's main office and to provide such forms by mail or electronically on request. My clients are advised that several director candidates have sought application forms, but none have been provided.
- Art. 8, § 4(b) of the Bylaws sets the deadline for filing of director candidate application forms. That deadline was December 23, 2020. It appears to have been disregarded.
- Pursuant to Tex. Water Code § 67.0052, the corporation was required to notify the members of the ballot application deadline not later than the 30th day before the deadline, or no later than November 23, 2020. That deadline likewise was disregarded.
- Pursuant to Tex. Water Code § 67.0053 and Art. 8, § 5 of the Bylaws, not later than the 30th day before the date of an annual meeting, the corporation shall mail to each member or shareholder of record written notice of the meeting, the election ballot and a statement of each candidate's qualifications, including biographical information as provided in each candidate's application. The election ballot must include the number of directors to be elected and the names of the candidates for each position. That deadline is January 7, 2021. It is inconceivable under the circumstances that the WSC will meet that deadline.
- While the Board is aware of numerous concerns and complaints concerning past elections, it has declined to adopt procedures pursuant to Art. 8, § 6(f) to address such concerns and complaints and to protect the fairness, integrity and openness of the voting process.
- By way of illustration, the Board has once again appointed Janet Crow to serve as the "independent election auditor." Ms. Crow has been at the center of controversy in connection with prior director elections. She has openly aligned herself with incumbent directors who we understand are seeking re-election.
- The Board has once again declined to impress the ballots with unique control numbers or to implement some other mechanism that would ensure only legitimate votes are counted. We understand that in the past embossed seals or watermarks have been used.
- The Board is aware of concerns over the physical security of the ballots themselves. In 2019, there was even a break in at the WSC office when director ballots were being held there. Nevertheless, the Board has once again declined to implement appropriate measures to secure the ballots.

- The election process has been manipulated in the past to enable at least one candidate – Bill Earnest – who did not qualify to be placed on the ballot for director. The full ramifications vis-à-vis the actions in which Mr. Earnest participated as a director have yet to be determined.

In addition, it is our understanding that the Board intends for the Annual Meeting to be conducted via Zoom or similar “remote” conferencing platform in the same manner as recent Board meetings. Such a meeting does not comply with the requirements of applicable law. First, the WSC’s governing documents require that the Annual Meeting be held in person. See, e.g., Art. 7, § 6. They also require that votes be cast prior to the Annual Meeting (by mail or hand delivery) or at the in-person meeting. Art. 7, § 4. To the extent it is applicable, Tex. Bus. Orgs. Code Ann. § 6.002 permits videoconferencing technology if, but only if, the system permits each person participating in the meeting to communicate with all other persons participating in the meeting. This has not been the case for “remote” Board meetings. That section does not trump the voting requirements set forth in the WSC’s governing documents.

The Board’s disregard of the requirements of the governing documents and applicable law does nothing to instill member confidence in the director election process. More important, the terms of three of the Board’s directors expire on March 9, 2021. After that date, there can be no quorum and it will be impossible for the Board to transact the business of the corporation.

I raised this issue with you last week to emphasize that it is more important now than ever that the WSC comply scrupulously with the governing documents, applicable law and the obligation to conduct an Annual Meeting and election that is fair, honest and transparent. There is no “we haven’t gotten around to it” exception, nor should there be. According to the minutes from the Board’s October 12, 2020 meeting, the Board is well-aware of these obligations and claimed then to have been working on these matters with counsel and the TRWA for some time.

If the Board insists upon disregarding the WSC’s obligations, challenges are inevitable. This is no time for the Board to cause the corporation to pick – or fund – a fight it likely cannot win and surely can easily avoid. You have portrayed this Board as folks who are just trying to do the right thing. There is no time like the present for them to step up and prove it. Hold the Annual Meeting on the required date and in a legal manner. Outsource the election process to a truly independent third party with the expertise and facilities to safeguard the integrity of the process and the legitimacy of the outcome. Go the extra mile to do what is right, rather than going out of the way to envelope the process in a cloud of doubt, suspicion, and skepticism. While I cannot guarantee that no one will make a challenge, I am confident if the Board does what is right it will not cost the WSC hundreds of thousands of dollars in an effort to defend what its Board has done.

Mr. Jose de la Fuente  
December 29, 2020  
Page 4

Thank you for hearing me out. Please do not hesitate to call to discuss these matters further.

Sincerely,

*Kathryn E. Allen*

KEA/ks

cc: Mr. Rene Ffrench  
Mr. Bruce Sorgen  
Mr. Dick Dial

Mr. Jose de la Fuente  
December 29, 2020  
Page 1

## The Law Office of Kathryn E. Allen, P.L.L.C.

114 W. 7<sup>th</sup> Street, Suite 1100  
Austin, Texas 78734  
512.495.1400 (Office)  
512.499.1499 (Fax)

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kallen@keallenlaw.com

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December 29, 2020

*Via email to [jdelafuente@lglawfirm.com](mailto:jdelafuente@lglawfirm.com)*  
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