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Addendum StartPage: 0

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RATEPAYERS APPEAL OF THE	§	BEFORE THE STATE OFFICE
DECISION BY WINDERMERE OAKS	§	<small>PUBLIC UTILITY COMMISSION</small>
WATER SUPPLY CORPORATION TO	§	FILING CLERK
CHANGE WATER AND SEWER	§	OF
RATES	§	ADMINISTRATIVE HEARINGS

**WINDERMERE OAKS WATER SUPPLY CORPORATION'S RESPONSE TO
RATEPAYER REPRESENTATIVES' OBJECTIONS TO AND
MOTION TO STRIKE DIRECT TESTIMONY**

Windermere Oaks Water Supply Corporation (WOWSC) files this response to Ratepayer Representatives' (Ratepayers) Objections to and Motion to Strike WOWSC's Direct Testimony and in support respectfully shows the following:

I. BACKGROUND

On April 27, 2020, Josephine Fuller, individually and on behalf of the Ratepayers, filed a petition under Texas Water Code (TWC) § 13.043(b) appealing the decision by WOWSC to change its water and sewer rates.

WOWSC filed its direct testimony on March 10, 2021. Representatives filed its objections on March 17, 2021. Pursuant to SOAH Order No. 7, responses to objections to WOWSC's direct testimony are due March 24, 2021. Therefore, this pleading is timely filed.

II. PROCEDURAL BASIS

The Direct Testimonies of Joe Gimenez III (Mr. Gimenez), Mike Nelson (Mr. Nelson), George Burriss (Mr. Burriss), and Jamie Mauldin (Ms. Mauldin) are permissible under the Texas Rules of Evidence (TRE). Ratepayers fail to object to the testimonies on any grounds other than they disagree with the contents of the testimonies. Objections are normally grounded in a rule for procedure or evidence, and the failure to abide by such rule may warrant an objection. However, objecting to evidence because Ratepayers disagree with the contents is improper and akin to briefing an argument.

WOWSC may present any relevant evidence it wishes, so long as it does not violate Commission rules, Texas Rules of Civil Procedure, Rules of Evidence, TWC, or any order issued by the Commission or Administrative Law Judge (ALJ). The ALJ, and later the Commissioners,

are the fact finders in this proceeding, and they will determine which findings of fact to adopt in the proposal for decision based upon the evidence presented. As such, all of Ratepayers' objections should be overruled.

III. RESPONSE TO REPRESENTATIVES' OBJECTIONS

A. Ratepayers' Objections to Direct Testimony of Mike Nelson

Ratepayers object generally to Mr. Nelson's testimony in its entirety "because it is irrelevant to the issues in this proceeding and speculative."¹ Further, Ratepayers object to Mr. Nelson's testimony because "the witness's testimony is not based on application of the witness's specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter]"² Ratepayers continued to make blanket objections to specific portions of Mr. Nelson's testimony based on "speculation" and "irrelevant to the rate case appeal."³

Ratepayers argue that Mr. Nelson's testimony "is irrelevant to the issues the Commission will consider in this rate appeal, as it does not provide any evidence that will help decide the issues in the Preliminary Order"⁴ Under TRE Rule 401, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action. Each of the sections of testimony to which Ratepayers objected will assist the trier of fact, first the ALJ and then the Commissioners themselves, in determining whether WOWSC's rates are just and reasonable. Further, Ratepayers' objection is misplaced and premature. Ratepayers will have an opportunity to question and challenge Mr. Nelson at a hearing on the merits in this docket and argue their position during post-hearing briefing.

Ratepayers argue that Mr. Nelson's "testimony is not based on application of the witness's specialized knowledge, skill, experience, training, or education to his familiarity to the [subject matter]."⁵ Under TRE Rule 702, an expert's testimony is admissible if the expert is qualified by

¹ Ratepayer Representatives' Objections to and Motion to Strike the Direct Testimony of Mike Nelson on Behalf of Ratepayers at 4 (Mar. 17, 2021).

² *Id.*

³ *Id.* at 4-6.

⁴ *Id.* at 6.

⁵ *Id.* at 4.

knowledge, skill, experience, training, or education, and the expert's opinion is relevant to the issues in the case and based upon a reliable foundation. Mr. Nelson's testimony concerning issues such as WOWSC's rate changes, budget, operations and maintenance, revenues, and cost allocation is based on his experience, responsibilities, and specialized knowledge as a Board Member and Treasurer for WOWSC. Therefore, Mr. Nelson's testimony is admissible under the TRE. Ratepayers did not challenge the expertise of Mr. Nelson, and Mr. Nelson was clearly testifying in areas of his expertise. Ratepayers' objections should be overruled.

Ratepayers assert that Mr. Nelson's expert testimony provided opinions instead of facts based on personal knowledge. TRE Rule 701 allows fact witnesses to provide opinions if they are rationally based on the witness's perception and helpful to clearly understanding the witness's testimony or to determining a fact in issue. Several of the questions and answers Ratepayers cite in their objections relate to such basic items as: "please describe the costs included for contract services," and "what information was available to WOWSC at the time of its decision to increase rates?"⁶ Note that these questions largely go toward factually-based background issues, and nothing in the Ratepayers' objections explains how Mr. Nelson's responses to these questions amounts to impermissible opinion testimony from an expert witness. Mr. Nelson's testimony consists of facts based on his personal knowledge and experience as a Board Member and Treasurer for WOWSC, and any opinions included are only those rationally based on Mr. Nelson's perception of the related events and are provided to help the fact finder understand the testimony and determine the related fact issues as specifically allowed by TRE Rule 701. The Ratepayers' objections are baseless and should be overruled.

Ratepayers also broadly claim that Mr. Nelson's testimony is speculative, without providing any rationale or basis for their assertion. Under TRE Rule 602, a witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. Mr. Nelson's testimony provided information relevant to the water rate appeal brought by Ratepayers, which will be reviewed by the Commission de novo based on what the Board knew at the time the rate increase went into effect.⁷ Mr. Nelson is a Board Member and the Treasurer

⁶ *Id.* at 4-5 (Objections Based on Speculation cited at Page 7, Answer Lines 16-20, and Page 9, Answer Lines 17-22).

⁷ TWC § 13.043(e).

of WOWSC and he provided testimony based on his personal knowledge at the time the rate increase went into effect. Therefore, his testimony is based on personal knowledge and is not speculative. If Ratepayers would like to demonstrate that Mr. Nelson's conclusions are not sound, then Ratepayers will have ample opportunity to cross examine Mr. Nelson at the hearing on the merits regarding the basis of his conclusions and argue their positions in post-hearing briefing. For the above stated reasons, WOWSC respectfully requests that the ALJ deny Ratepayers' Objections to and Motion to Strike the Direct Testimony of Mr. Nelson.

B. Ratepayers' Objections to Direct Testimony of Joe Gimenez III

Ratepayers object to a broad list of questions and answers in the direct testimony of Mr. Gimenez, stating little more other than the items in the provided lists "contain speculation"⁸ and "relate to irre[levant] facts regarding this rate appeal."⁹ Ratepayers argue that Mr. Gimenez was not properly designated as a testifying expert, and, "as a fact witness, this witness must only testify to factual matters on which the witness has personal knowledge."¹⁰ Ratepayers suggest that the broad list of questions they reference seek opinions and the corresponding answers are Mr. Gimenez's opinions.

Ratepayers broadly claim that Mr. Gimenez's testimony is speculative, without providing any rationale or basis for that assertion. Under TRE Rule 602, a witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. As demonstrated in Mr. Gimenez's testimony, he has been the President of the Board for WOWSC since 2019, and he has performed all of the attendant duties and responsibilities associated with that role. Mr. Gimenez's testimony is based on his personal knowledge of WOWSC and therefore his responses are not speculative. Ratepayers will have the opportunity to challenge the substance of Mr. Gimenez's testimony at the hearing on the merits and argue their positions in post-hearing briefing.

⁸ Ratepayer Representatives' Objections to and Motion to Strike the Direct Testimony of Joe Gimenez on Behalf of Ratepayers at 5 (Mar. 17, 2021).

⁹ *Id.* at 7.

¹⁰ *Id.* at 5.

Ratepayers also object to Mr. Gimenez testifying as an expert witness. However, Ratepayers do not challenge the expertise of Mr. Gimenez, except to say that he is “not a rate analysis expert.”¹¹ Under TRE Rule 702, an expert’s testimony is admissible if the expert is qualified by knowledge, skill, experience, training, or education, and the expert’s opinion is relevant to the issues in the case and based upon a reliable foundation. Mr. Gimenez’s testimony provided background on the history, governance, and operational challenges of WOWSC, including how it operates, its current financial health, and its reasons for employing a law firm to supply legal counsel. His testimony was based on his experience, responsibilities, and specialized knowledge as President of the Board for WOWSC. Therefore, Mr. Gimenez’s testimony is admissible under the TRE.

Ratepayers assert that Mr. Gimenez’s expert testimony provided opinions instead of facts based on personal knowledge. TRE Rule 701 allows fact witnesses to provide opinions if they are rationally based on the witness’s perception and helpful to clearly understanding the witness’s testimony or to determining a fact in issue. Several of the questions and answers Ratepayers cite in their objections relate to such basic items as: “please describe the WOWSC,” and “what improvements have been made to the system?” Note that these questions largely go toward factually-based background issues, and nothing in the Ratepayers’ objections explains how Mr. Gimenez’s responses to these questions amounts to impermissible opinion testimony from an expert witness. Mr. Gimenez’s testimony consists of facts based on his personal knowledge and experience as President of the Board for WOWSC, and any opinions included are only those rationally based on Mr. Gimenez’s perception of the related events and are provided to help the fact finder understand the testimony and determine the related fact issues as specifically allowed by TRE Rule 701. The Ratepayers’ objections are baseless and should be overruled.

Ratepayers also object that Mr. Gimenez’s testimony contains “irre[levant] facts regarding this rate appeal.”¹² Ratepayers argue that a very broad list of questions and answers from Mr. Gimenez’s testimony should be stricken because they will not help the fact finder resolve the issue at hand. Under TRE Rule 401, evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining

¹¹ *Id.* at 6.

¹² *Id.* at 7.

the action. Each of the sections of testimony to which Ratepayers objected will assist the trier of fact, first the ALJ and then the Commissioners themselves, in determining whether WOWSC's rates are just and reasonable. Further, some of the testimony Ratepayers claim is irrelevant is necessary to lay the foundation for Mr. Gimenez's expertise and personal knowledge. For example, Ratepayers object to Mr. Gimenez's response to such questions as: "how long have you been involved with WOWSC," and "please describe your responsibilities during your tenure with WOWSC."¹³ As stated above, TRE Rule 602 permits a witness to testify regarding matters of which they have personal knowledge, and the witness's own testimony may be used to demonstrate said personal knowledge. While some of Mr. Gimenez's testimony may not bare directly on a specific issue from the preliminary order—it is not irrelevant, as the testimony demonstrates that Mr. Gimenez has the personal knowledge necessary to testify regarding such issues.

Ratepayers' blanket objections contain little merit and evidence a clear intent to frustrate the appeals process. Ratepayers begin their objections with several items from the preliminary order, including issues 8 and 9 asking whether outside legal expenses were included in the rates and about the amount of reasonable expenses incurred.¹⁴ Ratepayers then object to the relevance of Mr. Gimenez's testimony on these very issues, including Mr. Gimenez's response summarizing the legal expenses included in WOWSC's rates and why they were incurred.¹⁵ This is clearly inconsistent, and rather than make improper objections, Ratepayers should address any disagreement they have with the contents of Mr. Gimenez's testimony through cross-examination at the hearing on the merits and in post-hearing briefing. For the above stated reasons, WOWSC respectfully requests that the ALJ deny the Ratepayer' objections to the Direct Testimony of Mr. Gimenez.

C. Ratepayers' Objections to Direct Testimony of George Burriss

Ratepayers object to Mr. Burriss's testimony regarding how he allocates WOWSC's costs between water and sewer claiming that he distorts the facts of his analysis.¹⁶ Ratepayers fail to

¹³ *Id.* (Objections Based on Irrelevant to the Rate Case Appeal cited at Page 4, Answer Lines 9-10, and Page 7, Answer Lines 17-23).

¹⁴ *Id.* at 1-3.

¹⁵ *Id.* at 6-7 (Objections Based on Irrelevant to the Rate Case Appeal cited at Page 13, Answer Line 22 through Page 16, Answer Line 6).

¹⁶ Ratepayer Representatives' Objections to and Motion to Strike the Direct Testimony of George Burriss on Behalf of Ratepayers at 4 (Mar. 17, 2021).

object to the testimony on any grounds other than they disagree with the information presented. This is not a valid objection and should be overruled. The ALJ, as the fact finder in this proceeding, will determine which findings of fact to adopt in the proposal for decision based upon a preponderance of the evidence as presented by parties in this proceeding.¹⁷ As such, WOWSC requests Ratepayers' objection and motion to strike be overruled.

D. Ratepayers' Objections to Direct Testimony of Jamie Mauldin

Ratepayers object to the fees incurred for the defense of this rate appeal as "extreme and unreasonable."¹⁸ Ratepayers fail to object to the testimony on any grounds other than they disagree with the information presented and request that the ALJ strike the entirety of Ms. Mauldin's testimony. This is not a valid objection and should be overruled.

Ms. Mauldin's testimony is relevant to this proceeding because she is WOWSC's attorney and has provided the services for which she is requesting reimbursement. The testimony does not create unfair prejudice, confuse the issues, mislead a fact finder, create an undue delay, or needlessly present cumulative evidence.¹⁹

Rate case expenses are expressly permissible in rate appeals brought under TWC § 13.043.²⁰ Whether the fees are reasonable must be determined by the fact finder—not the ratepayers.²¹ Accordingly, the ALJ should overrule Ratepayers' objection and motion to strike.

IV. CONCLUSION AND PRAYER

WOWSC respectfully requests that the ALJ overrules the objections of the Ratepayers and grant any further relief to which WOWSC shows itself justly entitled.

¹⁷ See 16 Texas Administrative Code (TAC) §§ 22.2(35), 22.161.

¹⁸ Ratepayer Representatives' Objections to and Motion to Strike the Direct Testimony of Jamie Mauldin on Behalf of Ratepayers at 2 (Mar. 17, 2021).

¹⁹ See TRE 403.

²⁰ TWC § 13.043(e); 24.101(e)(2).

²¹ 16 TAC § 22.161(b), (c).

Respectfully submitted,

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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 March 24, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.



JAMIE L. MAULDIN