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Addendum StartPage: 0

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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  
OBJECTIONS AND MOTION TO STRIKE PORTIONS OF THE DIRECT  
TESTIMONY OF DANIEL FLUNKER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Windermere Oaks Water Supply Corporation (WOWSC) files these Objections and Motion to Strike Portions of the Direct Testimony of Daniel Flunker, seeking to strike certain portions of this prefiled direct testimony submitted by Ratepayer Representatives (Ratepayers) in this Docket.

**I. PROCEDURAL HISTORY**

On April 7, 2021, Ratepayers filed their Representative Daniel Flunker's Direct Testimony (Daniel Flunker's Direct Testimony).<sup>1</sup> Pursuant to SOAH Order No. 7, the deadline to file objections to prefiled testimony is April 14, 2021. Thus, these Objections are timely filed.

**II. INTRODUCTION**

WOWSC generally objects to Mr. Flunker's testimony because it is largely irrelevant to the issues in this proceeding, speculative, and contains inadmissible hearsay. Mr. Flunker's testimony is irrelevant to the extent it will not help determine any "fact in issue" in this litigation.<sup>2</sup> When the main substance of the witness's testimony is not based on application of the witness's specialized knowledge, skill, experience, training, or education to his familiarity of the subject matter, then the witness's testimony must be excluded if it goes beyond the facts into the realm of

<sup>1</sup> Ratepayers' Direct Testimony of Daniel Flunker (Apr. 7, 2021) (Daniel Flunker's Direct Testimony).

<sup>2</sup> Tex. R. Evid. 701.

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opinion.<sup>3</sup> Any opinion testimony by Mr. Flunker as a lay witness is limited by Texas Rules of Evidence (TRE) Rule 701, which states:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- a. rationally based on the witness's perception; and
- b. helpful to clearly understanding the witness's testimony or to determining a fact in issue.<sup>4</sup>

Although a lay witness's testimony is not required to have certainty, if the witness is simply speculating or guessing and does not establish a personal perception and knowledge upon which the testimony is based, then the testimony must be excluded.<sup>5</sup>

The Commission issued its Preliminary Order in this proceeding on July 16, 2020, identifying the following issues for consideration in this ratepayer appeal:

1. Did the petition appealing the rate change by Windermere Oaks follow the requirements of TWC § 13.043(b), (c), and (d); 16 TAC § 24.101(b), (c), and (d); and 16 TAC § 24.103(a) and (b)?
  - a. Was the petition filed within 90 days after the effective date of the rate change as required by TWC § 13.043(c) and 16 TAC § 24.101(b)?
  - b. What number of ratepayers had their rates changed and were eligible to appeal the rate change in accordance with TWC § 13.043(b)(3) and (d) and 16 TAC § 24.101(c) and (d)?
  - c. Did the lesser of 10,000 or 10% of those ratepayers file valid protests to the rate change in accordance with TWC § 13.043(c); and 16 TAC §§ 24.101(b) and 24.103(a) and (b)?
2. Did Windermere Oaks provide written notice of the hearing to all affected customers as required by 16 TAC § 24.101(c)(6)?

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Bigby v. State*, 892 S.W.2d 864, 889 (Tex. Crim. App. 1994).

3. Should the Commission establish or approve interim rates under TWC § 13.043(h) and 16 TAC § 24.101(e)(6) and (h) to be in effect until a final decision is made?
4. Do the retail water and sewer rates being charged to petitioners by Windermere Oaks fulfill the requirements of TWC § 13.043(j) and 16 TAC § 24.101(i)? In addressing this question, evaluate the following:
  - a. Are the rates just and reasonable?
  - b. Are the rates unreasonably preferential, prejudicial, or discriminatory?
  - c. Are the rates sufficient, equitable, and consistent in application to each class of customers?
5. If the rates being charged to petitioners by Windermere Oaks meet the requirements of TWC § 13.043(j), must this appeal be dismissed?<sup>6</sup>

If the rates being charged to petitioners by Windermere Oaks do not meet the requirements of TWC § 13.043(j), address the following issues:

6. What information was available to Windermere Oaks at the time it made its decision to increase the water and sewer utility service rates under TWC § 13.043(e)?
7. Considering only the information available to Windermere Oaks at the time of its decision, what are the just and reasonable rates for Windermere Oaks's customers that are sufficient, equitable, and consistent in application to each customer class and that are not unreasonably preferential, prejudicial, or discriminatory under TWC § 13.043(e) and (j) and 16 TAC § 24.101(e) and (i)?
  - a. What is the appropriate methodology to determine just and reasonable rates for Windermere Oaks's customers?
  - b. What is the revenue requirement that would give Windermere Oaks sufficient funds to provide adequate retail water and sewer service to petitioners?
  - c. What is the appropriate allocation of the revenue to customer classes?

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<sup>6</sup> Preliminary Order at 3-4 (Jul. 16, 2020).

- d. What is the appropriate design of rates for each class to recover Windermere Oaks' revenue requirement?
8. Were Windermere Oaks's outside legal expenses related to defending civil suits included in the rates appealed? If so, what amount of outside legal expenses was included in the rates appealed?
9. What are the reasonable expenses incurred by Windermere Oaks in this proceeding under TWC § 13.043(e) and 16 TAC § 24.101(e)(2) and (5)?
  - a. Should the Commission allow recovery of these reasonable expenses?
  - b. If so, what is the appropriate recovery mechanism?
10. What is the appropriate effective date of the rates fixed by the Commission in this proceeding under TWC § 13.043(e) and 16 TAC § 24.101(e)(3)?
11. If the Commission establishes rates different from the rates set by Windermere Oaks, should the Commission order refunds or allow surcharges to recover lost revenues under TWC § 13.043(e) and 16 TAC § 24.101(e)(4)? If so, what is the appropriate amount and over what period should the refund or surcharge be in place?<sup>7</sup>

Additionally, the Commission's Preliminary Order specifically identified the following issues not to be addressed in this proceeding:

1. Whether the stand-by fees, membership fees, and equity-buy in fees charged by Windermere Oaks are subject to appeal under TWC § 13.043 and 16 TAC § 24.101.<sup>8</sup>

Mr. Flunker's testimony should generally be excluded to the extent it relates to issues outside of the Commission's Preliminary Order. This testimony is not relevant to WOWSC's 2020 rate setting process or any of the issues the Commission will consider. Testimony on these irrelevant points will only confuse the issues. Accordingly, Mr. Flunker's testimony should be excluded as noted herein and struck under Rules 401, 402, 403, 602, and 802.

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<sup>7</sup> *Id.* at 4-5.

<sup>8</sup> *Id.* at 5-6.

### III. STANDARD OF REVIEW

The standard for evaluating objections and a motion to strike evidence and exhibits in a contested case hearing before SOAH is found in 16 Texas Administrative Code (TAC) § 22.221, which provides the following:

The Texas Rules of Civil Evidence as applied in nonjury civil cases in the courts of Texas shall be followed in contested cases. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. When necessary to ascertain facts not reasonably susceptible of proof under the Texas Rules of Civil Evidence, evidence not admissible under those rules may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. . . . Objections to evidentiary offers may be made, shall be ruled upon, and shall be noted in the record. Failure to object to evidence at the time it is offered constitutes a waiver of all objections to the evidence.

The Texas Rules of Civil Evidence (TRE) that are pertinent to these Objections are as follows:

#### RULE 401. TEST FOR RELEVANT EVIDENCE

Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

#### RULE 402. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE

Relevant evidence is admissible unless any of the following provides otherwise: the United States or Texas Constitution; a statute; these rules; or other rules prescribed under statutory authority.

Irrelevant evidence is not admissible.

#### RULE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence.

#### RULE 602. NEED FOR PERSONAL KNOWLEDGE

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. This rule does not apply to a witness's expert testimony under Rule 703.

**RULE 801(d). DEFINITION OF HEARSAY**

“Hearsay” means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

**RULE 802. THE RULE AGAINST HEARSAY**

Hearsay is not admissible unless any of the following provides otherwise: a statute; these rules; or other rules prescribed under statutory authority. Inadmissible hearsay admitted without objection may not be denied probative value merely because it is hearsay.

**IV. SPECIFIC OBJECTIONS TO PREFILED DIRECT TESTIMONY OF DANIEL FLUNKER**

WOWSC objects to significant portions of Daniel Flunker’s Direct Testimony because (i) his testimony largely consists of inadmissible hearsay; (ii) he fails to demonstrate that his testimony is based upon facts and/or data in this matter that he was made aware of, reviewed, or personally observed; and (iii) portions of his testimony are unfairly prejudicial to WOWSC, confuse the issues, and mislead the Administrative Law Judge (ALJ).

**A. Inadmissible Hearsay – TRE 801(d) and 802**

WOWSC objects to the portions of Daniel Flunker’s Direct Testimony that consist of inadmissible hearsay pursuant to TRE 801(d) and 802.

Mr. Flunker routinely testifies to statements allegedly made by WOWSC, or other declarants, outside of evidence in this proceeding, in order to offer the statements for the truth of the matters asserted. For example, Mr. Flunker testifies to a conversation from 2018 between a WOWSC member and WOWSC’s attorney without providing any citations or other proof of the alleged statements.<sup>9</sup> Not only does Mr. Flunker fail to establish a basis for testifying to the WOWSC’s statements, he has also not offered any testimony or referenced any other evidence in this matter to support his assertions related to other Ratepayer customers of WOWSC. He has not described any visits to other customers’ homes or any other source of information on which he can base his testimony. Therefore, any reference to “Ratepayers,” “we,” “customers,” “the

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<sup>9</sup> Daniel Flunker’s Direct Testimony at 4:2-3 (Apr. 7, 2021).

community,” or “members,” the statements made by them, descriptions of their experiences, and measures taken by them, all constitute inadmissible hearsay.

Accordingly, WOWSC objects to and moves to strike the following portions of Daniel Flunker’s Direct Testimony in accordance with TRE 801(d) and 802:

- Page 4, lines 2-3, beginning with “In 2018” and ending at “PIR.”
- Page 6, lines 11-12, beginning with “They” and ending at “request.”
- Page 6, lines 22-23, beginning with “Note-” and ending at “mistake.”
- Page 7, lines 8-11, beginning with “Note-” and ending at “directors.”
- Page 10, line 17, “After much condemnation in the community.”
- Page 10, line 18, “The membership comments show their disapproval.”

#### **B. Need for Personal Knowledge – TRE 602**

WOWSC objects to the portions of Daniel Flunker’s Direct Testimony for which he has not laid the foundation for his personal knowledge, pursuant to TRE 602.

While Mr. Flunker is the authorized representative for Ratepayers, he has not laid the foundation for his personal knowledge of the experiences of any WOWSC customer other than himself. He has not laid any foundation for being present or witnessing any customers’ experiences or conversations with WOWSC. Therefore, Mr. Flunker has not provided sufficient evidence that he has personal knowledge of several events which he testifies about.

Accordingly, WOWSC objects to and moves to strike the following portions of Daniel Flunker’s Direct Testimony in accordance with TRE 602:

- Page 4, lines 2-3, beginning with “In 2018” and ending at “PIR.”
- Page 10, line 17, “After much condemnation in the community.”
- Page 10, line 18, “The membership comments show their disapproval.”

#### **C. Irrelevant and Unfairly Prejudicial Testimony – TRE 403**

WOWSC objects to the portions of Daniel Flunker’s Direct Testimony that are irrelevant, unfairly prejudicial to WOWSC, confuse the issues, and mislead the ALJ, pursuant to TRE 403.



Mr. Flunker's testimony is unfairly prejudicial and confuses the issues at bar. Accordingly, WOWSC objects to such testimony under TRE 401, 402 and 403. Daniel Flunker's testimony includes a quote from a company website allegedly owned by WOWSC witness Joe Gimenez for the purpose of speculating on Mr. Gimenez's experience as a public information specialist.<sup>10</sup> Not only is this information prejudicial against Mr. Gimenez and the WOWSC, it is completely irrelevant to determining the issues described in the Commission's Preliminary Order. The discussion related to Mr. Gimenez's public information experience is incomplete and intended only to confuse the issues and mislead the ALJ. Any probative value of Mr. Gimenez's alleged public information experience is outweighed by the confusion of the issues and misleading effects of such testimony, making it inadmissible under TRE 403.

Mr. Flunker also makes several comments as to the propriety of WOWSC's actions or responses without citing any evidence to prove up the acts in question. Not only is this unfairly prejudicial to WOWSC, most of Mr. Flunker's commentary is completely irrelevant to the issues identified in the Commission's Preliminary Order. For example, Mr. Flunker testifies that WOWSC made excuses for not responding to public information requests and failing to meet deadlines, but he does not provide any actual evidence of these responses or even cite references of where such evidence can be found. Mr. Flunker also testifies to how WOWSC has violated the Texas Open Meetings Act without citing evidence or providing any background to qualify his assertions. The effect of making such irrelevant statements without even evidencing the underlying activity is unfairly prejudicial to WOWSC and should be deemed inadmissible.

Therefore, WOWSC objects to, and moves to strike, the following portions of Daniel Flunker's testimony in accordance with TRE 403:

- Page 6, lines 10-12, beginning with "Note-" and ending at "the request."
- Page 7, lines 8-11, beginning with "Note-" and ending at "POA directors."
- Page 9, lines 8-12.

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<sup>10</sup> Daniel Flunker's Direct Testimony at 9:8-12 (Apr. 7, 2021).

- Page 10, line 16, “without a board vote in violation of TOMA.”
- Page 10, lines 18-19, “This was once again in violation of TOMA,”
- Page 11, lines 6-12, beginning with “WOWSC has” and ending at “release it.”

## V. CONCLUSION

For the foregoing reasons, WOWSC respectfully requests that its objections to portions of the prefiled direct testimony of Daniel Flunker be sustained, and that its motion to strike such testimony be granted. WOWSC further requests that it be granted all other relief to which it is entitled.

Respectfully submitted,

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**ATTORNEYS FOR WINDERMERE OAKS  
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**CERTIFICATE OF SERVICE**

I certify that notice of the filing of this document was provided to all parties of record via electronic mail on April 14, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

  
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JAMIE L. MAULDIN