

Control Number: 50788



Item Number: 99

Addendum StartPage: 0

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**SOAH DOCKET NO. 473-20-4071.WS
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**RATEPAYERS APPEAL OF THE § BEFORE THE STATE OFFICE
DECISION BY WINDERMERE OAKS § OF
WATER SUPPLY CORPORATION TO § ADMINISTRATIVE HEARINGS
CHANGE WATER AND SEWER RATES**

**WINDERMERE OAKS WATER SUPPLY CORPORATION'S
OBJECTIONS AND MOTION TO STRIKE PORTIONS OF THE DIRECT
TESTIMONY OF KATHRYN E. ALLEN**

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 Kathryn E. Allen, seeking to strike the prefiled direct testimony submitted by Ratepayer Representatives (Ratepayers) in this Docket.

I. PROCEDURAL HISTORY

On April 7, 2021, Ratepayers filed Kathryn E. Allen's Direct Testimony (Kathryn E. Allen's Direct Testimony).¹ On April 8, 2021, Ratepayers filed a Supplemental Exhibit to Testimony of Kathryn E. Allen.² 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 Ms. Allen's testimony and Supplemental Exhibit because they are irrelevant to the issues in this proceeding, speculative due to a lack of personal knowledge, and contain inadmissible hearsay. Ms. Allen's testimony and supplemental exhibit are irrelevant because they will not help determine any "fact in issue" in this litigation.³ 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 her familiarity with the subject matter, then

¹ Ratepayers' Direct Testimony of Kathryn E. Allen (Apr. 7, 2021) (Kathryn E. Allen's Direct Testimony).

² Ratepayers' Supplemental Exhibit to Kathryn E. Allen's Direct Testimony (Apr. 8, 2021) (Supplemental Exhibit).

³ Tex. R. Evid. 701.

the witness's testimony must be excluded if it goes beyond the facts into the realm of opinion.⁴ Any opinion testimony by Ms. Allen 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.⁵

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.⁶

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)?

⁴ *Id.*

⁵ *Id.*

⁶ *Bigby v. State*, 892 S.W.2d 864, 889 (Tex. Crim. App. 1994).

2. Did Windermere Oaks provide written notice of the hearing to all affected customers as required by 16 TAC § 24.101(c)(6)?
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?⁷

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?

⁷ Preliminary Order at 3-4 (Jul. 16, 2020).

- c. What is the appropriate allocation of the revenue to customer classes?
 - 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?⁸

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 § 24.101.⁹

Nothing in Ms. Allen's testimony or supplemental exhibit will help the Commission decide the issues described in the Preliminary Order. Her testimony alleges: (1) that she previously served as counsel for Ratepayers regarding prior litigation matters, outside the scope of the ordered issues in this proceeding and (2) her opinion as to previous litigation matters, again, outside the limited

⁸ *Id.* at 4-5.

⁹ *Id.* at 5-6.

scope of this proceeding. Testimony on these irrelevant points, including the supplemental exhibit, only confuses the issues. Accordingly, and for the reasons below, Ms. Allen's testimony should be excluded in its entirety and struck under Rules 401, 402, 403, 602, and 802.

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
KATHRYN E. ALLEN**

WOWSC objects to the entirety of Kathryn E. Allen’s Direct Testimony and Supplemental Exhibit because (i) her entire direct testimony and supplemental exhibit are irrelevant, as they do not make any fact of consequence more or less probable, including portions of her testimony which are unfairly prejudicial to WOWSC, confuse the issues, and mislead the Administrative Law Judge (ALJ); (ii) her testimony and supplemental exhibit consist of inadmissible hearsay; and (iii) she fails to demonstrate that her testimony is based upon facts and/or data in this matter that she was made aware of, reviewed, or personally observed.

A. Relevance – TRE 401, 402, and 403

WOWSC objects to the portions of Kathryn E. Allen’s direct testimony and supplemental Exhibit that are irrelevant or are unfairly prejudicial to WOWSC, confuse the issues, and mislead the ALJ, pursuant to TRE 401, 402, and 403.

In an appeal under Tex. Water Code § 13.043(b), the Commission shall hear an appeal de novo and consider only the information that was available to the governing body at the time it

made its decision and evidence of reasonable expenses incurred in the rate proceedings.¹⁰ Ms. Allen's testimony and related exhibits are wholly irrelevant to the issues the Commission will consider in this proceeding, and if admitted, would be unfairly prejudicial and confuse the issues at bar. Accordingly, WOWSC objects to such testimony under TRE 401, 402, and 403.

Ms. Allen's testimony includes attached unlabeled exhibits purporting to show an Order from a 2018 proceeding, a demand letter concerning a contractual matter involving a prior litigation matter, an uncertified court reporter partial record from a 2018 proceeding, and an affidavit from a previous litigation matter from 2018, all of which is irrelevant to this proceeding.¹¹ The Supplemental Exhibit filed contains a 2016 memorandum concerning the removal of a Director, which is irrelevant to this proceeding.¹² None of the testimony or exhibits provide any required evidentiary foundation for (i) determining the reliability and accuracy of the documents (ii) proper authentication (iii) completeness or (iv) any proof that the exhibits have any relation to the listed issues in the Preliminary Order and this proceeding. In fact, and importantly, the exhibits, including the Supplemental Exhibit, refer to events occurring in years 2016 through 2018 regarding previous litigation matters, which do not have a tendency to make any fact in this proceeding more or less probable. In the Preliminary Order, the Commission specifically addressed issues that should be addressed in this proceeding, and this entire testimony, including exhibits, does not address any issue listed by the Commission.¹³ Therefore, any discussion related to these exhibits are red herrings, intended only to confuse the issues and mislead the ALJ. Further, even if any of the testimony is found to be relevant, the probative value is outweighed by the confusion of the issues and misleading effects of such testimony and exhibits, making it inadmissible under TRE 403.

¹⁰ 16 TAC 24.101(e)(5).

¹¹ Kathryn E. Allen's Direct Testimony at 3:23-14-10 (Apr. 7, 2021) and Exhibits.

¹² Supplemental Exhibit (Apr. 8, 2021)

¹³ Preliminary Order at 3-5 (Jul. 16, 2020).

Therefore, WOWSC objects to, and moves to strike, the following portions of Kathryn E. Allen's direct testimony, attached exhibits, and supplemental exhibit in accordance with TRE 401, 402, and 403:

- Page 3, line 23.
- Page 4, lines 1-23.
- Page 5, lines 1-23.
- Page 6, lines 1-23.
- Page 7, lines 1-22.
- Page 8, lines 1-23.
- Page 9, lines 1-22.
- Page 10, lines 1-22.
- Page 11, lines 1-23.
- Page 12, lines 1-23.
- Page 13, lines 1-23.
- Page 14, lines 1-7.
- Pages 16-25.
- Supplemental Exhibit, Pages 1-5.

B. Inadmissible Hearsay – TRE 801(d) and 802

WOWSC objects to the portions of Kathryn E. Allen's direct testimony and supplemental exhibit that consist of inadmissible hearsay pursuant to TRE 801(d) and 802.

Ms. Allen often testifies to matters for which she does not attempt to provide a foundation. She routinely testifies using conclusory statements based upon the statements of other declarants made outside the evidence of this proceeding, in order to offer the statements for the truth of the matters asserted. Each and every reference to statements made by any declarant outside of this proceeding, descriptions of their experiences, and measures taken by them, all constitute inadmissible hearsay.

Ms. Allen also provides exhibits to her testimony, including the Supplemental Exhibit that constitute inadmissible hearsay. Ms. Allen never provided the required evidentiary foundation for any of the documents included as attachments. Further, the testimony does not describe (i) the reliability and accuracy of the documents (ii) proper authentication, or (iii) completeness. These documents, by definition, are written statements made by someone other than Ms. Allen, which Ratepayers are offering for the truth of the matter asserted. Therefore, each exhibit offered constitutes inadmissible hearsay, and should be stricken.

Accordingly, WOWSC objects to and moves to strike the following portions of Kathryn E. Allen's Direct Testimony, attached exhibits, and Supplemental Exhibit in accordance with TRE 801(d) and 802:

- Page 4, lines 6-23.
- Page 5, lines 1-8.
- Page 5, line 15, beginning with "Based" and ending on line 17, with word "parties."
- Page 5, lines 20-23.
- Page 6, lines 1-14.
- Page 6, lines 23, beginning with the word "They" and ending with the word "by."
- Page 7, lines 1-22.
- Page 8, lines 1-23.
- Page 9, lines 1-22.
- Page 10, lines 1-14.
- Page 12, line 4, beginning with the word "decided" and ending on line 5, with the word "website."
- Page 13, lines 2-23.
- Page 14, lines 1-7.
- All exhibits attached, pages 16-25.
- Supplemental Exhibit, pages 3-7.

C. Need for Personal Knowledge – TRE 602

WOWSC objects to the portions of Kathryn E. Allen’s direct testimony for which she has not laid the foundation for her personal knowledge, pursuant to TRE 602.

Ms. Allen has not laid the foundation for her personal knowledge of the experiences of any WOWSC Board matter outside of her intermittent role as counsel for Ratepayers in matters outside the scope of this proceeding. She has not laid any foundation for being present or witnessing any of the matters first-hand in which she discusses in her testimony. In fact, Ms. Allen specifically points out that she was not counsel of record, but reviewed records, which is on what her opinion is based.¹⁴ Further, her testimony describes actions taken by the Board based on speculation, as Ms. Allen was not counsel to the Board, in addition to information that she obtained secondhand or thirdhand. Therefore, Ms. Allen has not provided sufficient evidence that she has personal knowledge of several events about which she testifies.

Accordingly, WOWSC objects to and moves to strike the following portions of Kathryn E. Allen’s Direct Testimony in accordance with TRE 602:

- Page 3, line 23.
- Page 4, lines 1-23.
- Page 5, lines 1-23.
- Page 6, lines 1-14.
- Page 6, line 23, beginning with “They reflect” through the word “by.”
- Page 7, lines 1-22.
- Page 8, lines 1-23.
- Page 9, lines 1-22.
- Page 10, lines 1-22.
- Page 11, lines 1-2.
- Page 11, line 18, beginning with, “The Corporation” through line 19, “information.”

¹⁴ Kathryn E. Allen’s Direct Testimony at 4:2-5 (Apr. 7, 2021).

- Page 12, line 1, beginning with, “At that point...” through line 5, “website.”
- Page 12, lines 9-23.
- Page 13, lines 1-23.
- Page 14, lines 1-7.

V. CONCLUSION

For the foregoing reasons, WOWSC respectfully requests that its objections to portions of the prefiled Direct Testimony, exhibits, and Supplemental Exhibit of Kathryn E. Allen be sustained, and that its motion to strike such testimony and exhibits be granted. WOWSC further requests that it be granted all other relief to which it is entitled.

Respectfully submitted,

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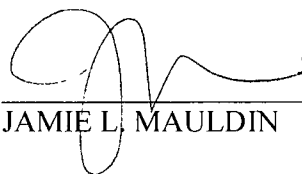
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CERTIFICATE OF SERVICE

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.



JAMIE L. MAULDIN