

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

<b>RATEPAYERS APPEAL OF THE</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>DECISION BY WINDERMERE OAKS</b>	<b>§</b>	
<b>WATER SUPPLY CORPORATION TO</b>	<b>§</b>	<b>OF</b>
<b>CHANGE WATER AND SEWER</b>	<b>§</b>	
<b>RATES</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**SOAH ORDER NO. 5**

**GRANTING IN PART MOTION TO COMPEL, DENYING MOTION TO ABATE,  
AND REFERRING TO MEDIATION**

**I. BACKGROUND AND SUMMARY**

This case arises from a petition filed with the Public Utility Commission of Texas (Commission) by Josephine Fuller, individually and on behalf of the ratepayers (collectively, Ratepayers), of Windermere Oaks Water Supply Corporation (Windermere).<sup>1</sup> The petition was brought under Texas Water Code § 13.043(b) and appeals Windermere's increases to its water and sewer rates. Ratepayers allege that the rates are unjust and unreasonable insofar as they include legal expenses for litigation brought against Windermere's Board of Directors. Windermere responded to the petition, asserting that its rates are just and reasonable.

At the prehearing conference, the parties agreed to a procedural schedule that contemplated referring this case to mediation after Ratepayers received Windermere's response to Ratepayers' August 26, 2020 first request for information (RFI). However, Windermere objected to several of Ratepayers' requests, specifically RFI Nos. 1-1, 1-2, 1-3, 1-7, 1-9, and 1-12, which are described below. Ratepayers filed a motion to compel Windermere to provide the requested information. Windermere responded to that motion and also filed a motion to abate this proceeding, alleging that the confidentiality of some of the requested information is the subject of ongoing litigation that should be fully adjudicated before this case proceeds, and that the protective order in this proceeding may not adequately preserve Windermere's confidentiality claims in the other cases.

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<sup>1</sup> Windermere is also referred to as "Windermere Oaks," "WOWSC" or "the Corporation" in various filings in this docket.

Commission Staff (Staff) responded to the motion to abate, arguing that it be denied and that the discovery dispute should be referred to mediation along with the rest of the case. Ratepayers filed a response opposing abatement and supporting Staff's recommendation. The Administrative Law Judge (ALJ) stayed discovery pending resolution of the motion to abate. On that same day, Windermere filed its own motion to compel Ratepayers to respond to Windermere's RFI.

As described below, the ALJ, having considered the arguments of the parties and the applicable rules and laws, **GRANTS IN PART** Ratepayers' motion to compel, **DENIES** Windermere's motion to abate, and, pursuant to the parties' agreed scheduling order, **REFERS TO MEDIATION** this matter, together with the discovery disputes comprising Ratepayers' RFI No. 1-9 and Windermere's motion to compel.

## **II. RATEPAYERS' MOTION TO COMPEL**

### **A. Ratepayers' RFI Nos. 1-1 and 1-2**

Ratepayers' RFI Nos. 1-1 and 1-2 seek water and wastewater rate studies and analyses, along with associated notes and related documentation:

#### Ratepayers' RFI 1-1

Produce all TRWA Water Rate Studies/Rate Analysis/Rate Assistance documents for the years 2017, 2018 and 2019 completed by TRWA including but not limited to a copy of the final report, any notes taken during meetings and any email correspondence.

#### Ratepayers' RFI 1-2

Produce all TRWA Wastewater Rate Studies/Rate Analysis/Rate Assistance documents for the years 2017, 2018 and 2019 completed by TRWA including but not limited to a copy of the final report, any notes taken during meetings and any email correspondence.

**Windermere objects on the basis that these requests do not identify with reasonable particularity the information, documents or material sought; would require Windermere to create a document**

not in existence, and therefore, not within Windermere's possession; and that creating documents to respond would be unduly burdensome and expensive. In response, Ratepayers cites the minutes of Windermere's board meetings that imply the existence of such responsive documents.

The ALJ finds that the minutes point Windermere to the specific documentation that is sought and are sufficiently definite to overcome Windermere's vagueness objections. Further, on their faces, these requests do not seek to have Windermere create any new documents—and to the extent they do, Windermere is not obligated to create them. Therefore, Windermere's objections to these requests are overruled.

**B. Ratepayers' RFI No. 1-3**

Ratepayers' RFI No. 1-3 requests that Windermere admit or deny that rates would "substantially decrease if the 2019 legal fees totaling \$169,000 or more were not included" in the calculations. Windermere objects that the phrase "substantially decrease" is overly vague and that the request is intended to harass Windermere. In response, Ratepayers note that the request mirrors language in a letter sent by Windermere to Ratepayers stating that "legal assaults are forcing our Board to raise your water rates - significantly - to cover ongoing legal expense..."

The ALJ is not persuaded that the meaning of "significantly" is overly vague, especially given Windermere's use of "substantially" when describing the effect of the same legal fees on rates. And because the impact of legal fees on rates lies at the center of the controversy here, this request does not appear to be made for the purpose of harassment. Windermere's objections are overruled.

**C. Ratepayers' RFI No. 1-7**

Ratepayers' RFI No. 1-7 states, "Provide total billing for 2019 legal expenses." After Windermere objected on vagueness grounds, Ratepayers clarified their request as seeking "the sum total . . . for all and every type of legal representation in 2019 which was billed to



[Windermere].” Windermere contends that this clarification is insufficient because it does not distinguish between services rendered in 2019 but not yet billed and bills received in 2019 for legal services performed in other years. However, the ALJ finds that the plain language of the request refers to “legal representation in 2019” that was billed to Windermere. Thus, the request adequately specifies that the total sought refers to the total of bills received at any time for legal work done only in 2019. Windermere’s objection is overruled.

**D. Ratepayers’ RFI No. 1-9**

Ratepayers’ RFI No. 1-9 seeks “all unredacted attorney invoices for the years 2018 and 2019.” Windermere contends that this material is subject to the attorney-client privilege under Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure. Ratepayers concede the applicability of this privilege but contend that the unredacted invoices are discoverable under the “Offensive Use Doctrine.” The attorney-client privilege is waived under the Offensive Use Doctrine when three requirements are met:

1. The party who asserts privilege seeks affirmative relief;
2. The privileged information, if believed by the fact finder, in all probability would be outcome determinative of the action asserted; and
3. The evidence is not otherwise available to the opposing party.<sup>2</sup>

Windermere responds that, because it is not seeking affirmative relief in this proceeding but is merely defending its rates, it does not meet the first prong of this analysis.<sup>3</sup> While technically accurate, the common law framework does not neatly align with this type of administrative proceeding. Here, while Windermere is not seeking anything that could be described as affirmative relief in district court, its alleged inclusion of the fees identified in the requested invoices is arguably analogous to such relief in the context of a rate challenge like this one. Moreover, as

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<sup>2</sup> Ratepayers cite *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163, 166 (Tex. 1993).

<sup>3</sup> Although Windermere contends that the other factors are also inapplicable, only the first factor is in doubt. Windermere’s arguments regarding waiver of privilege contained in its motion to abate, discussed below, are less compelling. The Commission’s standard protective order, which has been adopted in this proceeding, expressly prohibits the use of any such confidential information in other proceedings. See *Windermere Oaks Water Supply Corporation’s Motion for Entry of Protective Order* (Sept. 8, 2020) Ex. A at Bates 11.

Commission Staff notes in its response to Windermere's motion to abate, the Commission has made these expenses part of the inquiry in this matter. In its Preliminary Order, the Commission expressly states that this issue shall be addressed: "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?"<sup>4</sup>

Given that the invoices relate directly to that issue, combined with the need for careful consideration of the parties' concerns, the ALJ declines to rule on this objection at this stage of the proceeding. As Staff notes, a mediator is well suited to craft a solution that may balance Ratepayers' need for this information with Windermere's confidentiality interests. Therefore, the extent to which the requested invoices are discoverable in this proceeding is referred to mediation together with the proceeding as a whole, as further explained below. Accordingly, the ALJ takes under advisement Windermere's objection to Ratepayers' RFI No. 1-9, and will revisit this dispute if necessary following mediation.

**E. Ratepayers' RFI No. 1-12**

Ratepayers' RFI No. 1-12 states as follows:

Provide a current list of all property the Corporation owns and that is reasonably necessary for and used in the operation of the corporation:

- (A) to acquire, treat, store, transport, sell, or distribute water; or
- (B) to provide wastewater service and is under active construction or other physical preparation for future use and;
- (C) provide a list of all property the Corporation owns that is not applicable to (A) and (B).

In partial response to this request, Windermere provided a printout from appraisal district records identifying certain property it owns. However, Windermere objects that the request is unduly burdensome and expensive because it would require Windermere to create a document not in existence. Windermere also argues that the request is beyond the scope of Texas Rule of Civil

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<sup>4</sup> Preliminary Order at 5 (July 16, 2020).



Procedure 192.3, which limits the duty to produce documents to those within a party's possession, custody or control. Ratepayers' motion to compel does not address the assertion that a complete response would require Windermere to create a document not in existence. However, the identification of property included as reasonable and necessary to serve a utility's customers is an essential component of rate review, as reflected in the issues to be addressed in the Commission's Preliminary Order. Even assuming that compiling a list of its own property is burdensome, the ALJ concludes that the burden is not undue.<sup>5</sup> Accordingly, Windermere's objection is overruled.

## II. WINDERMERE'S MOTION TO COMPEL

On September 30, 2020, Windermere filed a motion to compel Ratepayers to respond to its first RFI. However, on that same day, the ALJ issued SOAH Order No. 4, which, among other things, stayed all discovery in this matter pending a ruling on Windermere's motion to abate this proceeding. Ratepayers have not yet responded to the motion to compel. Given that discovery is stayed and the agreed procedural schedule contemplated that this case would be referred to mediation before Ratepayers' response to the RFI would be due, the ALJ declines to rule on the motion to compel at this time, but refers this motion to mediation as well, to be taken up again should mediation fail.

## III. WINDERMERE'S MOTION TO ABATE

On September 28, 2020, Windermere moved to abate this proceeding pending the resolution of various other legal proceedings. Both Staff and Ratepayers oppose the motion, with Staff adamantly against deferring a legitimate rate appeal indefinitely based on the argument that the disclosure of certain materials sought in discovery may hypothetically affect other matters. Because the protective order in this proceeding expressly forbids the use of such materials in other matters, the ALJ agrees with Staff. Accordingly, Windermere's motion to abate is **DENIED**.

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<sup>5</sup> See 16 Tex. Admin. Code § 22.141(a) ("Discoverable matters include the existence, description, nature, custody, condition, location and contents of any documents, including papers, books, accounts, drawings, graphs, charts, photographs, maps, email, audio or video recordings, and any other data compilations from which information can be obtained and translated, if necessary, by the person from whom information is sought, into reasonably usable form ....").

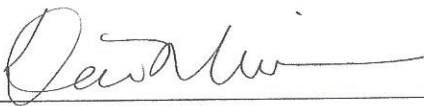
**IV. REFERRING CASE TO MEDIATION**

Pursuant to the parties' agreed procedural schedule, this matter, together with the pending discovery disputes specifically identified above, is hereby referred to mediation. The procedural schedule is **ABATED** until further notice. It is further ordered that:

1. This case is referred to the State Office of Administrative Hearings (SOAH) Alternative Dispute Resolution Team Leader for appointment of a mediator and a period of evaluation and/or mediation. The mediator/evaluator will be contacting the parties directly.
2. If the mediator/evaluator determines mediation should be tried, the mediator will schedule a mediation in consultation with the parties.
3. If the mediator/evaluator schedules a mediation, the parties are ordered to appear at the mediation with a party representative who has full authority to settle this case on behalf of that party.

The parties **SHALL** submit a status report to the ALJ upon the earlier of 30 days from the date of this order or the occurrence of any significant event.

**SIGNED October 8, 2020.**

  
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DANIEL WISEMAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS