



State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

March 31, 2022

TO: Stephen Journey, Commission Counsel
Commission Advising and Docket Management
William B. Travis State Office Building
1701 N. Congress, 7th Floor
Austin, Texas 78701

VIA EFILE TEXAS

RE: SOAH Docket No. 473-20-4071.WS
PUC Docket No. 50788

Ratepayers Appeal of the Decision by Windermere Oaks Water Supply Corporation to Change Water and Sewer Rates

Enclosed is the Proposal for Decision (PFD) in the above-referenced case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify me and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,


Christiaan Siano
Administrative Law Judge

Enclosure

xc: All Parties of Record

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

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

PROPOSAL FOR DECISION

I. INTRODUCTION

Ratepayers (Ratepayers) of Windermere Oaks Water Supply Corporation (Windermere or WOWSC) appealed a rate decision by Windermere’s board of directors approving an increase to water and sewer base rates to recover the cost of certain outside legal expenses. Staff (Staff) of the Public Utility Commission of Texas (Commission) supports removing the legal expenses from the revenue requirement. For the reasons explained below, the administrative law judges (ALJs) recommend that the Commission dismiss this appeal and award the rate case expense amount supported by Windermere.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this matter pursuant to Texas Water Code § 13.043. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters relating to the conduct of the hearing and issuance of a proposal for decision, if needed, pursuant to Texas Government Code § 2003.049.

On February 1, 2020, Windermere’s board of directors approved a rate increase effective March 23, 2020. Within 90 days thereafter, on April 27, 2020, Ratepayers appealed the board’s decision. The petition was signed by 52 of Windermere’s 271 active connections. Windermere filed

a response to the petition.¹ The Commission found the petition sufficient and referred the case to SOAH, requesting the assignment of an ALJ to conduct a hearing and issue a proposal for decision, if necessary.² No party requested interim rates or an effective date other than the original one proposed by Windermere. This matter was referred to mediation, which did not resolve the dispute.³

In support of its rate increase and rate case expenses, Windermere filed direct testimony of George Burriss, Joe Gimenez, Mike Nelson, and Jamie Mauldin. Ratepayers filed direct testimony of Daniel Flunker, Pattie Flunker, Bill Stein, and Kathryn E. Allen. Staff filed direct testimony of Spencer English, Stephen Mendoza, Heidi Graham, and Maxine Gilford. The testimony of Spencer English was subsequently adopted by Mark Filarowicz.⁴ Windermere filed rebuttal testimony of Mike Nelson, Joe Gimenez, and Grant Rabon. Both Staff and Windermere filed supplement direct testimony on rate case expenses.

A hearing was held on December 1-3, 2021, via videoconference. Ratepayers, Staff, and the Windermere appeared. The record closed initially on January 25, 2022, with the submission of reply briefs.⁵ The record was reopened on February 15, 2022, to admit WOWSC Exhibit 22, which provided updated rate case expenses.⁶

Counsel for Windermere represented that it provided written notice of the hearing to all affected customers at a February 2, 2021 open meeting, albeit not on a Commission-prescribed

¹ WOWSC Response to Order No. 1 (May 27, 2020).

² PUC Order No. 3 (June 23, 2020); Order of Referral (June 23, 2020).

³ SOAH Order No. 5 (Oct. 8, 2020); Mediator's Report on Mediation (Jan. 19, 2021).

⁴ SOAH Order No. 13 (June 28, 2021).

⁵ Commission Staff did not timely file a reply brief or move to extend the deadline; therefore, its reply brief was not considered in this proposal for decision.

⁶ SOAH Order No. 18 (Feb. 15, 2022).

notice form, which it never received.⁷ No party contested the sufficiency of the notice in initial briefs.⁸ The ALJs find that Windermere substantially complied with 16 Texas Administrative Code (TAC) § 24.101(c)(6) and that notice to customers was sufficient.⁹

III. SCOPE OF REVIEW

Under section 13.043 of the Water Code, the Commission shall hear *de novo* an appeal from a decision a nonprofit water-supply corporation's governing body affecting rates, considering only the information available to the governing body at the time it made its decision, except to the extent subsequent events tend to shed light on what conditions existed at the time of the decision.¹⁰ The scope of review is further set out in section 13.043(j), which states in relevant part—

In an appeal under this section, the utility commission shall ensure that every appealed rate is just and reasonable. Rates shall not be unreasonably preferential, prejudicial, or discriminatory but shall be sufficient, equitable, and consistent in

⁷ Tr. at 589. Windermere counsel, Ms. Katz, represented that the original procedural schedule in this matter was provided to customers on February 2, 2021, while continuances were provided at duly posted open meetings on August 17, 2021, August 24, 2021, September 30, 2021, and November 18, 2021. Tr. at 589-90.

⁸ While Staff characterized notice as an uncontested issue, Staff Initial Brief at 2, Ratepayers argued for the first time in reply brief that notice of the hearing was not provided “in a form prescribed by the Commission,” as required by 16 Texas Administrative Code (TAC) § 24.101(c)(6). Ratepayers Reply Brief at 4-5. This complaint is WAIVED. The issue was not raised in initial briefs. *See* SOAH Order No. 15 at 2 (“**The ALJs may consider waived any statement or argument set forth in a brief to the extent that it (1) lacks accurate citations to the evidence and law, or (2) is in a party’s reply brief but should have been in its initial brief.**” (emphasis original)). Nor was the issue raised in testimony or any statement of position. Tex. Gov’t Code § 2001.051(2) (“In a contested case, each party is entitled to an opportunity . . . to respond and to present evidence and argument on each issue involved in the case.”); 16 TAC § 22.124(a) (“[I]nsofar as its prefiled direct testimony does not address issues that a party intends to litigate, each party that has prefiled direct testimony shall file a statement of position no later than three working days before the start of a hearing”).

⁹ Any due process notice requirements are satisfied by the fact that this is an appeal and both the appellants and the corporation in fact appeared. *See Pierce v. Tex. Racing Comm’n*, 212 S.W.3d 745, 758-59 (Tex. App.—Austin 2006, pet. denied) (actual notice sufficient to satisfy due process notice requirement).

¹⁰ Tex. Water Code § 13.043(e); *Petition for Review of Certain Rate Making Actions of the City of Austin*, Docket No. 6560, Examiner’s Report at 15 (Apr. 16, 1986). The Examiner’s Report in Docket No. 6560 (after amendment in respects not relevant here) was adopted by the Commission. Docket No. 6560, Order at 1 (Apr. 25, 1986). *See also Petition by Homeowners United for Rate Fairness to Review Austin Rate Ordinance No. 20120607-055*, Docket No. 40627, Supplemental Preliminary Order at 6 (Dec. 13, 2012).

application to each class of customers. The utility commission shall use a methodology that preserves the financial integrity of the retail public utility.¹¹

The Commission has construed this language to require an initial finding that the appealed rates are unreasonably preferential, prejudicial, or discriminatory before the Commission may fix just and reasonable rates.¹²

The Commission may also consider evidence of reasonable expenses incurred by the retail public utility in the appeal proceedings.¹³

IV. BURDEN OF PROOF

The water or sewer service provider has the burden of proof to show its rates are just and reasonable.¹⁴ On “any other matters,” the burden of proof is on the movant.¹⁵ Here, before reaching the question of whether Windermere’s rates are just and reasonable, it must be determined whether the rates are unreasonably preferential, prejudicial, or discriminatory. Because Ratepayers seek affirmative relief that would change the *status quo*, and placing the burden of proof on the service provider would require it to prove a negative by showing that the rates are *not* unreasonably preferential, prejudicial, or discriminatory, the ALJs conclude that the party

¹¹ Section 13.043(j) was amended effective September 1, 2021. Act of May 22, 2021, 87th Leg., R.S., ch. 279, § 1 (H.B. 3689). The amendment does not affect the analysis here because the operative language is unchanged.

¹² *Ratepayers’ Appeal of the Decision by Bear Creek Special Utility District to Change Rates*, Docket No. 49351, Order on Rehearing at 3, 20 (Conclusion of Law No. 8) (Nov. 19, 2021); *Tex. Water Comm’n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994, writ denied); Preliminary Order at 4 n.11 (noting that the initial determination under § 13.043(j) required by *City of Fort Worth* was not limited to appeals under § 13.043(f), and “[t]herefore, the same initial inquiry under subsection (j) must be made in this appeal under § 13.043(b) before the Commission can reset rates”).

¹³ Tex. Water Code § 13.043(e).

¹⁴ 16 TAC § 24.12.

¹⁵ *Id.* Docket No. 49351 did not address burden of proof on the threshold issue because there the district agreed with Staff’s rate design, showing that its rates were unreasonably preferential, prejudicial, and discriminatory. Proposal For Decision at 15 (May 18, 2021).

challenging the rates bears the burden of proof as to this initial question.¹⁶ Assuming this burden is met, the service provider then has the burden to show that the rates are just and reasonable.

V. DISCUSSION

Windermere is a non-profit water supply and sewer service corporation governed by chapters 49 and 67 of the Water Code as well as the Texas Business Organizations Code.¹⁷ Windermere has one class of members, as defined by the Water Code.¹⁸ Windermere is managed by a member-elected board of directors.¹⁹ Directors must be members and customers of the corporation.²⁰ Although directors are authorized to receive compensation for their services, here they do not.²¹ Windermere serves approximately 271 water connections and 245 sewer connections.²²

¹⁶ See 1 TAC § 155.427 (in determining which party bears the burden of proof, after considering applicable statute and agency rules, the judge may consider the party seeking affirmative relief, to change the *status quo*, and whether a party would be required to prove a negative); see also 16 TAC § 24.317 (placing burden on petitioner in wholesale water or sewer appeal to prove that the challenged rate is adverse to the public interest—an analogous threshold issue in such appeals).

¹⁷ WOWSC Ex. 2 at 5 (Gimenez Dir.); Tex. Water Code § 67.004 (stating that water supply corporations are subject to the Texas Non-Profit Corporation Act). The Texas Non-Profit Corporation Act was repealed January 1, 2010 and codified as chapter 22 of the Business Organizations Code. House Comm. on Bus. & Indus., Bill Analysis at 1, Tex. H.B. 1156, 78th Leg., R.S. (2003) (“Unless otherwise noted, the provisions of this Code are nonsubstantive revisions of comparable provisions found in the ... Texas Non-Profit Corporation Act...”); *Id.* at 63 (“Chapter 22 codifies the provisions relating to nonprofit corporations currently located in Art. 1396-1.01 *et seq.*”); Tex. Bus. Orgs. Code § 2.010(2) (“A nonprofit corporation may not be organized or registered under this code to conduct its affairs in this state to . . . engage in water supply or sewer service except as an entity incorporated under Chapter 67, Water Code.”).

¹⁸ Tex. Water Code § 13.002(11) (“Member” means a person who holds a membership in a water supply or sewer service corporation and is a record owner of a fee simple title to property in an area served by a water supply or sewer service corporation or a person who is granted a membership and who either currently receives or will be eligible to receive water or sewer utility service from the corporation. In determining member control of a water supply or sewer service corporation, a person is entitled to only one vote regardless of the number of memberships the person owns.).

¹⁹ WOWSC Ex. 2 at 5-6 (Gimenez Dir.); Tex. Water Code §§ 67.005-.0075.

²⁰ WOWSC Ex. 2 at 5-6 (Gimenez Dir.); Tex. Water Code § 67.0051(a)(2).

²¹ WOWSC Ex. 2 at 6 (Gimenez Dir.), Attachment JG-2 (Bylaws); Tex. Water Code § 67.006(c).

²² WOWSC Ex. 2 at 9 (Gimenez Dir.); WOWSC Ex. 8 at (Bates) 7.

A. The Rate Decision

The primary issue in this case is whether Windermere's rates should include certain outside legal expenses relating to three lawsuits stemming from a 2015 sale of corporate land to a then-board member.²³ In one of those lawsuits, individual board members were named, in addition to Windermere, as defendants.²⁴ In that case, Windermere also paid the legal costs of defending the individual board members.²⁵ To finance the legal expenses while maintaining normal operations, Windermere included \$171 thousand in base rates.²⁶ The increase was allocated 60% to water and 40% to sewer.²⁷ This resulted in a monthly base rate increase from \$50.95 to \$90.39 for water, and from \$40.12 to \$66.41 for sewer.²⁸

Ratepayers and Staff argue that the inclusion of these outside legal expenses in rates is not just and reasonable, and therefore they should be removed from the revenue requirement.²⁹ Windermere asserts that the outside legal expenses were necessary and justified, and therefore their inclusion in rates is just and reasonable.

As a threshold issue, the ALJs assess whether the rates are unreasonably preferential, prejudicial, or discriminatory without regard to whether the rates are just and reasonable.

²³ WOWSC Ex. 2 at 18 (Gimenez Dir.).

²⁴ WOWSC Ex. 2 at 19 (Gimenez Dir.); WOWSC Ex. 3 at 9 (Gimenez Reb.); *Rene Ffrench, John Richard Dial, and Stuart Bruce Sorgen, Individually and as Representatives for Windermere Oaks Water Supply Corporation v. Friendship Homes & Hangars, LLC, WOWSC, and its Directors William Earnest; Thomas Michael Madden; Dana Martin; Robert Mebane; Patrick Mulligan* Joe Gimenez, Mike Nelson, and Dorothy Taylor, Cause No. 48292 (33rd Dist. Ct., Burnet County, Tex.).

²⁵ WOWSC Ex. 3 at 7, 11 (Gimenez Reb.).

²⁶ WOWSC Ex. 2 at 13 (Gimenez Dir.).

²⁷ Staff does not challenge this allocation. Staff Ex. 4 at 6 (Gilford Dir.), Attachment MG-5; Staff Ex. 2 (Mendoza Dir.), Attachment SJM-3.

²⁸ WOWSC Ex. 7 at 5-6 (Nelson Dir.).

²⁹ Staff Ex. 4 at 6-7 (Gilford Dir.).

B. Threshold Issue

No party addressed in prefiled testimony or statement of position whether the rates were unreasonably preferential, prejudicial, or discriminatory, despite being listed as an issue to be addressed in this proceeding.³⁰ Though alerted to this omission at the commencement of the hearing, the parties chose to move forward on the record as submitted.³¹

1. Staff and Ratepayer Positions

In initial briefs, Staff and Ratepayers argue that the threshold issue does not apply. Staff argues that whether the rates are unreasonably preferential, prejudicial, or discriminatory is one of three thresholds—along with whether the rates are just and reasonable and whether they are sufficient, equitable, and consistent—any one of which, if overcome, allows the Commission to set new rates.³² Somewhat similarly, Ratepayers directly challenge whether this inquiry presents a threshold issue to this case. Generally, Ratepayers argue that the threshold issue does not apply because the *City of Fort Worth* case, upon which the Commission’s construction is based, addressed contractual rates under the Federal Power Act, and that the Legislature’s recent amendment to Water Code § 13.043(j) was intended to remove this as a threshold issue. The ALJs do not further address these challenges because the Commission’s precedent is clear and the recent amendment to subsection (j) did not change the operative language.³³

³⁰ See Preliminary Order at Issue Nos. 4-and 5 (July 16, 2020).

³¹ Tr. at 14-17.

³² Ratepayers Initial Brief at 4; Staff Initial Brief at 2.

³³ *Ratepayers’ Appeal of the Decision by Bear Creek Special Utility District to Change Rates*, Docket No. 49351, Order on Rehearing at 3, 20 (Conclusion of Law No. 8) (Nov. 19, 2021); *Tex. Water Comm’n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994, writ denied); Preliminary Order at 4 n.11 (noting that the initial determination under § 13.043(j) required by *City of Fort Worth* was not limited to appeals under § 13.043(f), and “[t]herefore, the same initial inquiry under subsection (j) must be made in this appeal under § 13.043(b) before the Commission can reset rates”).

Substantively, Ratepayers argue—summarily and without record citation—that the rates are “unduly preferential and discriminatory,” because “while all customers are required to pay the increased rates,” only the named board-member defendants benefited from the increase.³⁴ Ratepayers also argue that Windermere violated its tariff by not requiring individual board members to pay for those legal services.³⁵

2. WSC Position

Windermere argues that the rates set by the board are not unreasonably preferential, prejudicial, and discriminatory, and that the appeal therefore fails on the threshold issue. More specifically, Windermere contends that because there is only one customer class, and each rate is uniform for all customers,³⁶ the rates cannot be discriminatory. Moreover, it adds, the board increased only the base rates to ensure that its customers, including board members, shared the cost equally.³⁷

In response to the assertion that Windermere violated its tariff, Windermere notes that the tariff refers to the cost of providing utility services, not legal defense funds, when addressing direct assignment of costs.³⁸ Therefore, it concludes, the tariff provision is not implicated.

³⁴ Ratepayers Initial Brief at 6-7.

³⁵ *Id.*; WOWSC Ex. 12 at (Bates) 46, paragraph 27 (“All services outside the normal scope of utility operations that the Corporation may be compelled to provide at the request of a customer or Member shall be charged to the recipient based on the cost of providing such service.”). WOWSC Ex. 2 (Gimenez Dir.), Attachment JG-1 also purports to be the tariff; however, it is not accessible on the flash-drive provided by the WSC, which contains only links, now expired, to an access site.

³⁶ Tr. at 82 (Burriss Clarifying) and 94 (Burriss Cross); *see* WOWSC Ex. 2 at 5 (Gimenez Dir.); *see also* WOWSC Ex. 3 at 24 (Gimenez Reb.).

³⁷ *See* WOWSC Ex. 8 at 11 (Nelson Reb.); WOWSC Ex. 9 at 9 (Rabon Reb.).

³⁸ WOWSC Reply Brief at 7.

3. Analysis

The ALJs conclude that Ratepayers failed to meet their burden of proof to show that the appealed rates are unreasonably preferential, prejudicial, or discriminatory. First, Ratepayers' petition does not assert that the rates are preferential, prejudicial, or discriminatory, only that they are not just and reasonable.³⁹ Ratepayers' petition admits that there is no meter size "except for the 5/8" x 3/4".⁴⁰ Thus, Ratepayers' pleading, on its face, shows no preference, prejudice, or discrimination. Second, Ratepayers appealed only the base rates, and water and sewer service each have a single base rate.⁴¹ Although a single meter size alone is not enough to show inequality, where, as here, all customers, including Board members, pay the same rates, this affirmatively shows no preference, prejudice, or discrimination. Additionally, board members pay the same rates and receive any utility service as all other ratepayers.

Ratepayers' argument to the contrary is not persuasive. Ratepayers do not explain how "only the customers who are defendants in the member lawsuits receive the benefit." They do not explain what the benefit is⁴² nor how it is exclusive to the customers who are defendants in the member lawsuits. Put simply, Ratepayers' argument is unsupported by evidence and is insufficient to support a finding that the rates are unreasonably preferential, prejudicial, or discriminatory.

³⁹ First Amended Ratepayer Appeal of the Decision by Windermere Oaks Water Supply Corporation to Change Water and Sewer Rates at 1-2 (Apr. 30, 2020).

⁴⁰ *Id.*

⁴¹ Staff Ex. 2 at 4 (Mendoza Dir.); Tr. at 553, 556-58 (Mendoza Cross); Staff Initial Brief at 5.

⁴² Even assuming *arguendo* that the benefit Ratepayers reference is the legal defense expenses of the named board members, this too fails. There is no evidence that any expense on behalf of the board's volunteer directors confers on those members a preferential rate, or discriminates against all non-board member ratepayers. First, it is axiomatic that the evaluation of a rate must relate to the service for which it is exchanged—not, as here, a customers' service to the water provider. Moreover, evidence shows that the WSC incurred expenses on behalf of volunteer board members incident to their service on the board. Covering the legal defense expenses of named directors guards against corporate demise, a benefit to all customers. *See* WOWSC Ex. 3 at 14-15 (Gimenez Reb.) (identifying legal and policy reasons for covering director legal defense costs). Directors enjoy significant protection against personal liability under the business judgment rule, safe harbor provisions for non-profit corporations, and the corporate bylaws. *See Sneed v. Webre*, 465 S.W.3d 169, 178 (Tex. 2015); Tex. Bus. Orgs. Code § 22.221; WOWSC Ex. 2 (Gimenez Dir.), Attachment JG-2 at Art. 8, § 18. A corporation in turn has discretion in advancing legal expenses on behalf of directors and officers, which becomes mandatory if they prevail. Tex. Bus. Orgs. Code. §§ 8.104-105, .051.

Finally, any alleged violation of Windermere's tariff does not demonstrate that the *rates* are preferential, prejudicial, or discriminatory. Moreover, the ALJs agree that the referenced tariff provisions refer to the cost of providing utility services, not legal defense funds, when addressing direct assignment of costs.⁴³

The preponderance of the evidence shows that the rates are not unreasonably preferential, prejudicial, or discriminatory. The Ratepayers having failed to meet their burden of proof on this threshold issue, the ALJs do not address whether the rates are just and reasonable.

C. Rate Case Expenses

Staff supports Windermere's requested rate case expenses while Ratepayers oppose Windermere's recovery of rate case expenses for this proceeding on two grounds.⁴⁴ First, Ratepayers argue that rate case expenses are not justified because Staff reviewed the reasonableness of rate case expenses under 16 TAC § 24.44, which, they argue, applies to hearings that benefit ratepayers and serve the public interest, a standard that Ratepayers assert would only be met if the rates are reduced.⁴⁵ The ALJs agree that section 24.44 does not apply to rate appeals under Water Code § 13.043, but not for the reason Ratepayers suggest.

Section 24.44 applies to a utility's recovery of rate case expenses in rate proceedings under Water Code sections 13.187 or 13.1871.⁴⁶ However, a water supply corporation is not a "utility" as

⁴³ WOWSC Reply Brief at 7.

⁴⁴ Ratepayers raise the issue of rate case expenses for the first time in post-hearing briefing. They did not prefile direct testimony or a statement of position regarding opposition to rate case expenses. 16 TAC § 22.124(a) ("[I]nsofar as its prefiled direct testimony does not address issues that a party intends to litigate, each party that has prefiled direct testimony shall file a statement of position no later than three working days before the start of a hearing.").

⁴⁵ Ratepayers Initial Brief at 7.

⁴⁶ 16 TAC § 24.44(a). Texas Water Code sections 13.187 and 13.1871 govern Class A and B utility applications to change rates.

defined by the Water Code, and this case is not a rate proceeding under Water Code section 13.187 or 13.1871.⁴⁷ Therefore, section 24.44 does not govern the recovery of rate case expenses here. Rather, the Water Code specifically authorizes the recovery of rate case expenses in an appeal under section 13.043(e).⁴⁸ Moreover, a water supply corporation “may employ and compensate counsel to represent the corporation as the board determines is necessary.”⁴⁹ Staff looked to section 24.44 as a guide in evaluating the reasonableness of rate case expenses but was not required to do so.⁵⁰

Next, Ratepayers argue that rate case expenses should not be allowed because Windermere, in their view, abused the appeal process through various wrongdoings on the part of the board and legal counsel. Ratepayers’ arguments largely lack record citation and evidentiary support. Generally, Ratepayers base their argument against the recovery of rate case expenses by addressing their disagreement with the board’s ratemaking process. The argument is without merit.

The Commission may allow recovery of reasonable expenses incurred by Windermere in the appeal proceedings.⁵¹ The evidence of rate case expenses presented by Ms. Mauldin is un rebutted.⁵²

⁴⁷ See Tex. Water Code § 13.002(23) (defining “utility” to exclude “a municipal corporation, *water supply or sewer service corporation*, or a political subdivision of the state”) (emphasis added).

⁴⁸ Tex. Water Code § 13.043(e) (The Commission “may allow recovery of reasonable expenses incurred by the retail public utility in the appeal proceedings.”).

⁴⁹ Tex. Water Code § 67.013.

⁵⁰ Staff Initial Brief at 10.

⁵¹ Tex. Water Code § 13.043(e). Unlike 16 TAC § 24.44, the Commission’s rules do not address determining the reasonableness of rate case expenses in appeals such as this one.

⁵² WOWSC Ex. 4 (Mauldin Dir.); WOWSC Ex. 5 (Mauldin 1st Supp. Dir.); WOWSC Ex. 6 (Mauldin 2nd Supp. Dir.); WOWSC Ex. 22 (Mauldin 3rd Supp. Dir.).

1. Amount

Windermere requests \$345,227.03 in rate case expenses, as of December 15, 2021.⁵³ This amount does not account for trailing rate case expenses—expenses incurred between the date of the report and when the Commission’s decision becomes final. Staff supports Windermere’s collection of rate case expenses incurred in this appeal. Staff’s brief, as with its testimony, accounted only for rate case expenses incurred through October 31, 2021.⁵⁴ Staff based its recommendation on the testimony, including supplements, of Ms. Mauldin. Ms. Mauldin’s third supplement provides equal detail and Staff filed no objection to its admission.

The ALJs find \$345,227.03 in rate case expenses to be reasonable and recommend that Windermere be authorized to recover that amount. Because this amount does not account for trailing expenses incurred after December 15, 2021, the ALJs recommend that Windermere file an affidavit or supplemental testimony closer in time to the Commission’s consideration of this matter reflecting the then-current total.

2. Recovery Mechanism

Staff recommends that rate case expenses be recovered through a surcharge over a five-year period to alleviate financial burden on the customers. Staff recommends that this surcharge be charged to all customers at a monthly amount equal to the total rate case expenses divided by the current number of connections, divided by five years, divided by twelve months. Windermere argues that prolonging recovery over such a long time would severely impact its ability to retain current counsel, and without counsel, the nonprofit water supply corporation would be at risk of

⁵³ WOWSC Ex. 22 (Mauldin 3rd Supp. Dir.).

⁵⁴ Staff Initial Brief at 9; Staff Ex. 5 at 4 (Gilford Supp. Dir.).

additional litigation.⁵⁵ According to Windermere, the litigation is ongoing and shows no sign of stopping.⁵⁶ Instead, Windermere asks to recover rate case expenses over two years.

The ALJs are concerned with the bill impact to customers of a two-year recovery, which would be in addition to the existing base rates of \$90.39 for water and \$66.41 for sewer per month. With 271 connections, the currently supported amount of rate case expenses, spread over two years, will exceed \$50 per month per customer.⁵⁷ Over five years, this amount would be closer to \$20 per month.⁵⁸ However, over a 42-month recovery period, this amount approaches \$30 per month.⁵⁹ Although still unusually long, the ALJs find that this recovery period balances the need to mitigate the bill impact on customers and Windermere's need to recover its rate case expenses in a timely manner.

Additionally, Staff witness Maxine Gilford recommended recovering the rate case expenses through a surcharge that would terminate once Windermere collects the amount awarded. The ALJs agree and recommend that the rate case expenses be recovered through a surcharge until the earlier of 42 months after the surcharge takes effect or full recovery of the final amount awarded.

VI. CONCLUSION

Because the ALJs do not find that the appealed rates are unreasonably preferential, prejudicial, or discriminatory, the ALJs do not reach the substantive issues of whether the rates are just and reasonable. The ALJs recommend that the Commission dismiss this appeal and allow

⁵⁵ WOWSC Ex. 8 at 8 (Nelson Reb.).

⁵⁶ *Id.*

⁵⁷ By the ALJs' calculation: $\$345,227.03/271/2/12=\53.08 .

⁵⁸ By the ALJs' calculation: $\$345,227.03/271/5/12=\21.23 .

⁵⁹ By the ALJs' calculation: $\$345,227.03/271/42=\30.33 .

Windermere to recover its rate case expenses through a surcharge until the earlier of 42 months after the surcharge takes effect or full recovery of the amount awarded.

Alternatively, if the Commission believes it is appropriate to address whether the rates are just and reasonable, the ALJs recommend that the Commission remand this matter to SOAH for a proposal for decision based on the existing record and argument, so as to avoid additional rate case expenses.

VII. FINDINGS OF FACT

General and Procedural Findings

1. Windermere Oaks Water Supply Corporation (Windermere or WOWSC) is a nonprofit water supply and sewer service corporation operating under chapters 49 and 67 of the Texas Water Code (TWC).
2. Windermere's water and sewer service certificates of convenience and necessity numbers are 12011 and 20662.
3. Windermere is managed by a member-elected board of directors, where each director must be a member and customer of the corporation.
4. Windermere has five board members, and the board of directors elects its officers.
5. On February 1, 2020, the board approved a rate increase that took effect beginning March 23, 2020.
6. On or about February 11, 2020, Windermere sent notice of its rate increase to its customers.
7. On April 27, 2020, certain ratepayers (Ratepayers) timely filed a petition under TWC § 13.043(b) to appeal the decision by the board.
8. The petition was filed within 90 days after the effective date of the rate change.
9. As of the date of the board's decision to increase rates in 2020, Windermere had 271 water connections and 245 sewer connections.

10. Fifty-two ratepayers signed the petition.
11. Greater than 10 percent of Windermere's total active connections at the time of filing signed a petition to contest the rate increase.
12. On May 27, 2020, Windermere filed a response to the petition.
13. No party requested an effective date other than the original one proposed by Windermere.
14. The appealed rates were in effect from March 23, 2020, to the present.
15. Only the base rates for water and sewer service were appealed.
16. On June 23, 2020, by Order No. 3, a Public Utility Commission of Texas (Commission) administrative law judge (ALJ) found the petition administratively complete.
17. On June 23, 2020, the Commission referred the case to the State Office of Administrative Hearings (SOAH), requesting the assignment of an ALJ to conduct a hearing and issue a proposal for decision, if necessary.
18. On July 16, 2020, the Commission issued a Preliminary Order identifying eleven issues to be addressed in the SOAH proceeding.
19. On October 8, 2020, by SOAH Order No. 5, this matter was referred to mediation.
20. On January 19, 2021, a mediator's report stated that the parties did not reach agreement during mediation.
21. No party moved to establish interim rates.
22. On March 10, 2021, Windermere filed direct testimony of George Burriss, Joe Gimenez, Mike Nelson and Jamie Mauldin.
23. On April 7, 2021, Ratepayers filed direct testimony of Daniel Flunker, Pattie Flunker, Bill Stein, and Kathryn E. Allen.
24. On May 5, 2021, Commission staff (Staff) filed direct testimony of Spencer English, Stephen Mendoza, Heidi Graham, and Maxine Gilford. The testimony of Spencer English was subsequently adopted by Mark Filarowicz.
25. On July 7, 2021, the Windermere filed rebuttal testimony of Mike Nelson, Joe Gimenez, and Grant Rabon.

26. On June 7, 2021, Windermere filed the first supplemental direct testimony of Jamie Mauldin.
27. On November 19, 2021, Windermere filed the second supplemental direct testimony of Jamie Mauldin.
28. On November 23, 2021, Staff filed the supplemental direct testimony of Maxine Gilford.
29. Windermere provided written notice of the hearing to all affected customers.
30. On December 1-3, 2021, a hearing on the merits was held before ALJs Christiaan Siano and Daniel Wiseman via Zoom videoconference at which Windermere, Ratepayers, and Staff appeared.
31. On December 6, 2021, SOAH Order No. 15 set a post-hearing briefing schedule.
32. On December 11, 2021, Ratepayers filed a motion for interim relief.
33. On December 20, 2021, SOAH Order No. 16 denied the motion for interim relief.
34. Under SOAH Order No. 15, initial post-hearing briefs were due on December 30, 2021, and reply briefs were due on January 25, 2022.
35. On December 30, 2021, Windermere filed the third supplement direct testimony of Jamie Mauldin.
36. On February 1, 2022, Windermere moved to strike portions of Ratepayers' reply brief and response to Windermere's motion to admit evidence.
37. By SOAH Order No. 17, the motions to strike were denied.
38. By SOAH Order No. 18, the record was reopened and WOWSC Exhibit 22 was admitted into the evidentiary record. The record closed on February 15, 2022.

Background

39. Windermere provides water and sewer service.
40. Windermere board's February 1, 2020 rate decision resulted in a monthly base rate of \$90.39 for water service and \$66.41 for sewer service.
41. There is no meter size except for the 5/8" x 3/4" meter.

42. Water and sewer service each have a single base rate applicable to a single meter size.
43. All customers are charged the same rates.

Rate Case Expenses

44. The rate case expenses of \$345,227.03 through December 15, 2021, are supported as reasonable and necessary.
45. A 42-month recovery period for rate case expenses is reasonable considering the rate impact on customers and the need to recover rate case expenses in a timely manner.
46. The rate case expense surcharge should be calculated based on a 42-month recovery, and the surcharge should continue until the earlier of 42 months after the surcharge takes effect or all reasonable and necessary rate case expenses are fully recovered.

VIII. CONCLUSIONS OF LAW

1. Windermere is a nonprofit water supply and sewer service corporation governed by TWC chapters 49 and 67 and is a retail public utility as defined by TWC § 13.002(19) and 16 Texas Administrative Code (TAC) § 24.3(31).
2. Windermere is governed by the Business Organizations Code. TWC § 67.004; House Comm. on Bus. & Indus., Bill Analysis at 1, 63, Tex. H.B. 1156, 78th Leg., R.S. (2003).
3. The Commission has jurisdiction over this proceeding under TWC § 13.043(b)(1) and 16 TAC § 24.101.
4. Upon referral, SOAH has jurisdiction to conduct the hearing and issue a proposal for decision pursuant to Texas Government Code § 2003.049.
5. Notice of the hearing was provided consistent with Texas Government Code §§ 2001.051-.052 and 16 TAC § 22.55.
6. Windermere substantially complied with 16 TAC § 24.101(c)(6) regarding notice of the hearing.
7. The petition for review was timely filed with the Commission and with Windermere in compliance with TWC § 13.043(c) and 16 TAC § 24.101(b).
8. The petition for review was signed by more than 10 percent of Windermere's ratepayers whose rates were changed by the rates appealed and who were eligible to file an appeal

- under TWC § 13.043(b) in compliance with TWC § 13.043(c), 16 TAC § 24.101(b) and (d), and 16 TAC § 24.103(b).
9. Windermere's volumetric rates are not subject to this appeal.
 10. In a rate appeal, the service provider bears the burden of proof to establish that the contested rates are just and reasonable. 16 TAC § 24.12.
 11. The Commission hears this appeal *de novo*.
 12. Under TWC § 13.043(e), the Commission may in an appeal brought under TWC § 13.043(b) consider the information that was available to the governing body of the retail public utility at the time the governing body set the rates appealed; any information that shows, or tends to show, the information that was available to the governing body at the time it set the rates appealed; and evidence of reasonable expenses incurred by the retail public utility in the appeal proceedings.
 13. The Commission must find that the appealed rates are unreasonably preferential, prejudicial, or discriminatory before setting just and reasonable rates. TWC § 13.043(j); *Tex. Water Comm'n v. City of Fort Worth*, 875 S.W.2d 332, 336 (Tex. App.—Austin 1994, writ denied).
 14. The party challenging the rates has the burden of proof to establish that the contested rates are unreasonably preferential, prejudicial, or discriminatory. 16 TAC § 24.12; 1 TAC § 155.427.
 15. The assessment of whether the rates are unreasonably preferential, prejudicial, or discriminatory is done without regard to whether the rates are just and reasonable.
 16. Windermere has one class of members, as defined by TWC § 13.002(11).
 17. The appealed rates were not shown to be unreasonably preferential, prejudicial, or discriminatory. TWC § 13.043(j).
 18. The Commission may allow the recovery of Windermere's reasonable expenses incurred in the appeal proceedings. TWC § 13.043(e).
 19. A water supply corporation may employ and compensate counsel to represent the corporation as the board determines is necessary. TWC § 67.013.
 20. 16 TAC § 24.44 does not apply to rate appeals brought under TWC § 13.043(b), but may be used as a guide in evaluating the reasonableness of rate case expenses.

21. The Commission may allow Windermere to impose surcharges to recover rate case expenses. TWC § 13.043(e).
22. Windermere should be authorized to recover its reasonable rate case expenses through a surcharge. TWC § 13.043(e).

IX. PROPOSED ORDERING PARAGRAPHS

1. The appeal is denied.
2. This case is dismissed.
3. The Corporation shall surcharge each connection \$___ per month in rate case expenses. The monthly rate case expense surcharge shall cease at the earlier of 42 months after the rider takes effect or full recovery of the amount awarded.
4. The Commission denies all other motions and any other requests for general or specific relief that the Commission has not expressly granted.

SIGNED March 31, 2022.



CHRISTIAAN SIANO
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



DANIEL WISEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS