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STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Jodi Brown, CLERK

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

SOAH ORDER NO. 7
MEMORIALIZING PREHEARING CONFERENCE; ADOPTING AMENDED
PROCEDURAL SCHEDULE; SETTING HEARING ON THE MERITS; AND RULING
ON DISCOVERY DISPUTES

I. MEMORIALIZING PREHEARING CONFERENCE; ADOPTING AMENDED
PROCEDURAL SCHEDULE; AND SETTING HEARING ON THE MERITS

On January 27, 2021, a telephonic prehearing conference was convened by the undersigned Administrative Law Judge (ALJ). All parties appeared: Windermere Oaks Water Supply Corporation (Windermere or WOWSC), ratepayers of Windermere (Petitioners), and the staff (Staff) of the Public Commission of Texas (Commission).

Prior to the prehearing conference, the parties submitted an agreed procedural schedule. At the prehearing conference each party affirmed its support for the proposed schedule. Accordingly, the ALJ hereby adopts the parties' proposed procedural schedule, which amends and supersedes the prior schedule set forth in State Office of Administrative Hearings (SOAH) Order No. 2, including the February 11, 2021 hearing on the merits and February 9, 2021 prehearing conference, which are **CANCELED**:

Event	Date
WOWSC to file direct testimony	March 10, 2021
Deadline to file written objections to WOWSC's direct testimony	March 17, 2021
Deadline to file responses to objections to WOWSC's direct testimony	March 24, 2021

Event	Date
Petitioners to file direct testimony	April 7, 2021
Deadline to file written objections to Petitioners' direct testimony	April 14, 2021
Deadline to file responses to objections to Petitioners' direct testimony	April 21, 2021
Staff to file direct testimony	May 5, 2021
Deadline to file written objections to Staff's direct testimony	May 12, 2021
Deadline to file responses to objections to Staff's direct testimony	May 19, 2021
Deadline to propound discovery on direct case of all parties	May 26, 2021
Deadline to conduct all depositions on direct case of all parties	May 26, 2021
WOWSC to file rebuttal testimony	June 7, 2021
Deadline to file written objections to WOWSC's rebuttal testimony	June 14, 2021
Deadline to file responses to objections to WOWSC's rebuttal testimony	June 21, 2021
Deadline to propound discovery on WOWSC rebuttal testimony	July 6, 2021
Deadline to conduct all depositions on rebuttal testimony	July 6, 2021
Hearing on the Merits ¹	Week of July 12-16 2021

Also pursuant to the parties' agreement, drafts of testimony and email communications containing drafts of testimony are not discoverable.

¹ It remains unclear when regular live hearings will resume. Under the Chief ALJs' current Emergency Order, hearings shall generally be conducted by phone or videoconference "until further notice." See <http://www.soah.texas.gov/emergencyNotice.html>. Given this uncertainty, the parties should plan for a Zoom hearing. The parties should continue to monitor the Commission's and SOAH's webpages for developments, and may request a live hearing if warranted. Otherwise, instructions for preparing for and attending the Zoom videoconference hearing on the merits will issue in a future order.

While the schedule in SOAH Order No. 2 has been superseded, the information concerning filing and discovery procedures remains valid. Parties are requested to consult that information and the rules cited therein as they continue the discovery process.

The parties may contact the ALJ's Administrative Assistant, Nadia Martinez, at nadia.martinez@soah.texas.gov, with procedural questions.

II. RULING ON PENDING MOTIONS

At the prehearing conference, the parties also discussed pending discovery motions, stating that they were unable to resolve any disputes through mediation. These motions comprised: (1) Staff's November 4, 2020 motion to compel Windermere to respond to Staff's first requests for information (RFIs) Nos. Staff 1-7 and Staff 1-14, and (2) Windermere's September 30, 2020 motion to compel Petitioners to respond to Windermere's first RFIs. Each motion is addressed below.

Staff's November 4, 2020 Motion to Compel

Following the prehearing conference, Windermere filed on January 28, 2021, a supplemental response to Staff's contested RFIs, which sought invoices for legal expenses that Windermere is recovering through the water and sewer rates being appealed in this proceeding. Having initially objected to disclosing this information on the grounds of attorney/client and work product privilege, Windermere's Board since voted to disclose this information and waive its prior objection. Because Windermere purports to have provided the responsive information sought by Staff under seal, the ALJ finds that the motion to compel is thus moot and **denies** it without prejudice on that basis.

Windermere's supplemental response states that it is still in the process of releasing the unredacted legal invoices to the public and so has provided them under seal in this proceeding. Windermere is requested to inform the ALJ when this process has progressed to the point where

the seal may be lifted on these documents, so that they may be a part of the public record of this proceeding, to which they appropriately belong.

Windermere's September 30, 2020 Motion to Compel

On September 9, 2020, Windermere served Petitioners with its First RFI, seeking documents and other items in this matter. After seeking an extension of time, Petitioners, on September 23, 2020, filed their objections to Windermere's First RFI. Windermere filed its motion to compel Petitioners to respond on September 30, 2020, and there appears to be no filed response to Windermere's motion.

As an initial matter, Windermere alleges multiple deficiencies in Petitioners' failure to respond to its discovery requests. First, Windermere asserts that Petitioners did not timely object, instead filing their objections three days after the deadline for such objections and two days after their motion for extension of time, which Windermere contends was also untimely. The ALJ finds that, due to the unusual and unexpected procedural posture of this case at the time of the dispute—when it was expected to have already been referred to mediation pursuant to the agreed procedural schedule adopted in SOAH Order No. 2—Petitioners' untimeliness is not a sufficient basis to compel them to respond to discovery. However, the ALJ does expect all parties to comply with the discovery rules and procedural schedule now in effect and to henceforth confer in better faith regarding any objections.

Second, Windermere argues that Petitioners' privilege log is inadequate, apparently lacking some documents for which Petitioners claim privilege, and organized such that it is impossible to determine which RFIs correspond to which documents and claims. The ALJ reminds Petitioners that, though they are not lawyers, they are held by law to the same standard as the other parties to this case. Petitioners are therefore **ORDERED** to revise and maintain a privilege log that complies with Texas Rule of Evidence 193.3, no later than seven business days from the issuance of this order.

Having addressed the preliminary complaints regarding Windermere's response, each objection is addressed below.

- 1. WOWSC RFI No. 1-2 Provide all Public Information Act Requests from Ratepayer Representatives and other WOWSC members to WOWSC regarding WOWSC operations, services, litigation fees, board members, and rates from 2017 to present.**

Petitioners object on the apparent basis of relevancy and assert that Windermere has at least an equal right of possession of any such materials. Windermere apparently has withdrawn its request to compel production of these materials, stating that it will provide all relevant requests in its direct testimony. Accordingly, its motion to compel is **denied without prejudice as moot**.

- 2. WOWSC RFI No. 1-3 On Feb. 29,2020, representatives from Aqua Texas, Inc., Aqua Utilities, Inc., and Aqua Development, Inc. d/b/a Aqua Texas (Aqua Texas) gave a presentation to WOWSC members. Admit or deny that Petitioners advertised and/or promoted via email or social media posting the event to WOWSC members.**

Petitioners object to this request as irrelevant. Windermere responds that, to the extent Aqua Texas has encouraged or otherwise affected the legal fees at issue, any responsive material could bear on the reasonableness of the rates that seek to recover such fees. Windermere further contends that responsive documents may show that Aqua Texas has attempted to lure ratepayers away from Windermere, calling into question how the reasonableness of rates thus affected should be evaluated. The ALJ agrees. Windermere's motion to compel a response to this RFI is **granted**.

- 3. WOWSC RFI No. 1-4 Provide all correspondence and documents between Petitioners and representative of Aqua Texas representatives between January 1, 2019 and August 26, 2020.**

Petitioners again object to this request as irrelevant. For the same reasons described with respect to the previous RFI, Windermere's motion to compel a response to this RFI is **granted**.

4. **WOWSC RFI No. 1-6 Provide all correspondence between Josie Fuller and Patti Flunker and the named plaintiffs in Cause No. 48929, in the 33rd Judicial District of Burnet County, Texas, Dick Dial, Bruce Sorgen, and Rene Ffrench, regarding WOWSC operations, services, litigation fees, board members, and rates from 2017 to present.**

Petitioners object to this request as irrelevant and contend that responsive information may be privileged. Windermere asserts that it is entitled to know if there is a coordinated effort against it, and that Petitioners have failed to show any privilege. While this request approaches the limit of relevance, it cannot be denied that responsive materials may show a united purpose among ratepayers that could, again, call into question how reasonableness may be evaluated when there is an ulterior motive at play. Windermere's motion to compel a response to this RFI is **granted**. However, Petitioners are not required to produce privileged documents, though their privilege log must conform to the applicable rules, and Windermere may challenge any such claim of privilege in a future motion.

5. **WOWSC RFI No. 1-7 Provide all correspondence and documents between Ratepayer Representatives and signatories to the rate protest petition filed in this docket regarding the Petition to Appeal Rates from January 1, 2019 to present.**

Petitioners contend that, again, this information is irrelevant, and possibly privileged. Windermere rightly notes that Petitioners do not explain how this information is irrelevant, as it relates to the key issue in this proceeding, and have not established any privilege. Therefore, again, Windermere's motion to compel Petitioners to respond to this RFI is **granted**, though Petitioners may withhold any privileged information, subject to potential future challenge.

6. **WOWSC RFI No. 1-8 Provide all correspondence and documents between Ratepayer Representatives and signatories to the rate protest petition filed in this docket regarding WOWSC operations, services, litigation fees, Ratepayer Representatives nominations, and rates from 2017 to present.**

Petitioners and Windermere repeat the same arguments here. And the result is the same: Windermere's motion to compel Petitioners to respond to this RFI is **granted**, though Petitioners may withhold any privileged information, subject to potential future challenge.

7. **WOWSC RFI No. 1-9 Admit or deny that Ratepayer Representatives sent a survey to WOWSC members regarding WOWSC operations, service, and rates. If admission, provide the survey and all drafts of the survey.**

Petitioners object on grounds of relevance, and that it will cause confusion, or prejudice. Windermere flatly disputes these concerns. The ALJ finds that the material is relevant and that Petitioners have failed to demonstrate a persuasive basis for its stated concerns. Accordingly, Windermere's motion to compel Petitioners to respond to this RFI is **granted**.

8. **WOWSC RFI No. 1-12 Provide links and/or video files to all posts by Petitioners on NextDoor, Facebook, YouTube and other social media platforms regarding WOWSC, its Board members, operations, services, and rates from 2017 to present.**

Petitioners assert that this information is outside of their possession, custody, or control, as well as irrelevant. Windermere points out that the request is defined to include only posts made by Petitioners, such that they should have control over the requested links or files. Petitioners also object that that the request is irrelevant and misleading or prejudicial. The ALJ finds these concerns are misplaced. Windermere's motion to compel Petitioners to respond to this RFI is **granted**.

9. **WOWSC RFI No. 1-14 Provide all correspondence and documents between Josie Fuller and Patti Flunker regarding WOWSC operations, services, litigation fees, board operations, board members and rates from 2017 to present.**

Petitioners object on the basis that the responsive material may contain privileged information. As Windermere notes, Petitioners have simply not met the burden to withhold responsive material on such a speculative basis. Accordingly Windermere's motion to compel Petitioners to respond to this RFI is **granted**, though Petitioners may withhold any privileged information, subject to potential future challenge.

To summarize, in addition to revising their privilege log, Petitioners must provide all information responsive to those portions of Windermere's RFIs for which its motion to compel was granted. In order to allow Windermere sufficient time to review the responses prior to its deadline for direct testimony, Petitioners shall provide the responsive materials no later than February 26, 2021.

SIGNED February 2, 2021.



DANIEL WISEMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS