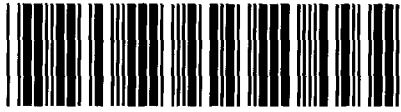


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APPLICATION OF PK-RE § BEFORE THE STATE OFFICE
DEVELOPMENT COMPANY, INC., §
D/B/A GREENSHORES UTILITY §
SERVICES AND D/B/A OAK SHORES § OF
WATER SYSTEM FOR AUTHORITY §
TO CHANGE RATES AND TARIFFS §
IN TRAVIS COUNTY § ADMINISTRATIVE HEARINGS

SOAH ORDER NO. 2
MEMORIALIZING PREHEARING CONFERENCE,
GRANTING INTERVENTIONS,
ADDRESSING PROCEDURAL SCHEDULE,
AND RULING ON INTERIM RATES

I. INTRODUCTION

On March 16, 2017, the undersigned Administrative Law Judge (ALJ) convened the initial prehearing conference in this docket for ALJ Steven Arnold, who was not able to preside over the prehearing conference. At the prehearing conference, the ALJ discussed pending motions to intervene, as well as oral motions to intervene made by parties attending the prehearing conference. A procedural schedule was discussed, and two versions of an agreed procedural schedule have been filed since the date of the prehearing conference. A request for interim rates was pressed by PK-RE Development Company, Inc. D/B/A Greenshores Utility Services (PK-RE), and opposed by the intervenor groups.¹ A schedule for formal responses to PK-RE's request for interim rates (PK-RE's Request) and PK-RE's response was established during the prehearing conference. These issues will be discussed in more detail below. In addition, for the reasons discussed in more detail in Section IV, below, PK-RE's Request is denied.

¹ Intervenor Undine Development, LLC (Undine) is interested in acquiring PK-RE and its interests are aligned with those of PK-RE. References in this order to "intervenors" do not include Undine.

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II. APPEARANCES AND INTERVENTIONS

The following parties appeared at the prehearing conference:

1. PK-RE represented by Russell Eppright;
2. Undine Development, LLC (Undine) represented by Georgia Crump;
3. Greenshores on Lake Austin Property Owners Association (Greenshores POA) represented by John Carlton;
4. Cynthia and Scott Smiley;²
5. Woods of Greenshores Property Owners Association (Woods POA) represented by Frank Ainsa;
6. Alexander Williams; and
7. Commission Staff represented by Ralph Daigheault.

Mr. Williams and Mr. Ainsa made oral motions to intervene, and both motions were granted. Ms. Smiley's motion to intervene was also granted. The parties explained that there are three apparent groups of residential customers served by PK-RE, who live in three different areas. The three groups are the Greenshores POA, the Woods POA, and the Oak Shores Property Owners Association (Oak Shores POA). Though the three residential POA groups are generally aligned, they are participating separately in this case because the three groups do not necessarily receive the same services from PK-RE. Mr. Carlton represents the Greenshores POA, Mr. Ainsa represents the Woods POA, and Ms. Smiley, though intervening on behalf of herself and her husband, will represent the interests of the Oak Shores POA. Mr. Williams intervened on his own behalf and is a member of the Woods POA. He may be grouped with the Woods POA during the hearing for purposes of efficiency.

² Ms. Smiley acknowledged she is a member of the Oak Shores POA, which will be discussed below.

III. PROCEDURAL SCHEDULE

On March 22, 2017, Undine filed an agreed proposed schedule. Among other things, that schedule would have allowed the parties almost eight weeks between the end of the hearing and the deadline for initial briefs and allowed the ALJ only one month after filing of reply briefs to issue the proposal for decision (PFD). On April 4, 2017, Undine filed a revised agreed procedural schedule, which also allowed the ALJ only one month to issue the PFD. Neither proposal is adopted. No later than one week after the date of this order, the parties shall file an agreed proposed schedule that provides approximately 60 days between the deadline for reply briefs and the issuance of the PFD, and allows sufficient time for the Public Utility Commission of Texas (Commission) to consider the PFD and any exceptions and replies to exceptions relating to it. In addition, because their interests are aligned, the deadline for Undine's direct testimony, if any, will be the same as for PK-RE's direct testimony. As the applicant, only PK-RE may file rebuttal testimony. If no schedule complying with this paragraph is filed, the ALJ will issue an order setting the schedule.

IV. INTERIM RATES

After a hearing is convened, any party may petition the Commission or an ALJ to set interim rates.³ In this case, PK-RE filed a request for interim rates on March 7, 2017, before any hearing had been held. At the prehearing conference, the parties agreed that PK-RE's Request would be decided based on filings and oral argument, without an evidentiary hearing on that request. The presiding ALJ deemed PK-RE's Request to have been filed after the prehearing conference, and set a date for intervenors and Staff to file responses to PK-RE's Request. On March 23, 2017, responses opposing PK-RE's Request were filed by the Greenshores POA, Ms. Smiley, and Mr. Williams. On March 27, 2017, Staff filed its response to PK-RE's Request.

³ 16 Tex. Admin. Code § 24.29(b).

On March 31, 2017, PK-RE filed its Reply to Responses to Motion for Interim Rates (Reply). All responses were timely filed.⁴

In this case, the ALJ may set interim rates:

... where the proposed increase in rates could result in an unreasonable economic hardship on the utility's customers, unjust or unreasonable rates, or failure to set interim rates could result in an unreasonable economic hardship on the utility.⁵

PK-RE's Request

In its Request, PK-RE states that Mr. Eppright has invested \$345,000 of his personal funds since January 2014 to keep the utility systems operating and compliant with state regulations. This is so, asserts Greenshores, because the current rate structure does not produce revenues sufficient to cover operating costs.⁶ PK-RE also points to a 2013 settlement agreement among the parties that permits PK-RE to seek a rate increase every year for 5 years with a capped increase to total revenues of 5% per requested rate case.⁷ PK-RE argues that the 5% per year revenue cap is cumulative so that, for example, the 20% interim rate increase requested in this case complies with the settlement agreement because, cumulatively, it represents 4 years of what could have been 4 annual 5% increases.

⁴ On April 5, 2017, Greenshores POA filed a Response Regarding Opposition to Motion for Interim Rates that purported to respond to PK-RE's Reply. There was no provision made at the prehearing conference for an intervenor response to PK-RE's Reply. There was also no express prohibition against such a reply. However, as the party with the burden of proof, it is PK-RE's prerogative to open and close the presentation of evidence, as well as a request for affirmative relief, such as the request for interim rates in this case. As a result, the ALJ has not reviewed Greenshores POA's Reply, nor has he considered it in the preparation of this order. The parties should expect that the ALJ may strike future pleadings not provided for in Commission rules or orders.

⁵ 16 Tex. Admin. Code § 24.29(d).

⁶ PK-RE's Request at 2.

⁷ See PK-RE's Request, Exhibit B.

Intervenors' Responses

The intervenors and Staff oppose PK-RE's Request for several reasons. Greenshores POA makes a number of assertions to the effect that PK-RE made questionable business decisions that helped form the basis of the request for interim rates. For example, Greenshores POA contends that the expenditures of \$240,000-\$360,000 per year on "pump-and-haul" sewage service from the Oak Shores development to the PK-RE sewer treatment facility could have been avoided had a proper sewer main been constructed.⁸ As a result, Greenshores POA contends that those expenses should not be included in any rate calculation. Greenshores POA also asserts that there are unusually high water losses, the expense for which should also be excluded from any rate calculation. Finally, Greenshores POA argues that portions of PK-RE's utility plant should not be considered used and useful in the calculation of just and reasonable rates.⁹

Cynthia and Scott Smiley (Smiley Response), and Mr. Williams, raise in their respective responses to Greenshores's Request many of same factual claims made by Greenshores POA. In addition, the Smiley Response questions whether the \$2.2 million in loans that Mr. Eppright secured from OmniBank have been used for the benefit of the utility system, and if so, why Mr. Eppright claims to need such a significant rate increase in this case.¹⁰

Staff

Staff alludes to complex issues that deserve close scrutiny in this case, including the size of PK-RE's requested invested capital, as well as the level of PK-RE's claimed operating expenses, which include the pump-and-haul expenses.¹¹ Staff argues that these matters militate against a hasty decision on interim rates. More importantly, Staff points out that the Settlement

⁸ Greenshores on Lake Austin POA's Response at 6.

⁹ Greenshores on Lake Austin POA's Response at 7.

¹⁰ Smiley Response at 3.

¹¹ Staff Response at 3.

Agreement to which PK-RE alludes states that the utility *may seek* rate increases of 5% annually. It does not guarantee a 5% revenue increase every year for 5 years.¹² Staff opposes the PK-RE Request, but concludes by stating that, if interim rates are approved, the additional revenue should be placed in an escrow account as permitted by 16 Texas Administrative Code § 24.29(e)(3).¹³

ALJ's Analysis

In deciding whether to approve interim rates, the ALJ is guided by the provisions of 16 Texas Administrative Code § 24.29(d). PK-RE argues that failure to approve interim rates would create an economic hardship because Mr. Eppright should not have to invest his personal funds to keep the utility in operations. The intervenors contend that, had PK-RE made prudent operating decisions in the past, it would not be in the position in which it claims to be today. The ALJ believes the intervenors raise serious factual issues that cannot be resolved at this time. They are matters that must be investigated during discovery and litigated at hearing. The ALJ takes no position whatsoever on the merits of any factual claims asserted by the intervenors.

The more perplexing question for the ALJ is the issue raised by Staff regarding the failure of PK-RE to use self-help in filing a timely rate case at any time between the time of the Settlement Agreement (i.e., 2013) and the filing of this case in 2016. While the Settlement Agreement among the parties *permits* annual rate-case filings capped by a 5% revenue increase, it does not guarantee an annual 5% increase in revenues. In addition, while Mr. Eppright states that he began injecting personal funds into the utility system in July 2014, the Settlement Agreement provided PK-RE with the right to file annual rate cases each year for 5 years beginning in 2014. While rate cases may be difficult to litigate, PK-RE does not provide a compelling reason why it eschewed the very provision for which it bargained in the Settlement Agreement in 2013.

¹² Staff Response at 3.

¹³ Staff Response at 3.

The utility maintains the burden of proof regarding its request for an interim rate increase, and based on the information provided, P-K did not demonstrate that a 20% increase is reasonable and contemplated by the Settlement Agreement.¹⁴ On the contrary, a 20% interim rate increase could result in unreasonable rates and economic hardship for many of the utility's customers.

Conversely, while PK-RE argues that its rates are unreasonably low, as evidenced by the assertion that Mr. Eppright has injected his personal funds to keep the utility operating, he has apparently done so for at least 3 years. At any time during those 3 years Mr. Eppright could have filed a rate case where appropriate rates could have been set after a thorough examination of revenues, expenses, rate base, and rate of return. That could very well have obviated the predicament PK-RE claims to be in today. For these reasons, PK-RE's Request is **DENIED**.

V. SERVICE BY EMAIL

At the conclusion of the prehearing conference the parties agreed to service by email. Therefore, the service list attached to this order includes email addresses for all the parties in this case. Pleadings, correspondence, testimony, briefs, and all other filings may be *served* on all parties via email rather than by U.S. Mail. However, the agreement to abide by email service does not absolve the parties from their responsibility to file documents with the Commission's Filing Clerk, as per normal Commission practice.


VI. REASSIGNMENT OF CASE

This case has been reassigned to ALJ Elizabeth Drews, and all future pleadings and filings should be directed to her. Routine procedural and logistical questions, such as the ALJ's

¹⁴ Public Utility Regulatory Act § 36.006.

availability on possible hearing dates, may be directed to Judge Drews's administrative assistant, Erin Hurley, at (512) 475-3419 or Erin.Hurley@soah.texas.gov. State Office of Administrative Hearings support personnel may not provide advice or interpret orders or regulations for the parties.

SIGNED April 10, 2017.



FERNANDO RODRIGUEZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS