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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Updated and Corrected Application of GREAT OAKS WATER CO. (U162W) for an Order Authorizing an Increase in Rates Charged for Water Service, increasing the revenue requirement by \$1,846,100 or 14.94% in 2010, by \$254,425 or 1.79% in 2011, and by \$165,822 or 1.14% in 2012.

Application 09-09-001
(Filed September 3, 2009)

**ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE'S
RULING ADDRESSING THE MOTION OF THE DIVISION OF RATEPAYER
ADVOCATES TO REOPEN THE RECORD
AND ISSUE AN ORDER TO SHOW CAUSE**

1. Summary

This ruling reopens the evidentiary record in this proceeding for the limited purpose of receiving into the record information and declarations regarding Great Oaks Water Company's (Great Oaks) withholding of payment of pump tax fees since April 2009 to the Santa Clara Valley Water District (SCVWD), the same fees that Great Oaks continues to collect in customer rates.¹ The fee is treated as a pass-through expense for ratemaking purposes and

¹ The pump tax fee is a groundwater extraction fee, also referred to as a groundwater production charge, that SCVWD levies on well owners for extraction of underground water. In 2005, Great Oaks' filed Case No. 1-05-CV053142 in Santa Clara County Superior Court against SCVWD over this fee. A tentative Decision was issued on April 23, 2009 and a Statement of Decision on June 9, 2009. Great Oaks states in its response to the Division of Ratepayer Advocates' (DRA) motion that the matter is as yet unresolved because SCVWD has appealed the trial court's decision.

represents approximately 38% of an average residential bill; as of March 2010, Great Oaks had withheld \$4,856,030 and incurred interest penalties of 1% of the delinquent amount per month.

We direct that the Commission's Division of Water and Audits (DWA) verify Great Oaks' assertion that the ratepayer provided funds are being held in a separate bank account and that the provisions of the account require approval by the Superior Court of the County of Santa Clara (Court) for any of these funds to be dispensed to an entity other than the SCVWD. Further, DWA should verify that Great Oaks' accounting entries reflect the utility's assertions that ratepayers are not liable for late payment interest and penalty charges relating to the withheld payments. Finally, we direct DWA examine Great Oaks assertion that in choosing to not inform DRA and the Commission that it is withholding payment of the pump tax fees to SCVWD, it has not violated any generally accepted accounting principles (GAAP) or Commission accounting or reporting requirements. DWA is directed to file a verification report in this proceeding on its findings within 60 days of this ruling. DWA should contact the assigned Administrative Law Judge (ALJ) for an extension of time, if it is needed to complete the requests.

Due to the potential for substantial ratepayer harm, we appreciate DRA's prompt action in bringing this matter to the Commission's attention. Based on Great Oaks' declarations that the funds are being held in a secured account and that its customers are not, and will not be, at risk for any interest or penalty charges Great Oaks' incurs from its withholding of payments to SCVWD, we do not grant DRA's request to issue an Order to Show Cause for Violation of Rule 1.1 and Possible Violation of Public Utilities Code Section 2114. We may reconsider this request if information contained in DWA's verification report

warrants such action. We will also give further consideration to the documents admitted here in analyzing the proper ratemaking treatment for Great Oaks' litigation expenses in this proceeding.

2. Background

Great Oaks filed this general rate case application on September 3, 2009. Evidentiary hearings were held in San Francisco on January 21, 22, and 29, 2010, and parties submitted opening briefs on February 25, 2010 and reply briefs on March 11, 2010.

On March 19, 2010, DRA filed a "Motion to Reopen the Record to Admit Great Oaks' Nondisclosure of Lack of Payment of Groundwater Charges and Request that the Commission Issue an Order to Show Cause for Violation of Rule 1.1 and Possible Violation of Section 2114." Great Oaks timely responded to the motion on April 12, 2010 and, with permission of the assigned ALJ, DRA replied on April 23, 2010.²

3. Position of the Parties

In its motion, DRA alleges that Great Oaks intentionally misled the Commission, and thus violated Rule 1.1 of the Commission's Rules of Practice and Procedure (Rules), by (1) failing to report that it has been withholding payment to SCVWD of the pump tax fees that it collects on a monthly basis from ratepayers and (2) including SCVWD's fees as an ongoing expense in its rate request for 2010, 2011, and 2012 when it had no intention of remitting the funds

² On April 26, 2010, Great Oaks mailed a letter to the Commission regarding DRA's motion. This letter has been placed in the correspondence section of the formal file and is not considered in this ruling.

to SCVWD.³ As of March 2010, DRA states that Great Oaks has withheld \$4,856,030 in payments to SCVWD and incurred interest penalties of 1% of the delinquent amount per month. DRA also alleges that Great Oaks may have violated Public Utilities Code Section 2114 by its misrepresentations to the Commission.⁴

Specifically, DRA asserts that Great Oaks stopped paying the SCVWD four months prior to submitting its application in this proceeding and yet it continued to show the pump tax fees as an ongoing expense in its rate request. In addition, Great Oaks did not inform DRA of its actions in its September 21, 2009 response to DRA's request for (1) the balances in the pump tax accounts and (2) the status of litigation against SCVWD. Lastly, Great Oaks did not disclose its actions when its chief executive officer and general counsel both testified during evidentiary hearings about the litigation with SCVWD. DRA states that it first

³ Rule 1.1 states:

(Rule 1.1) Ethics.

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

⁴ Public Utilities Code Section 2114 states:

Any public utility on whose behalf any agent or officer thereof who, having taken an oath that he will testify, declare, depose or certify truly before the commission, willfully and contrary to such oath states or submits as true any material matter which he knows to be false, or who testifies, declares, deposes, or certifies under penalty of perjury and willfully states as true any material matter which he knows to be false, is guilty of a felony and shall be punished by a fine not to exceed five hundred thousand dollars (\$500, 000).

(Added by stats. 1975, Ch. 1264.)

learned of Great Oaks' actions from SCVWD after the evidentiary record closed and asserts that SCVWD has never agreed to allow Great Oaks to withhold payment of the pump tax fees and that the Court has never given Great Oaks permission to do so.

DRA requests that the record in this proceeding be reopened for the narrow purpose of admitting Attachments A-F to its motion. These attachments contain the following information:

- SCVWD's record of Great Oaks' outstanding invoices as of March 12, 2010 (Attachment A);
- The July 2, 2009 declaration of Joseph Atmore, Treasury/Debt Finance Officer for SCVWD (Attachment B);
- The June 9, 2009 Statement of Decision in Case No. 1-05-CV053142 and the February 2, 2010 Judgment After Trial (Attachment C);
- Great Oaks' Rate Case Operating Expense workpaper (Attachment D);
- Great Oaks' Projected Pump Tax Expenses workpaper (Attachment E); and
- Great Oaks' September 21, 2009 response to DRA Data Request PE-01 with attached Balancing Account calculations through August 2009 (Attachment F).

In its response to DRA's motion, Great Oaks acknowledges that while the pump tax fees are in dispute, it is withholding payment to SCVWD; but denies that its actions are improper. It denies DRA's allegation that it "failed to make a material disclosure pertinent to this ratemaking proceeding."⁵ In support of its position, Great Oaks asserts that it is following GAAPs and the Commission's

⁵ Response of Great Oaks at 3.

ratemaking procedures by treating SCVWD's pump tax fee as a payable, continuing to collect these fees from ratepayers as an incurred operating expense, depositing and securely holding the money collected, and showing these funds as current and accrued liabilities.⁶ It then states that "DRA cited no accounting principle, Commission decision, rule or standard practice requiring Great Oaks to account for, report or forecast groundwater charges differently than Great Oaks has done in this ratemaking proceeding."⁷

Great Oaks adamantly denies its ratepayers will face any increased costs due to its decision to not pay the pump tax fee to SCVWD and asserts that "there are no amounts in any reports or forecasts for the interest charges the District is assessing for the withheld groundwater charges."⁸ Great Oaks also argues that its actions actually protect ratepayers because SCVWD may become insolvent, and thus be unable to pay a final court judgment, as a result of its illegal conduct.⁹

Further, Great Oaks also states that SCVWD has not asserted a cause of action against Great Oaks for nonpayment of the pump tax fees and that "unless or until a court rules on the issue, it is factually and legally incorrect for DRA to say that Great Oaks has no legal right to withhold payment."¹⁰

⁶ See Declaration of Vicki Morse, attachment to Response of Great Oaks.

⁷ Response of Great Oaks at 5.

⁸ Response of Great Oaks at 14.

⁹ Response of Great Oaks at 9.

¹⁰ Response of Great Oaks at 12.

Great Oaks requests the Commission enter into the record the following attachments to its response: Declaration of Vicki Morse; Declaration of John W.S. Roeder; and Declaration of Timothy S. Guster with three attachments: January 7, 2010 Phase Two Decision in Case No. 1-05-CV053142; three stipulation orders between Great Oaks and SCVWD staying Cases 1-08-CV119465, 1-08-CV123064, and 1-09-CV146018 until January 20, 2011 or until the date final judgment is rendered in Case 1-05-CV053142 (lead case); and an April 1, 2010 letter published in the San Jose Mercury News from Beau Goldie, Chief Executive Officer of the SCVWD.

In its reply, DRA focuses on Great Oaks' failure to disclose in this proceeding, either in its September 2009 application, November update, or in response to specific data requests and cross-examination questions, that since April 2009 it has undertaken actions that pose substantial risk to its ratepayers. DRA also cites to Great Oaks' 2009 Annual Report, filed with the Commission in April 2010, that shows an accumulated interest expense liability on past due payments to SCVWD of \$191,783, which if continued for the entire year of 2010 could reach approximately \$426,000; Great Oaks also accumulated \$65,235 in delinquent penalties from SCVWD for late filing its monthly reports in October and November of 2009.¹¹ Finally, DRA asserts that Great Oaks' argument that it must withhold payment to protect its ratepayers has no basis in fact as Great Oaks does not present evidence that SCVWD would refuse to repay the charges should the appellate court order it to do so. DRA requests the record be reopened to also admit:

¹¹ Reply of DRA at 13-14 and Attachment A.

- SCVWD's April 21, 2010 response to DRA's public records request for "any and all documents that show the total amount of interest charges imposed on Great Oaks between March 2009 and April 2010" and a spreadsheet of penalty fees for a late production statement, together with e-mail discussions with Vicki Morse concerning these matters (Attachment A);
- SCVWD's April 19, 2010 response to DRA's public records request for "any and all documents that convey whether Great Oaks requested that SCVWD accept payment of the disputed groundwater production charges into a trust account pending the outcome of the litigation" with four responsive e-mails exempt from release pursuant to Confidential Settlement Discussions (Attachment B); and
- April 20, 2010 declaration of Joseph Atmore (Attachment C).

4. Discussion

The pump tax expense represents approximately 38% of the average monthly bill for Great Oaks' residential customers and is treated for ratemaking purposes as a direct pass-through expense.¹² Customers face a substantial risk if the pump tax fees they have paid are not being held in a secured bank account and/or the accrued late payment interest and penalties are not being accounted for as solely a shareholder expense.

We appreciate DRA's prompt action in bringing this important matter to the Commission's attention. Great Oaks had several opportunities in this proceeding to inform DRA and the Commission of its decision to withhold

¹² In the preliminary statement to its tariffs, Great Oaks states that "the pump tax expense is a pass through that only impacts customers, and not the Company. See Preliminary Statement Section F.1.b. of Cal. P.U.C. Sheet No. 465-W, effective May 5, 2005, issued by Alan J. Gardner, Chief Operating Officer of Great Oaks, in compliance with Commission Resolution W-4534.

payment to SCVWD and chose not to do so. While it may consider this a litigation strategy solely within its management discretion, when it chose to pursue this strategy, it should have immediately provided the Commission proof that the funds were being securely held and that no costs were accruing to ratepayers from its actions.

Therefore, we direct DWA to verify Great Oaks' assertion that the ratepayer provided funds are being held in a separate bank account and that the provisions of the account require approval by the Court for any of these funds to be dispersed to an entity other than the SCVWD. Further, DWA should verify that Great Oaks' accounting entries reflect the utility's assertions that ratepayers are not liable for late payment interest and penalty charges relating to the withheld payments. We request DWA pay particular attention to the reporting of accumulated interest expense liability on past due payments to SCVWD in Great Oaks' 2009 Annual Report. Finally, we direct DWA to examine Great Oaks' assertion that in choosing to not inform DRA and the Commission that it is withholding payment of the pump tax fees to SCVWD, it has not violated any GAAPs or Commission accounting or reporting requirements.

DWA is directed to file a report in this proceeding on its findings within 60 days of this ruling and all parties will have an opportunity to comment on the verification report.

Based on Great Oaks' (1) declarations that the funds are being held in a secured account and that its customers are not, and will not be, at risk for any interest or penalty charges Great Oaks incurs from its withholding of payments to SCVWD, and (2) assertions that its failure to disclose its actions to DRA and the Commission has not violated any GAAP or Commission accounting or reporting requirements, we do not grant DRA's request to issue an Order to

Show Cause for Violation of Rule 1.1 and Possible Violation of Public Utilities Code Section 2114. We may reconsider this request if information contained in DWA's verification report warrants such action.

We grant DRA's motion to reopen the record to admit information attached to its motion and its reply, and also grant Great Oaks' request to include in the record the attachments to its response to DRA's motion. In preparing the proposed decision in this proceeding, we may give consideration to this information in determining the proper ratemaking treatment for Great Oaks' litigation expenses.

Therefore, **IT IS RULED** that:

1. The March 19, 2010 Motion of the Division of Ratepayer Advocates to Reopen the Record to Admit Great Oaks' Nondisclosure of Lack of Payment of Groundwater Charges and Request that the Commission Issue an Order to Show Cause for Violation of Rule 1.1 and Possible Violation of Section 2114 is granted in part and otherwise denied. The motion is granted to reopen the record to admit the following information:

- a. The following attachments to DRA's motion:
 - SCVWD's record of Great Oaks' outstanding invoices as of March 12, 2010 (Attachment A);
 - The July 2, 2009 declaration of Joseph Atmore, Treasury/Debt Finance Officer for SCVWD (Attachment B);
 - The June 9, 2009 Statement of Decision in Case No. 1-05-CV053142 and the February 2, 2010 Judgment After Trial (Attachment C);
 - Great Oaks' Rate Case Operating Expense workpaper (Attachment D);
 - Great Oaks' Projected Pump Tax Expenses workpaper (Attachment E); and

- Great Oaks' September 21, 2009 response to DRA Data Request PE-01 with attached Balancing Account calculations through August 2009 (Attachment F).
- b. The following attachments to Great Oaks' response to the motion:
- Declaration of Vicki Morse;
 - Declaration of John W.S. Roeder; and
 - Declaration of Timothy S. Guster with three attachments: January 7, 2010 Phase Two Decision in Case No. 1-05-CV053142; three stipulation orders between Great Oaks and SCVWD staying Cases 1-08-CV119465, 1-08-CV123064, and 1-09-CV146018 until January 20, 2011 or until the date final judgment is rendered in Case 1-05-CV053142 (lead case); and an April 1, 2010 letter published in the San Jose Mercury News from Beau Goldie, Chief Executive Officer of SCVWD.
- c. The following attachments to DRA's reply:
- SCVWD's April 21, 2010 response to DRA's public records request for "any and all documents that show the total amount of interest charges imposed on Great Oaks between March 2009 and April 2010" and a spreadsheet of penalty fees for a late production statement, together with e-mail discussions with Vicki Morse concerning these matters (Attachment A);
 - SCVWD's April 19, 2010 response to DRA's public records request for "any and all documents that convey whether Great Oaks requested that SCVWD accept payment of the disputed groundwater production charges into a trust account pending the outcome of the litigation" with four responsive e-mails exempt from release pursuant to Confidential Settlement Discussions (Attachment B); and
 - April 20, 2010 declaration of Joseph Atmore (Attachment C).
2. The Commission's DWA is directed to verify Great Oaks' assertion that the ratepayer provided funds are being held in a separate bank account and that the

provisions of the account require approval by the Court for any of these funds to be dispensed to an entity other than the SCVWD. Further, DWA should verify that Great Oaks' accounting entries reflect the utility's assertions that ratepayers are not liable for late payment interest and penalty charges relating to the withheld payments. In reviewing Commission filed reports, we request DWA pay particular attention to the reporting of accumulated interest expense liability on past due payments to SCVWD in Great Oaks' 2009 Annual Report. Finally, DWA should determine whether Great Oaks failure to inform the DRA and the Commission of its actions in withholding the funds from SCVWD violates any GAAP or Commission accounting or reporting requirements.

3. Great Oaks shall respond to all DWA data requests within five business days.

4. Parties may file comments on DWA's report within ten days of its filing and reply comments five days later.

Dated June 21, 2010, at San Francisco, California.

/s/ JOHN A. BOHN
John A. Bohn
Assigned Commissioner

/s/ CHRISTINE M. WALWYN
Christine M. Walwyn
Administrative Law Judge

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

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Dated June 21, 2010, at San Francisco, California.

/s/ KE HUANG

Ke Huang

N O T I C E

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