

COMMONWEALTH OF KENTUCKY  
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BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION FOR APPROVAL	)	
OF TRANSFER OF A WASTEWATER	)	
TREATMENT UTILITY FROM PRO MAN	)	
PROPERTY MANAGEMENT, LLC TO FOX RUN	)	CASE NO.
LIVING, LLC; APPLICATION FOR APPROVAL OF	)	2019-00390
TRANSFER FROM FOX RUN LIVING, LLC TO	)	
FOX RUN UTILITY, LLC; AND OFFER TO	)	
SETTLE ANY VIOLATIONS	)	

ORDER

On November 19, 2019, Fox Run Living, LLC (Fox Run Living) applied for the approval of the transfer of Pro Man Property Management, LLC's (Pro Man) wastewater utility, including two treatment plants and the collection system, to Fox Run Living pursuant to KRS 278.020(7) and KRS 278.020(10). In support of this request, Fox Run Living submitted an October 23, 2017, Purchase Agreement wherein King Communities acquired the apartment complex and the associated wastewater facilities from Pro Man.<sup>1</sup> The Commission's jurisdiction to investigate and approve the acquisition and transfer of a utility arises under KRS 278.020(6) and 278.020(7).

Fox Run Living previously applied to the Commission for approval of the transfer of control of Pro Man to Fox Run Living. That application was filed on June 7, 2019, and docketed as Case No. 2019-00153.<sup>2</sup> Commission Staff issued, and Fox Run Living

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<sup>1</sup> *Id.*, Exhibit A, Purchase Agreement.

<sup>2</sup> Case No. 2019-00153, *Electronic Notice of Transfer of a Wastewater Treatment Utility from Pro Man Property Management, LLC to Fox Run Living, LLC; Application for Approval of Said Transfer; and Offer to Settle Outstanding Violations* (Ky. PSC Oct. 3, 2019).

responded to, two rounds of discovery in that matter. Fox Run Living subsequently withdrew its application due to a potential change in the management of the structure, which never occurred, and the timing of the statutory deadline for a final decision in that matter. Fox Run Living indicated in the prior case that it intended to submit a new application. On November 19, 2019, Fox Run Living submitted the instant application renewing its request for approval of the transfer. The instant application also requests that the record of Case No. 2019-00153 be incorporated into this matter because the majority of the information and documents relevant to the case have been previously filed in the prior case.

There are no intervenors in the proceeding and the matter stands submitted for a decision based on the existing record.

#### BACKGROUND

Fox Run Living is a Colorado Limited Liability Company, in good standing with the state of Colorado, and authorized to do business in the Commonwealth of Kentucky.<sup>3</sup> FR Utility, LLC (FR Utility) is a newly formed limited liability company. Jimmy King is the chief executive officer (CEO) of both Fox Run Living and FR Utility (jointly Fox Run Living/FR Utility).<sup>4</sup>

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<sup>3</sup> Application at 2.

<sup>4</sup> *Id.* at 2 and 4.

Pro Man, a wastewater utility subject to the Commission's jurisdiction, provided wastewater collection and treatment service to 12 single-family residences and 50 apartments/condominiums in the South Hills Subdivision in Campbell County, Kentucky.<sup>5</sup> The subject wastewater facility is a 20,000-gallon-per-day treatment plant that is approximately 20–25 years old.<sup>6</sup> In calendar year 2018, the average daily flow treated was 7,750 gallons per day.<sup>7</sup> Fox Run Living estimates that with proper maintenance the treatment plant has a remaining useful life of 25 years.<sup>8</sup> The wastewater treatment plant currently is operated pursuant to Kentucky Pollution Discharge Elimination System Permit No. KY0034711, issued August 1, 2018.<sup>9</sup>

#### TRANSACTION

On October 23, 2017, King Communities, LLC (King Communities) and Pro Man entered into a Purchase Agreement wherein King Communities acquired the Norse Landing apartment complex and the associated sewer facilities from Pro Man.<sup>10</sup> Subsequently, King Communities was substituted as the buyer and replaced by Laura A King Trust and Fox Run Living, who together own the assets as Tenants in Common, each with a 50 percent ownership interest.<sup>11</sup>

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<sup>5</sup> *Annual Report of Pro Man Property Management, LLC dba South Hills Subdivision Sewer Plant to the Public Service Commission for the Calendar Year Ended December 31, 2017* (2017 Annual Report) at 1, 9, and 36.

<sup>6</sup> Application at 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1. Application Case No. 2019-00153, Exhibit A, Purchase Agreement.

<sup>11</sup> *Id.* at 1.

Fox Run Living has determined that the proper recordkeeping for the utility can best be accomplished by separating the assets associated with the wastewater treatment facility from the non-utility related assets.<sup>12</sup> To accomplish the separation of the regulated operations from the non-regulated, the utility assets will be transferred into FR Utility following the Commission approval of the transfer of Pro Man.<sup>13</sup> Fox Run Living also seeks approval to transfer the wastewater utility assets to FR Utility for the purpose of simplifying the accounting records and separating the utility operations from the operations related to the apartment complex. Fox Run Living claims that the ownership structure and all relevant individuals and organizations involved in the management and operation of the utility will stay unchanged.<sup>14</sup>

#### DISCUSSION

In order for the Commission to approve the transfer of a wastewater treatment system, it must determine that: (1) the acquirer has the financial, technical, and managerial abilities to provide reasonable service;<sup>15</sup> (2) that the transfer is in accordance with law, for a proper purpose, and is consistent with the public interest;<sup>16</sup> and (3) that the person acquiring the utility has provided evidence of financial integrity to ensure the continuity of sewage service in the event that the acquirer cannot continue to provide service.<sup>17</sup> The Commission may also attach any conditions it deems necessary in

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<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> KRS 278.020(6).

<sup>16</sup> KRS 278.020(7).

<sup>17</sup> KRS 278.020(10).

approving a transfer.<sup>18</sup> Based on the evidence of record, the Commission finds that Fox Run Living will meet the statutory standards for acquisition of Pro Man only if it agrees to the conditions discussed below.

Approval Pursuant to KRS 278.020(6)

Fox Run Living provided audited financial statements<sup>19</sup> showing that it possesses the financial capability to provide reasonable service and to fund capital improvements. Since acquiring ownership of the wastewater assets, Fox Run Living has used its financial resources to install: (1) airlines and diffusers; (2) skimmers and sludge return pipes in the clarifier; (3) two new main trunk/sewer lines entering the plant; and (4) a dechlorination contact tank.<sup>20</sup> Fox Run Living has also sealed the influent pipeline to stop rain water runoff from entering the treatment plant.<sup>21</sup>

Mr. King, the CEO of Fox Run Living and FR Utility, will be responsible for managerial oversight of Fox Run Living. The technical operations are being overseen by Carl Crone, owner of Crone Environmental Services (CES).<sup>22</sup> Before starting CES in 1998, Mr. Crone worked for Sanitation District #1 for 31 years.<sup>23</sup> Currently, Mr. Crone is a certified Class IV Wastewater Operator and has a Class II Collection System certification.<sup>24</sup> CES is also field lab certified with the state of Kentucky, giving CES the

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<sup>18</sup> KRS 278.020(7).

<sup>19</sup> Case No. 2019-00153, Fox Run Living's Responses to Commission Staff's Initial Request for Information (Staff's Initial Request), Item 2, Exhibit B, Financial Statements for calendar year 2019.

<sup>20</sup> Application at 3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*, at 2-3.

ability to sample and test water, as well as submit samples to the laboratory for further analysis.<sup>25</sup>

Fox Run Living uses Pace Analytical to conduct its lab analysis and Flush Sanitation, LLC to pump and dispose of sludge from the wastewater treatment plant.<sup>26</sup> A King Communities employee will be responsible for providing the bookkeeping services to Fox Run Living. The time spent on the utility will be tracked and only time spent on the utility will be billed to Fox Run Living.

Having reviewed the evidence of record, the Commission finds that Fox Run Living and FR Utilities have the financial, managerial, and technical expertise to provide reasonable wastewater collection and treatment services, and therefore the proposed transactions should be approved pursuant to KRS 278.020(6).

Approval Pursuant to KRS 278.020(7)

Fox Run Living contends that the wastewater treatment facilities have not been properly managed or maintained for many years prior to it acquiring ownership of the utility.<sup>27</sup> Since acquiring control of the facilities, Fox Run Living has invested over \$100,000 into the physical facilities to ensure it continues to operate in such a manner that it serves the Fox Run Living customers and complies with the Division of Water requirements.<sup>28</sup>

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<sup>25</sup> *Id.*, at 3.

<sup>26</sup> Case No. 2019-00153, Staff's Initial Request, Item 1.a and Item 1.c.

<sup>27</sup> *Id.*, Item 3.

<sup>28</sup> *Id.*

As further support of its position, Fox Run Living argues that because Pro Man failed to seek base rate adjustments in a timely manner, the utility has been operated at a loss causing a decline in the physical facilities.<sup>29</sup> The current tariffed rate is \$13.67 per month, which was originally authorized for Schlueter Building Company, d/b/a South Hills Subdivision Sewer System in Case No. 1994-00333.<sup>30</sup> As part of its commitment to the proper and lawful operation of the wastewater utility, following approval of this application FR Utility intends to file an application with the Commission for a rate adjustment pursuant to 807 KAR 5:076.<sup>31</sup> Transferring the utility to the control of Fox Run Living and ultimately to FR Utility benefits the public by ensuring current and future investment in the continued operation of the wastewater facilities.<sup>32</sup>

Having reviewed the evidence of record, the Commission finds that Fox Run Living established that the proposed transaction was made in accordance with law for a proper purpose and is consistent with the public interest. Therefore, the proposed transactions should be approved pursuant to KRS 278.020(7).

Financial Integrity to Ensure Continuity of Sewer Service

KRS 278.020(10) applies to the matter at hand and evidence of the financial

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<sup>29</sup> *Id.*

<sup>30</sup> See Case No. 1994-00333, *In the Matter of the Application of Schlueter Building Company, Inc. D/B/A South Hills Subdivision Sewer Plant for a Rate Adjustment Pursuant to the Alternative Rate Filing Procedure for Small Utilities* (Ky. PSC Feb. 24, 1995).

<sup>31</sup> Application at 4.

<sup>32</sup> *Id.*

integrity to ensure continuity of service is necessary. In Case No. 2019-00104,<sup>33</sup> to comply with the requirements of KRS 278.020(10) and to ensure continued operations should Bluegrass Water Utility Operating Company, LLC (Bluegrass Water) be unable to provide reasonable service, the Commission required Bluegrass Water to post a financial instrument equivalent to two-months of the cost of its third-party contractors. The Commission finds that to comply with the requirements of KRS 278.020(10), Fox Run Living and FR Utility should post a financial instrument equivalent to two-months of the cost of their third-party contractors.

Violation of KRS 278.020(6) and KRS 278.020(7)

KRS 278.020(6) provides that no person shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of the commission by sale of assets, transfer of stock, or otherwise, or abandon the same, without prior approval by the commission. KRS 278.020(7) provides that no individual, group, syndicate, general or limited partnership, association, corporation, joint stock company, trust, or other entity, whether or not organized under the laws of this state, shall acquire control, either directly or indirectly, of any utility furnishing utility service in this state, without having first obtained the approval of the Commission.

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<sup>33</sup> Case No. 2019-00104, Electronic Proposed Acquisition by Bluegrass Water Utility Operating Company, LLC and the Transfer of Ownership and Control of Assets by P.R. Wastewater Management, Inc., Marshall County Environmental Services, LLC, LH Treatment Company, LLC, Kingswood Development, Inc., Airview Utilities, LLC, Brocklyn Utilities, LLC, Fox Run Utilities, LLC, And Lake Columbia Utilities, Inc. (Ky. PSC Aug. 14, 2019).



On February 27, 2019, a representative of the Commission's Division of Inspections performed a periodic inspection of the subject wastewater system.<sup>34</sup> In the March 29, 2019 Inspection Report, the inspector noted the following deficiency:

It appears that Fox Run Living, LLC has acquired ownership of Pro Man Property Management, LLC without prior approval by the Commission. If so, this is contrary to 278.020(6) and (7).<sup>35</sup>

Until its receipt of the Commission's March, 29, 2019 Inspection Report, Fox Run Living was unaware that the wastewater facility purchased as part of the Norse Landing apartment complex transaction was a regulated utility.<sup>36</sup> Fox Run Living recognizes that the process used to acquire the Pro Man wastewater utility assets was likely a violation of KRS 278.020(6).<sup>37</sup> Fox Run Living acknowledges an unintended violation and the authority of the Commission over the wastewater utility. In order to expedite a resolution of this matter, Fox Run Living is offering to pay a penalty in the amount of \$500 that would be payable within 30 days of receipt of a Commission Order approving the utility transfer, which would resolve all of Fox Run Living's alleged or acknowledged violations of KRS 278.020(6) and (7).<sup>38</sup>

Pursuant to KRS 278.990(1), a penalty of up to \$2,500 can be assessed for any willful statutory violation. The Commission finds that a reasonable penalty in this instance

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<sup>34</sup> *Id.*, Exhibit C, Periodic Waste Water Inspection, Fox Run Living, LLC Waste Water System Campbell County, KY.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1–2.

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Id.* at 3–4.

is \$1,500 factoring Fox Run Living's claim that the violation was not intentional and considering that Fox Run Living has made considerable investments to upgrade the existing wastewater facility system.

IT IS THEREFORE ORDERED that:

1. The transfer of Pro Man wastewater collection and treatment systems to Fox Run Living/FR Utility is conditionally approved, subject to the chief executive officer of Fox Run Living/FR Utility accepting the conditions set forth in the Appendix to this Order.

2. The proposed transfer of control shall not proceed unless, within 20 days of the date of this Order, the Commission receives written acknowledgments of the chief executive officer of Fox Run Living/FR Utility, that Fox Run Living/FR Utility accepts and agrees to be bound by the commitments set forth in the Appendix to this Order.

3. Within 60 days of the date of this Order, Fox Run Living/FR Utility shall file a financial and statistical report as required by 807 KRS 5:006, Section 4, for the calendar year ending December 31, 2018.

4. Any documents filed pursuant to ordering paragraphs 2 and 3 shall reference this case number and shall be retained in the post-case correspondence file.

5. Fox Run Living's motion to incorporate the record of Case No. 2019-00153 into this proceeding is granted.

6. Fox Run Living is assessed a civil penalty of \$1,500.

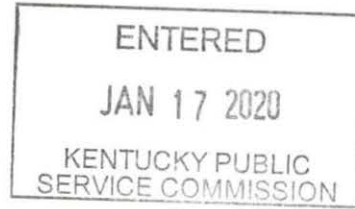
7. Fox Run Living shall pay the amount of \$1,500 within 30 days of the date of this Order by cashier's check or money order made payable to the Kentucky State

Treasurer and mailed to the Executive Director, Public Service Commission, 211 Sower Boulevard, P.O. Box 615, Frankfort, Kentucky 40602.

8. Upon payment of the \$1,500 by Fox Run Living, this case shall be closed and removed from the Commission's docket without further Order of the Commission.

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By the Commission



ATTEST:

  
Executive Director

## APPENDIX

### APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2019-00390 DATED JAN 17 2020

The proposed acquisition of Pro Man by Fox Run Living/ FR Utility is approved upon the following conditions:

1. Within 30 days of the closing of the transaction, Fox Run Living/ FR Utility shall file with the Commission, its post-closing accounting entries in accordance with the Commission's Uniform System of Accounts for Class C and D Sewer Utilities.
2. Fox Run Living/ FR Utility, post-closing, will adequately fund and maintain the transferred systems.
3. Within 60 days of the closing of the transaction, Fox Run Living/ FR Utility shall post a guaranteed financial instrument that is the equivalent of two-months of the cost of its third-party contractors.

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