

**BEFORE THE TENNESSEE REGULATORY AUTHORITY AT
NASHVILLE, TENNESSEE**

IN RE:)	
)	
PETITION OF LAUREL HILLS CONDOMINIUMS)	DOCKET NO. 12-00030
PROPERTY OWNERS ASSOCIATION FOR A)	
CERTIFICATE OF PUBLIC CONVENIENCE AND)	
NECESSITY)	

POST-HEARING BRIEF

Comes now the Investigative Staff appointed by the Directors of the Tennessee Regulatory Authority (“TRA” or “the Authority”) and respectfully requests that Laurel Hills Condominiums Property Owners Association’s (“Laurel Hills” or “Petitioner”) petition for a certificate of public convenience and necessity (“CCN”) be denied, that Laurel Hills be given a reasonable amount of time in which to divest itself of the system, that a reasonable rate for water be imposed during this period of divestiture to ensure that the Petitioner is able to continue providing water service and that civil penalties for continuous and knowing violations law be imposed. In support of this request Investigative Staff would show as follows:

I. Procedural History

1. Petitioner filed their Petition for a Certificate of Public Convenience and Necessity on April 10, 2012, to provide water service in Cumberland County, Tennessee.
2. On May 1, 2012, a group of Laurel Hill’s customers filed a petition to intervene.
3. On May 7, 2012, Laurel Hills voluntarily withdrew its petition stating that on July 9, 2012, they would cease providing water service to its customers.
4. On May 11, 2012, the Authority’s General Counsel issued a Notice to Appear to Laurel

- Hills requiring Petitioner's appearance at the Authority's conference on May 21, 2012.
5. On May 18, 2012, Laurel Hills filed a Response to Notice to Appear reiterating its intention of discontinuing water service to its customers.
 6. On May 21, 2012, the Authority appointed Investigative Staff "to take any necessary measures, including, but not limited to, filing for injunctive relief in the Chancery Court for Cumberland County, to maintain water service for all customers of Laurel Hills, including homeowners in Renegade Resort pending resolution" of a show cause proceeding which was simultaneously initiated by the Directors.¹
 7. As a result of subsequent actions taken by Investigative Staff in the Chancery Court of Cumberland County, Petitioner gave notice that it would reinstate its Petition on July 20, 2012.
 8. On August 3, 2012, Petitioner filed the First Amended Petition for a Certificate of Public Convenience and Necessity.
 9. This matter was heard by the Directors on February 13, 2013.

II. Requirements of Tenn. Code Ann. §65-4-201

10. The statutory requirements for obtaining a CCN are laid out in Tenn. Code Ann. §65-4-201 which states in part that "[n]o person or corporation not at the time a public utility shall commence... [sic] the owner or operator" of a public without first obtaining a CCN.²
11. A CCN may only be granted after the petitioner files an application and a hearing.³
12. While subsection (a) does not specify what the criteria for granting a CCN are there are

¹ *Order Appointing Hearing Officer*, p.4 (June 21, 2012).

² Tenn. Code Ann. §65-4-201(a).

³ *Id.*

requirements laid forth in subsection (c) specific to telecommunications carriers.⁴ By longstanding practice the authority has held that the requirements of subsection (c) are also incumbent upon other public utilities and specifically water utilities.⁵

13. The first requirement is that the utility “has demonstrated that it adhere to all applicable authority policies, rules and orders.”⁶
14. The second requirement is that the utility “possesses sufficient managerial, financial and technical abilities to provide for services.”⁷

III. Argument

15. As the Authority weighs Petitioner’s application for a CCN it must consider whether Laurel Hills has demonstrated that it can meet the requirements for the granting of a CCN.
16. Laurel Hill’s own testimony has indicated that it is unable to meet the standard set forth in law.

a. Laurel Hills’ Refusal to Comply with Legal Requirements

17. Laurel Hills has refused to comply with the requirements of law unless forced by court action to do so.
18. Petitioner purchased the water system on May 1, 2011, and did not apply for a CCN until

⁴ Tenn. Code Ann. §65-4-201(c).

⁵ *In Re: Joint Petition of Tennessee American Water Company and Marion County, Tennessee, for Approval of Purchase Agreement*, Docket No. 03-00388, *Order Approving Order, Report and Recommendation of Hearing officer, CCN, Purchase and Franchise Agreements*, p. 14 of Exhibit A (October 31, 2005). *See also In Re: Application of Hickory Star Water Company, L.L.C. for a Certificate of Public Convenience and Necessity for a regulated Water and Sewer Company Operating in Union County, Tennessee*, Docket No. 99-00485, *Order Granting Certificate of Public Convenience and Necessity*, p. 2 (November 24, 1999).

⁶ Tenn. Code Ann. §65-4-201(c)(1).

⁷ Tenn. Code Ann. §65-4-201(c)(2)

April 10, 2012, almost a full twelve months later.⁸

19. Petitioner only requested a CCN from the TRA at that time because it was ordered to do so by the Cumberland County, Chancery Court.⁹
20. Petitioner attempted to terminate service on July 9, 2012, after requesting a CCN from the Authority.¹⁰ Only after Investigative Staff obtained injunctive relief from the Chancery Court of Cumberland County did Petitioner renew its petition for a CCN.¹¹
21. At the hearing on this matter Mike McClung who testified on behalf of Laurel Hills, admitted that they had not paid Crab Orchard Utility District (“COUD”) for water since August 2012.¹² COUD had sent numerous letters and emails demanding payment for the outstanding amounts owed.¹³ On cross examination when Mr. McClung was confronted with the probability that the COUD would terminate water service on February 21, 2013, he stated that he was relying upon Investigative Staff to prevent the impending shut off.¹⁴
22. Petitioner’s constant refusals to comply with the requirement that it obtain a CCN, abide by the order of the Chancery Court of Cumberland County, and their ongoing attempts to deny water service to their customers during the pendency of this proceeding demonstrates in stark terms that they cannot be trusted to operate this system within the bounds of the law pursuant to Tenn. Code Ann. §65-4-201(c)(1).

b. Petitioner’s Lack of the Necessary Expertise

23. Petitioner has failed to assert the necessary expertise or ability to properly operate a water

⁸ *Petition of Laurel Hills Condominiums Property Owners Association for a Certificate of Public Convenience and Necessity*, p. 1 (April 10, 2012).

⁹ *Id.* at p. 4.

¹⁰ *First Amended Petition*, p. 7 (August 3, 2012).

¹¹ *Id.*

¹² Transcript of Proceedings, pp. 103-104 (February 13, 2013).

¹³ Exhibit 1, Tab 9 (February 13, 2013).

¹⁴ Transcript of Proceedings, pp. 163 (February 13, 2013).

system. Instead Petitioner is neither able to show basic competency in the running of a water utility nor does the Petitioner seem willing to obtain the necessary expertise.

24. Investigative staff asked Mr. McClung if he was the day to day manager of Laurel Hills and he responded “yes”.¹⁵
25. When asked what experience he had managing a utility Mr. McClung stated “I have none”.¹⁶
26. When asked “[Y]ou don’t have any technical experience or knowledge related to the running of a utility” Mr. McClung stated “that’s correct”.¹⁷
27. Petitioner does not have a working telephone and acknowledged that it does not have a person whose job is to routinely check email messages.¹⁸ Instead they rely upon a haphazard arrangement where Mr. McClung or his wife attempts to check the email account daily.¹⁹
28. Petitioner claims to have the services of an engineer named, Darrel McQueen. However, Mr. McQueen has never been paid and is under no obligation to continue providing his services.²⁰ Additionally, it is important to note that no evidence of Mr. McQueen’s actual expertise was produced.
29. When Laurel Hills installed shut off valves they retained a company out of Georgia to install them.²¹ This company, Gold Mine Golf, was operated by the brother of one of the investors in Laurel Hills.²² They selected this company because they were purportedly

¹⁵ Transcript of Proceedings, p. 82 (February 13, 2013).

¹⁶ Id.

¹⁷ Id. at p. 83.

¹⁸ Id. at p. 79

¹⁹ Id. at pp. 79-80

²⁰ Id. at p. 105

²¹ Id. at pp. 108-109.

²² Id.

familiar with the entire water system.²³ This expertise was developed installing the water pumps on the golf course not the actual water system that serves customers.²⁴ Mr. McClung was unable to testify how many shut off valves were installed.²⁵

30. Petitioner produced no evidence that it had other technical expertise to draw upon in providing water service to its customers.
31. Laurel Hills was unable to demonstrate it possesses the requisite financial capabilities or expertise to operate a public utility in Tennessee.
32. Mr. McClung was asked whether he possessed the financial expertise or knowledge for the running of a utility and he responded “I’m learning, but I don’t have probably the level that Tennessee is expecting of POAs and government utilities. **I’m trying but I’m not there.**”²⁶
33. The management of Laurel Hills has repeatedly engaged in self dealing and poor financial decision making since purchasing the water system.
34. Mr. McClung stated that when Laurel Hills purchased the water system from its predecessor Moy Toy, LLC, Phillip Guettler, who is also a director of Laurel Hills, negotiated on behalf of Moy Toy and Mr. McClung negotiated on behalf of Laurel Hills.²⁷ Mr. McClung stated that he and Darren Guettler, Phillip Guettler’s son, were the Laurel Hills board members who voted to purchase the system.²⁸
35. Mr. McClung was unable to recall the date of this meeting or who was present.²⁹
36. Laurel Hills purchased this system with a four hundred thousand dollar promissory note.³⁰

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id. at pp. 83-84 (emphasis added).

²⁷ Id. at p. 73.

²⁸ Id. at pp. 74 – 76.

²⁹ Id.

Laurel Hills did not obtain easements for the pipes instead they obtained a revocable license.³¹ Mr. McClung testified that he didn't know the difference between an easement and a revocable license.³²

37. When questioned about how Petitioner arrived at the four hundred thousand dollar valuation Mr. McClung stated that he arrived at that value by estimating the replacement value of the water tank and pipes was two million dollars and that the system was worth twenty percent of that two million dollars.³³
38. Mr. McClung decided upon a two million dollar replacement value by obtaining "verbal" estimates from Pittsburgh Tank and two other unidentified entities.³⁴ No record of these estimates or any other valuation by an independent third party was produced by Petitioner.
39. Laurel Hills was aware at the time of purchase that the system was subject to a Tennessee Department of Environment and Conservation enforcement action and that civil monetary penalties were likely.³⁵
40. After purchasing the system Petitioner continued making poor financial decisions by failing to pay its water bill from COUD.
41. Petitioner continued its self dealing practices by hiring a company to install shut off valves that was operated by Phillip Guettler's brother.
42. Installing shut off valves for its customers instead of paying COUD represents the worst kind of financial decision making. It was designed to ensure that the customers continued

³⁰ Id. at p. 72

³¹ Id.

³² Id. at p. 166.

³³ Id. at p. 73.

³⁴ Id. at p. 74.

³⁵ Id. at p. 76.

to pay that Petitioner while Petitioner endangered its continued ability provide utility service.

43. Petitioner has failed to demonstrate that it possesses any financial expertise much less the necessary financial expertise to operate a water system.

IV. Violations of Law

44. Petitioner purchased the water system from another company on May 1, 2011 and operated the system prior to applying for a CCN until April 10, 2012, a total of three hundred forty-five (345) days.³⁶ Laurel Hills withdrew its Petition on May 7, 2012 and did not renew it until August 3, 2012, a total of one hundred forty-nine (149) days. Thus Petitioner has operated the system without the benefit of a CCN or even the application for a CCN for at least four hundred ninety-four (494) days in violation of Tenn. Code Ann. §65-4-201.
45. Petitioner has operated a public utility for two inspection cycles since May 1, 2011, without paying an inspection fee in violation of Tenn. Code Ann. §65-4-301.
46. Petitioner did not file a tariff with the TRA from May 1, 2011 until filing its initial petition on April 10, 2012, for at least three hundred forty-five (345) days in violation of Tenn. Code Ann. §65-5-102.³⁷
47. Petitioner imposed water rates from May 1, 2011 until February 28, 2012, when the Cumberland County, Chancery Court imposed a rate of forty-three dollars and twenty cents (\$43.20) per month pending a decision by the Authority for at least three hundred

³⁶ *Petition of Laurel Hills Condominiums Property Owners Association for a Certificate of Public Convenience and Necessity*, p. 1 (April 10, 2012).

³⁷ *Id.*

three (303) days in violation of Tenn. Code Ann. §65-5-101.³⁸

48. Petitioner raised the amount charged for water service on June 1, 2011, without permission from the authority and charged an increased rate without approval until the Cumberland County, Chancery Court imposed a rate of forty-three dollars and twenty cents (\$43.20) per month pending a decision by the Authority for at least two hundred seventy-two (272) days in violation of Tenn. Code Ann. §65-5-103.
49. Petitioners twelve hundred sixteen (1,216) violations of law are subject to a civil penalty of fifty dollars (\$50) per violation of law for a total of sixty thousand eight hundred dollars (\$60,800).³⁹

WHEREFORE the Tennessee Regulatory Authority Investigative Staff respectfully requests the following relief:

- A. That Laurel Hills' petition for a CCN be denied;
- B. That Laurel Hills be given sixty (60) days to divest itself of the water system;
- C. That the divestiture be approved by the Authority;
- D. That until Laurel Hills has divested itself of the water system an appropriate rate be approved by the Authority;
- E. That if Laurel Hills is unable to divest itself of the water system within sixty (60) days that it be obligated to appear before the Authority and give a status regarding its efforts to divest itself of the water system;
- F. The Authority will be empowered to review Laurel Hills' efforts and determine whether additional time should be allowed or whether other action is necessary to ensure the

³⁸ Id. at p. 2.

³⁹ Tenn. Code Ann. §65-4-120

effectiveness of this order;

- G. That the sixty thousand eight hundred dollar (\$60,800) civil penalty be imposed upon laurel Hills but that the payment of that amount be stayed;
- H. In the event that Laurel Hills complies with all the terms of this order then these civil penalties will be waived in their entirety;
- I. In the event that Laurel Hills fails to comply with this terms of this order then the full amount of the civil penalty will be imposed immediately; and
- J. Such other action as the Authority deems appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE


I hereby certifies that I have served a copy of the forgoing document on the following persons by depositing a copy of same in the U.S. Mail, postage prepaid, addressed to them at the addresses shown below:

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This the 18th day of March, 2013.

A handwritten signature in black ink, appearing to read 'Shiva K. Bozarth', written over a horizontal line.

Shiva K. Bozarth