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May 18, 2012

* ALSO ADMITTED IN GA
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*** ONLY ADMITTED IN OH

filed electronically in docket office on 05/18/12

Ms. Sharla Dillon
Docket Room Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Via Hand Delivery

Re: Petition of Laurel Hills Condominiums Property Owners Association for a
Certificate of Public Convenience and Necessity
Docket No. 12-00030

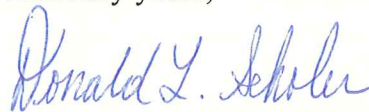
Dear Sharla:

I have enclosed an original and five copies of the Response to Notice to Appear in the above styled case.

This Response and this cover letter are being filed electronically by electronic mail this same date. Please return the additional copy of the Response stamp filed to me.

Thank you for your assistance.

Sincerely yours,



DONALD L. SCHOLLES

Enclosures

c: Jean Stone
Vance Broemel
Michael McClung
Robert Schwerer
Melanie Davis

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

**In re: PETITION OF LAUREL HILLS CONDOMINIUMS PROPERTY OWNERS
ASSOCIATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND
NECESSITY**

DOCKET NO. 12-00030

RESPONSE TO NOTICE TO APPEAR

On May 7, 2012, Laurel Hills Condominiums Property Owners Association (Laurel Hills) filed a Notice of Voluntary Dismissal and Withdrawal to withdraw the Petition filed in this docket. Laurel Hills filed this Notice because it has determined that it will no longer use its water system to provide water service to any person other than itself. Because Laurel Hills will no longer be serving members of the public, its water system will not be dedicated to public use, Therefore, Laurel Hills will not be a public utility as defined by T.C.A. § 65-4-101(6) and will not need a certificate of public convenience and necessity to serve the public. The attached Notice to Appear was issued to Laurel Hills shortly thereafter. Without waiving any right to object to the Authority's alleged jurisdiction over Laurel Hills, it files this Response to the Notice to Appear.

1. Effective July 9, 2012, Laurel Hills will no longer be a public utility as defined by T.C.A. 65-4-101(6).

Pursuant to T.C.A. § 68-221-711(9), Laurel Hills has advised its customers and the Tennessee Department of Environment and Conservation (TDEC) that it will no longer use its water system to serve anyone but itself and will cease providing water service to other persons connected to its water system. Laurel Hills asserts that when it begins providing water service only to itself, it will no longer be a public utility as defined by T.C.A. § 65-4-101(6) because it

will no longer be serving members of the public and will not be holding itself out as serving the public; therefore, its water system will not be dedicated to a public use. To be a public utility subject to the Authority's regulation, an organization must hold itself out to serve all members of the public and not just itself or selected individuals. While no Tennessee case has directly addressed this issue in construing T.C.A. § 65-4-101(6), courts in other states have consistently reached this same conclusion in deciding whether an organization or group is a "public utility."

In Lockwood Water Users Ass'n v. Anderson, 168 Mont. 303, 309, 542 P.2d 1212, 1220 (1975), the Montana Supreme Court found that:

[whether] an organization or group is in fact a public utility in this respect is the factor of serving or willingness to serve the entire public within the area in which the facilities of the organization are located. If it confines its service to its own stockholders or to members of its own group, and does not serve or hold itself out as willing to serve the public, it is not ordinarily considered a public utility.

Laurel Hills has decided to only provide water to itself and will not serve or hold itself out to serve members of the public. *See Coastal States Gas Transmission Company, Inc. v. Alabama Public Service Commission, et al.*, 524 So. 2d 357, 360-62 (Ala. 1988); *Johnson City v. Milligan Utility District*, 38 Tenn. App. 520, 531, 276 S.W. 2d 748, 753 (1954).

Laurel Hills acquired the Renegade Mountain water system on May 1, 2011, and the water system was serving approximately 50 water connections at that time. Laurel Hills and the property owners in the Renegade Mountain development never entered into any contract in which Laurel Hills agreed to or obligated itself to supply potable drinking water to the property owners. Permitting these property owners to continue to be connected to its water system did not clothe Laurel Hills with any permanent status as a "public utility." To find otherwise would be an unconstitutional taking of Laurel Hills' property. In *Lockwood Water Users Ass'n*, the Montana Supreme Court correctly stated:

No one may successfully contend that it is competent for the Legislature to regulate and control in such respect a mere private business or to declare a private business to be public service or a public utility. In other words, the state may not, by mere legislative fiat or edict, by regulating orders of a commission, convert mere private contracts or a mere private business into a public utility or make its owner a common carrier. [Citing cases] So, if the business or concern is not public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission."

168 Mont. At 309, 542 P.2d at 1220.

Laurel Hills is a private business which was not created for the purpose of providing water services to the public. Therefore, neither the Tennessee legislature nor the Authority can declare that Laurel Hills, a private business, to be a public utility unless it holds itself out to provide service to all members of the public. Since Laurel Hills will not be a public utility after July 9, 2012, the withdrawal of its Petition in this docket was an appropriate course of action.

2. The Renegade Mountain water system operated by Laurel Hills is not financially feasible to operate as a public utility.

When Laurel Hills acquired the Renegade Mountain water system, it acquired the water system to insure that the Laurel Hills time shares would have a continuing water supply. At the time Laurel Hills acquired the water system, the water system had approximately 50 connections. One of these connections was the Cumberland Point Condominium Association which is responsible for providing water service to the 84 units in the Cumberland Point Condominium complex. Laurel Hills has spent substantial funds in its efforts to bring the water system into compliance with the water quality regulations of the Tennessee Department of Environment and Conservation for a public water system. When TDEC performed its Sanitary Survey of the water system on October 19, 2011, the water system received an excellent score of 99 (out of 100 possible points).

Currently, the water system does not have meters in place capable of measuring the water usage of each connection. For many years the single family homes on the system paid a flat rate of \$25.00 per month for water service, and the Cumberland Point Condominiums paid a flat rate of \$20.00 per month for each condominium unit. Each single family home and each condominium unit pays the same flat rate regardless of usage. Prior to Laurel Hills purchasing the water system, no ongoing repair, maintenance and improvement to the water system had been in place for many years.

While the water system has about 50 connections, less than 10 of the single family homes on the system in the Renegade Mountain development are occupied full time. Currently, less than 25 of the units in the Cumberland Point Condominiums have full time residents. Therefore, its water system has a very small number of customers who can share the costs to operate and maintain the water system. Because the majority of the single family home and condominium units are not occupied full time, the cost per thousand gallons to operate and maintain the water system is very high.

When a water system has at least 25 connections, the water system is a public water system and is subject to all of the TDEC rules and regulations for public water systems and compliance with these regulations is mandatory. This compliance cost money which must be paid by the users of the public water system. The operation of a public water system under the jurisdiction of the Authority requires the ongoing expenditure of funds to meet all of the Authority's ongoing regulatory and filing requirements.

Despite the improvements made so far to the water system, the persons served by the system continue to assert that the water system is out of compliance with TDEC regulations and now the Authority's rules and regulations. Full compliance with the regulations of TDEC and

the Authority will substantially increase the water system's costs to serve over and above what the actual costs have been to operate the system in the past. In addition, the water system's customers who have sought to intervene in this case have requested that Laurel Hills be denied a certificate to operate the water system because it does not have the financial, managerial and technical expertise to operate a public water utility.

Laurel Hills is a Tennessee nonprofit corporation which was originally created to own, operate and maintain the common areas and facilities of the Laurel Hills time shares, and it has no ability to borrow funds to operate the water system which is not financially feasible.. Laurel Hills' experience over the last few months in operating the public water system, the extremely small customer base and usage of the present system and the continuing costs to comply with TDEC and the Authority's regulations have convinced it that the operation of the Renegade Mountain water system as a traditional water public utility is not financially feasible. Therefore, Laurel Hills concludes that it has no alternative other than to give the requisite notice to its customers and TDEC that it will no longer be providing service to the public effective July 9, 2012, and will only be providing water service to itself after that date.

3. Laurel Hills has no funds budgeted to defend itself in a proceeding to impose civil penalties against it for its failure to operate a water system without a certificate of public convenience and necessity from the Authority since May 1, 2011.

Since Laurel Hills acquired the water system in May of 2011, it has incurred substantial legal costs and other costs in working with and negotiating with TDEC to resolve an enforcement action against the prior owner and operator of the Renegade Mountain water system which was pending when Laurel Hills acquired the water system. Laurel Hills paid a civil penalty to TDEC in the amount of \$11,000 to resolve this pending enforcement action against the prior owner and operator. Because the prior owners and operators of the Renegade Mountain

water system had neglected the system for many years, Laurel Hills spent substantial funds to bring the water system into compliance with TDEC rules and regulations.

Laurel Hills has been sued by the users of the water system and has paid substantial legal expenses to defend against that lawsuit. Since the temporary injunction expired in this pending lawsuit, the majority of the water system's customers have paid nothing for water service for April and May of this year.

The Authority has filed and served a Notice to Appear on Laurel Hills threatening to institute a proceeding to impose civil penalties against it for operating a water system without a certificate, charging rates not approved by the Authority, not paying the Authority's inspection fee, not filing a tariff and not providing service. The Consumer Advocate has requested a meeting with Laurel Hills.

Laurel Hills simply does not have the funds budgeted to defend itself against the allegations set forth in the Notice to Appear. In the event the Authority finds that a proceeding should be instituted to determine and assess the amount of civil penalties which should be imposed, Laurel Hills will incur substantial legal, travel and other related expenses to defend itself in such a proceeding. Laurel Hills has no funds budgeted to defend itself in any civil penalty proceeding initiated by the Authority. Therefore, Laurel Hills will not be able to appear before the Authority on Monday, May 21, 2012, to defend against the allegations made against it. For the reasons set forth below, Laurel Hills does not believe any civil penalties are warranted and regrets that its financial condition will prohibit it from adequately defending itself.

- 4. The alleged statutory violations do not justify the initiation of a proceeding to impose civil penalties against Laurel Hills or the assessment of civil penalties against it for its actions in providing water service with the Renegade Mountain water system.**

The statutory violations cited in the Notice to Appear all arise from the Authority's position that Laurel Hills should have known that it was a public utility subject to its regulation and should have obtained a certificate of public convenience and necessity to operate as a public utility. To the extent Laurel Hills should have known it was a public utility either upon the acquisition of the water system on May 1, 2011 or upon the effective date of Public Chapter 430 of the 2011 Tennessee Public Acts, June 6, 2011, its actions to continue supplying water to the persons connected to its system were not taken in bad faith and do not justify the imposition of a civil penalty.

No previous owner or operator of the Renegade Mountain water system has ever obtained a certificate of public and necessity to operate a public water utility from either the Authority or its predecessor, the Tennessee Public Service Commission. On May 1, 2011, Laurel Hills believed that it was a nonutility under T.C.A. § 65-4-101(6) as a nonprofit corporation and as a property owners association. The water rate which Laurel Hills began charging effective June 1, 2011 was adopted before June 6, 2012, the effective date of Public Chapter 430 of the 2011 Tennessee Public Acts which appears to have made it a public utility under T.C.A. § 65-4-101(6).

Laurel Hills has never operated its water system pursuant to a certificate issued by the Authority; therefore, finding Laurel Hills in violation of statutes and regulations applicable to a regulated public utility which has applied for and obtained a certificate seems unreasonable.

Although Laurel Hills met with TDEC officials in June of 2011 and continued to have ongoing communications with it about the operations of the water system, TDEC never informed Laurel Hills that it needed a certificate from the Authority to operate a public water system. After the effective date of Public Chapter 430 of the 2011 Tennessee Public Acts, the Authority

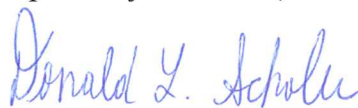
never contacted or notified the Board of Directors of Laurel Hills that it needed to obtain a certificate of public convenience and necessity to operate its water system. Laurel Hills has learned that there are several other nonprofit property owner associations and cooperatives in Tennessee which have operated public water systems in Tennessee for many years without a certificate to provide water service. To the best of its knowledge, Laurel Hills is not aware of any enforcement actions being taken by the Authority against these nonprofit associations and cooperatives for their failure to operate a public water system without a certificate from the Authority.

Conclusion

Laurel Hills has given its customers and TDEC the requisite notice required T.C.A. § 68-221-711(9) that it will cease providing water service to the public effective July 9, 2012. To the extent Laurel Hills has operated without a certificate, its actions have not been in bad faith. Laurel Hills believes it has no other choice except to stop providing water service to the public as a community water system and regrets that it has no funds budgeted to defend its against the claims and charges made against it in the Notice to Appear.

Dated May 18, 2012

Respectfully submitted,



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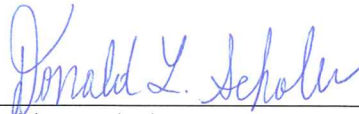
CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2012, a true and exact copy of the foregoing Response to Notice to Appear was served upon the following by electronic mail and by depositing a copy in the United States Mail, first-class postage prepaid:

Jean Stone, General Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville TN 37243-0505

Vance L. Broemel, Esq.
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202-0207

Melanie Davis
Kizer & Black Attorneys, PLLC
329 Cates Street
Maryville, TN 37801



Donald L. Scholes

TENNESSEE REGULATORY AUTHORITY



460 James Robertson Parkway
Nashville, Tennessee 37243-0505

NOTICE TO APPEAR

IN RE: *Petition of Laurel Hills Condominiums Property Owners Association
for a Certificate of Public Convenience and Necessity*

DOCKET NO: 12-00030

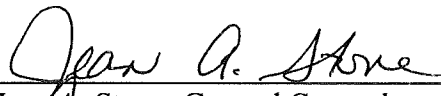
DATE: May 11, 2012

Laurel Hills Condominiums Property Owners Association ("Laurel Hills") shall appear before the Tennessee Regulatory Authority ("Authority") during the Authority Conference scheduled for **Monday, May 21, 2012 at 1:00 p.m. (central)** and show cause why the Authority should not proceed to convene a proceeding to impose civil penalties and sanctions for operation of a public utility without a Certificate of Public Convenience and Necessity in violation of Tenn. Code Ann. § 65-4-201; for failure to pay its annual inspection fee in violation of Tenn. Code Ann. § 65-4-301(a); for failure to file a tariff in violation of Tenn. Code Ann. § 65-5-102; for charging rates not approved by the Authority in violation of Tenn. Code Ann. § 65-5-101 and/or Tenn. Code Ann. § 65-5-103; and for withholding or refusing to provide service to its customers in violation of Tenn. Code Ann. § 65-4-115.

The Authority Conference shall be held in the Hearing Room on the Ground Floor at 460 James Robertson Parkway, Nashville, Tennessee. This matter will be considered by the voting panel of Chairman Kenneth C. Hill, Director Sara Kyle and Director Mary W. Freeman. Any party is entitled to be represented by counsel.

Participants with disabilities who require special accommodations or alternate communications formats should contact the Tennessee Regulatory Authority ADA-EEO/AA Coordinator/Officer at 460 James Robertson Parkway, Nashville, Tennessee 37243-0505, 1-800-342-8359 or TDD (615) 741-3930, so that reasonable accommodations can be made.

FOR THE TENNESSEE REGULATORY AUTHORITY:


Jean A. Stone, General Counsel

Original in Docket File No. 12-00030

c: Mr. Michael McClung, President, Laurel Hills Condominiums Property Owners Association, 17 Laurel Mountain Drive, Crab Orchard, TN 37723
Mr. Donald L. Scholes, Esq.
Ms. Melanie Davis, Esq.