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BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION  
NASHVILLE, TN

**In re: COMPLAINT OF MILCROFTON UTILITY DISTRICT AGAINST JOHN POWELL, KING'S CHAPEL CAPACITY, LLC, ASHBY COMMUNITIES, LLC, AND/OR NON-POTABLE WELL WATER, INC.**

**DOCKET NO. 17-00013**

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**RESPONSE TO AMENDED PETITION  
AND  
JURISDICTIONAL OPPOSITION**

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The Respondents (John Powell, Kings Chapel Capacity, LLC, Ashby Communities, LLC and Non-Potable Well Water, Inc.) respond to the Amended Petition as follows:

**INTRODUCTION**

The gravamen of the Amended Petition is that one or more of the Respondents are operating an illegal public utility within the Kings Chapel Development in Williamson County, thus invading the exclusive rights of the Complainant (Milcrofton Utility District) by providing residential water service to the Kings Chapel Subdivision.

The relevant players are more appropriately identified as follows:

- **Kings Chapel** is the name of a real estate subdivision east of Franklin, Tennessee.
- The Respondent, **Ashby Communities, LLC**, is the Developer of Kings Chapel.
- The Respondent, **Kings Chapel Capacity, LLC**, is the sewer service provider for Kings Chapel.
- The Respondent, **John Powell**, is the Owner of Kings Chapel Capacity, LLC and Ashby Communities, LLC.

None of the above-referenced Respondents are providing water utility services for the Kings Chapel Subdivision.

- The remaining Respondent, **Non-Potable Well Water, Inc.** [“Well Water”], was incorporated to use the well water on the Kings Chapel property for purposes of providing supplemental irrigation services to the homeowners, given the inability of Milcrofton to meet those needs. The Well Water entity has only provided services to approximately 30 of the 226 property owners. It has provided those services for several years and charges a flat rate of \$300, per year. In essence, the Well Water entity operates as a de facto co-op.

Nonetheless, Milcrofton contends that the Well Water entity (separately and/or in concert with the other Respondents) is a “*public utility*” and is operating “*an illegal public utility within the Kings Chapel Development...*”

The Respondents provide the following substantive Response to the Amended Petition of Milcrofton:

1. Admitted.
2. It is admitted that the Petitioner is a duly organized utility district. It is also admitted that the Petitioner provides residential water service to the Kings Chapel Subdivision. However, the Petitioner has been unable at various times to meet all of the residents’ needs. Hence, the exclusivity provided by T.C.A. §7-82-301 has not been met, given that the Petitioner has been unable to furnish all of the services that it was authorized to furnish. More specifically, the Petitioner has not provided the public (*i.e.*, those individuals who reside at Kings Chapel) with all of the public conveniences and necessities required.
3. Denied, as stated. Respondents incorporate by reference their introductory remarks, as set forth above. Specifically, the only entity that is responsible for answering this complaint is the Well Water entity. The Hearing Officer recognized this and directed the Petitioner to file an amended complaint in this docket precisely because King’s Chapel Capacity, LLC, Ashby Communities, LLC and John Powell are not the appropriate entities or individuals

that the complaint should address. Therefore, Milcrofton's Complaint remains deficient and should be amended again to only address the Well Water entity.

4. Denied, as stated.

5. Denied, as stated. The Petitioner only has the right to exclusively provide potable water service as opposed to non-potable water service.

6. Denied, as stated. Neither Mr. Powell, Kings Chapel Capacity, LLC nor Ashby Communities, LLC are providing water, water service or a water system to the residents of Kings Chapel. The remaining Respondent, *i.e.*, the Well Water entity, operates a small well on the property (with the consent of the Owner, Ashby Communities, LLC). The aforementioned well is operated only for purposes of providing supplemental irrigation water to a limited number of residents as a result of the inability of Milcrofton to provide the residents with all of their requisite needs for water.

7. Neither Mr. Powell, Kings Chapel Capacity, LLC nor Ashby Communities, LLC is providing any "public utility" services to the Kings Chapel residents. Thus, the allegations in ¶7 relate only to the actions of Well Water. However, the actions of that entity are extremely limited and tailored only for the exclusive purpose of providing supplemental irrigation water to a limited number of Kings Chapel residents.

8. The Respondents deny that Milcrofton is entitled to any enforcement remedies.

## **JURISDICTIONAL ISSUES**

The Well Water entity believes that there are several jurisdictional issues that the Commission must contend with before reaching a conclusion in this matter. Among these are the following:

### ***1. Does The Commission Have Jurisdiction Over The Distribution Of Non-Potable Water Through Pipes?***

T.C.A. §65-4-101(6) defines a public utility as “...every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, affected by and **dedicated to the public use**, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof.” (Emphasis added.)

Although this definition mentions water service, it does not specifically distinguish between potable and non-potable water service. Therefore, the question arises over whether the Commission has jurisdiction over the distribution of non-potable water service through pipes. To our knowledge, the Commission does not presently regulate any non-potable water entities in Tennessee, even though any of many existing entities sharing the cost and distribution of a well, river or lake access for irrigation would be subject to regulation under the Petitioner’s complaint. Because the Petitioner’s complaint involves an issue of first impression, we would encourage the Commission to seek an opinion from the Tennessee Attorney General’s office before deciding if the distribution of non-potable water is subject to regulation. If the Commission determines that it does not have jurisdiction over the distribution of non-potable water, then the Petitioner’s complaint must be dismissed.

**2. *Is Non-Potable Well Water, Inc. A Public Utility Subject To The Commission's Jurisdiction?***

As shown in the above definition, a public utility must be “dedicated to the public use.” Therefore, the issue is whether the distribution of non-potable well water for irrigation to voluntary customers constitutes public use? These customers certainly are not required to take service from Non-Potable Well Water, Inc. and could use other alternative services available to them such as potable water from the Petitioner, trucked non-potable water or non-potable water from their own wells. As noted, the Well Water entity is merely providing irrigation services to 30 of the 226 residents of Kings Chapel. It is not providing drinking water or other water services. And, it is not providing any irrigation services to all of the residents of Kings Chapel (or people beyond Kings Chapel). Hence, its services are limited in both nature and scope.

Additionally, the Well Water entity has not dedicated its property to the public use. And, it does not supply services that the public has a legal right to demand and/or receive. Hence, it is not a “public utility.”

In *Federal Express Corp. v. Tenn. State Bd. Of Equalization*, 1985 Tenn. App. LEXIS 2850 (Ct. of App. 1985) the Court held that the definition of a “public utility” includes the following:

- An entity that supplies services which the public has a legal right to demand and receive;
- An entity who has by some act dedicated its property to the public use; and
- An entity which is so affected by public interest that it may be regulated for the public good.

Id., p. 5.

None of the factors identified by the Court in *FedEx v. Tennessee State* exist in the present case. This is confirmed by the Affidavit of John Powell, which is attached hereto and incorporated herein, by reference.

Accordingly, the Well Water entity is not a public utility. Therefore, if the Commission has no jurisdiction over the limited irrigation services provided to a handful of individuals then the Petitioner's complaint must be dismissed.

***3. Is The Authority To Distribute Non-Potable Water Through Pipes Distinguishable From The Incumbent Distribution Of Potable Water Through Pipes In Such A Manner That The Commission Can Authorize Two Separate Entities To Provide Water Service (One For Potable Water And Another For Non-Potable Water) In The Same Geographic Territory?***

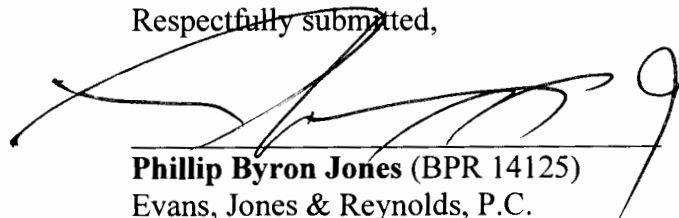
Simply stated, the Well Water entity is not competing with the Complainant. In fact, the only reason Well Water exists is because of the inability of the Complainant to provide all of the services upon which it was provided exclusivity. T.C.A. §7-82-301(a) granted the Complainant the exclusive right to provide water service. However, those rights to exclusivity are conditioned upon the Complainant continuing to actually “*furnish any of the services that it is authorized to furnish in this chapter...*” The right of a utility district to be the “*sole public corporation*” in a district is based upon the premise that it exists unless and until “*it has been established that the public convenience and necessity requires other or additional services...*”

Herein, the Complainant has failed to provide all of the required services. See, Powell Aff., ¶6. Therefore, the Complainant's right to exclusivity has been compromised. Thus, another issue is if there is a demand for non-potable water service in a specific territory, can the Commission issue a separate certificate of convenience and necessity for this service? If so, then it would appear that all the Commission would need to do is order Non-Potable Well Water, Inc. to file for such a certificate and dismiss the current complaint.

Finally, the Respondents do not dispute that the Commission has jurisdiction over enforcement issues, including those instituted as declaratory proceedings by an “*interested person*.” See, T.C.A. §65-2-104. The Complainant focuses a substantial portion of its jurisdictional arguments towards whether it is an “interested person” and, therefore, whether it can institute declaratory proceedings. However, those arguments by the Complainant miss the true jurisdictional issue. The true jurisdictional issue is whether the Commission’s activities herein relate to a “public utility.” Simply stated, neither Mr. Powell nor Ashby Communities, LLC are performing any activities that relate to utilities. Granted, Kings Chapel Capacity, LLC is a public utility; however, its activities in relation to the Kings Chapel Subdivision are related exclusively to sewer services. And, it is performing those services pursuant to authorization granted to it by the Commission.

Therefore, the only issue is whether the remaining Respondent (*i.e.*, the Well Water entity) is a “public utility.” It is not a “public utility.” Thus, this Commission has no jurisdiction over its activities and therefore, the Complainant’s Amended Petition should be dismissed.

Respectfully submitted,



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*Attorneys for Respondents, John Powell,  
Kings Chapel Capacity, LLC, Ashby  
Communities, LLC and Non-Potable Well  
Water, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been sent as follows on this the 16<sup>th</sup> day of May, 2017, to:


Addressee

**Mr. Benjamin A. Gastel**  
Branstetter, Stranch & Jennings, PLLC  
223 Rosa Parks Avenue, Suite 200  
Nashville, TN 37203

Method(s) of Service

- ☒ U.S. Postal Service (First-Class, Postage Prepaid)  
☒ Email  
☐ Hand-Delivery

*Attorneys for Defendants*

  
\_\_\_\_\_  
**Phillip Byron Jones**

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**AFFIDAVIT OF JOHN POWELL**

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STATE OF TENNESSEE    )  
  )  
COUNTY OF DAVIDSON    )

I, John Powell, being duly sworn, state as follows:

1.     I am over eighteen years of age and I have personal knowledge of the matters set forth below.
2.     I am an Owner and Officer of Ashby Communities, LLC, which owns the development in Williamson County known as Kings Chapel.
3.     I am also an Owner and Officer of Kings Chapel Capacity, LLC, which provides sewer for the Kings Chapel Development.
4.     I am also an Owner and Manager of Non-Potable Well Water, Inc., which operates a small well on the property of Kings Chapel.
5.     Neither I, nor Ashby Communities, LLC, nor Kings Chapel Capacity, LLC are providing any services to Kings Chapel residents or others that relate to drinking water or irrigation water.

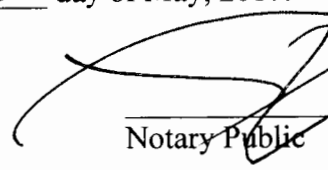
6. The entity known as Non-Potable Well Water, Inc. ["the Well Water entity"] operates a small well on the Kings Chapel property. However, that well is used only to provide supplemental irrigation water (and no drinking water) to approximately 30 of the 226 residents in Kings Chapel. It provides no service beyond Kings Chapel. The Well Water entity charges those individuals a flat rate of \$300 per year which has remained constant for several years. The revenue received from the homeowners is limited and is not charged for purposes of creating a profit. It is not, nor has it ever been, the intention of the Well Water entity to compete with the Milcrofton Water Utility District. To the contrary, the Well Water entity was set up simply to provide supplemental irrigation water to a handful of residents as a result of problems Milcrofton encountered in meeting the water needs of Kings Chapel residents.

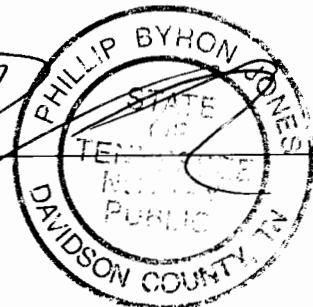
7. The Well Water entity does not supply the types of services which the public generally has a legal right to demand and receive (such as sewer and drinking water). Instead, the Well Water entity simply provides supplemental irrigation water. Likewise, the Well Water entity has not by any act dedicated its property to the public use. And, its activities are not so affected by a public interest that would normally mandate it being regulated for the public good. In fact, the Well Water entity's services are only provided to approximately 30 individuals in a subdivision that currently contains 226 homes.

**FURTHER THE AFFIANT SAYETH NOT.**

  
John Powell

Sworn to and subscribed before me this 16<sup>th</sup> day of May, 2017.

  
Notary Public



My Commission Expires: \_\_\_\_\_  
845200.002

My Commission Expires May 5, 2020