



Jacobs-Rabons Communications, LLC (“JRC” or “Respondent”), MJS Property Management, Inc. (“MJS” or the “HOA”), and Fiber One Consulting, LLC (“Fiber One”).<sup>1</sup> Complainants are residents of the Rabon Farms Subdivision in Richland County who are protesting a “Technology Fee” assessed by the HOA so that JRC could continue providing telecommunications service to a subset of residents in the neighborhood.

MJS Property Management is the homeowner’s association for Complainants’ Subdivision and is only specifically referenced in two of the four Complaints.<sup>2</sup> In those two Complaints, MJS is particularly mentioned as a property management company, and the Complaints did not allege that this property management company was a telephone utility within the Commission’s jurisdiction. Consequently, it was not served a scheduling notice and was therefore not a party before the Commission.

In a related matter, assigned to Docket No. 2010-351-C, the Office of Regulatory Staff (“ORS”) has filed a Petition for a Declaratory Order against JRC for providing telecommunications service in the Rabon Farms Subdivision without certification.

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<sup>1</sup> Fiber One was a third party contractor providing telecommunications service in the Rabon Farms Subdivision. Fiber One played no role in charging the Technology Fee and did not appear at the hearing. This Order does not further address the actions of Fiber One.

<sup>2</sup> Further information is provided in Section IV(B) of this Order that explains why MJS Property Management is also the homeowners’ association.

## **II. The Complaints**

### **A. Complaint of Michele Shearin**

Michele Shearin's filing on February 3, 2011, complains of the Technology Fee and names JRC as the respondent. According to Shearin's hearing testimony:

What really bothers me the most is I have been raising three children, and my husband was deployed when we purchased this house. And we have been basically, I feel, taken for a ride with fees and services that we have yet to receive, or credits we have yet to be given.

So the technology fee that came up doesn't make sense to me... It's my understanding that they [JRC] didn't have a license, that they chose to close down because of the license they didn't have. And I'm not even sure if they have paid taxes or anything else resulting in that.

Tr. 11-12. In her testimony, Shearin goes on to describe her telecommunications services as intermittent, causing her to go without a home phone, cable, and internet for a period of almost four months. Tr. 22. Shearin also describes how she wrote letters to the HOA, the HOA attorney Kenneth Hanson, and JRC without "basically" receiving a response and without receiving credit for services that were not rendered. Tr. 23-24. Although Shearin opted out of receiving services in the Subdivision, she has a past due balance on her homeowners' association dues, resulting at least in part from the Technology Fee, and faces the possibility of a foreclosable lien on her property. Tr. 20-22; Hearing Exhibit 2 (Exhibit 3-M of the ORS Investigative Report to the Commission).

### **B. Complaint of Rahkeem Golden**

Rahkeem Golden's filing on February 10, 2011, complains of the Technology Fee and names JRC, Fiber One, and "MJS (Property Management)" as respondents.

According to Golden, he is upset because he initially bought his home expecting to pay annual homeowners' association dues that were \$175, but that charge unexpectedly grew when he was forced to pay an additional \$420 per year to support poor telecommunications services that he eventually opted not to receive. *See* Tr. 29-34, 47-52. Golden owes a past due balance on his homeowners' association dues, resulting at least in part from the Technology Fee, and faces the possibility of a foreclosable lien on his property. Tr. 47-52; Hearing Exhibit 2 (Exhibit 3-M of the ORS Investigative Report to the Commission).

**C. Complaint of Shamika Robinson**

Shamika Robinson's filing on February 14, 2011, complains of the Technology Fee and names JRC as the respondent. According to Robinson's hearing testimony, "I just think the Fee is unfair. And I don't understand it, I don't think it's legal, and I just want to make sure that the Fee goes away and it doesn't come back in any type of similar fashion... It just seems very unfair." Tr. 57. Robinson owes a past due balance on her homeowners' association dues, resulting at least in part from the Technology Fee, and the HOA has a lien against her property. Tr. 62-65; Hearing Exhibit 2 (Exhibit 3-M of the ORS Investigative Report to the Commission).

**D. Complaint of Bernard Jones**

Bernard Jones's filing on February 14, 2011, complains of the Technology Fee and names JRC and "MJS (Property Management)" as the respondent. According to Jones' hearing testimony:

YRT<sup>2</sup> was I guess the communications provider for the area, and... if we wanted... the phone or whatever... we had to sign a piece of paper that we accepted that... Being new to buying a home..., I didn't know all the ins and outs about that kind of stuff. So we signed the paper and continued to move forward about the house.

... Once we got into the house and a few months later, then YRT<sup>2</sup> said they were going out of business. You know, we [were] like 'What's going on?' And then we got an e-mail saying that Fiber One was coming in. And we [were] like 'Okay, we didn't contract or... [agree] to Fiber One, so how are they just going to come in and take over the service?' ...[And] we [were] getting hit with a bunch of... fees and high bills with that.

Tr. 69. Jones opted out of service from Fiber One and owes a past due balance on his homeowners' association dues, resulting at least in part from the Technology Fee, and faces the possibility of a foreclosable lien on his property. Tr. 74-76; Hearing Exhibit 2 (Exhibit 3-M of the ORS Investigative Report to the Commission).

### **III. Procedural History**

On February 23, 2011, pursuant to 26 S.C. Code Ann. Regs. 103-840, the Commission consolidated the complaint dockets for hearing purposes, and under the authority of 26 S.C. Code Ann. Regs. 103-841, appointed Josh Minges, Esquire, as Hearing Examiner by Order No. 2011-164 (March 4, 2011). On March 8, 2011, pursuant to S.C. Code Ann. §§ 58-3-200 and 58-4-50(A)(2), Hearing Examiner Minges requested that ORS investigate whether the Technology Fee was either directly or indirectly an unlawful charge for telecommunications services. On April 15, 2011, ORS concluded its investigation and submitted its report, recommending a hearing. On June 8, 2011, JRC

filed a Motion to Dismiss. On June 24, 2011, Hearing Examiner Minges held the Motion to Dismiss in abeyance until after the hearing.

The hearing in this matter was held before the Hearing Examiner on November 21, 2011, in the offices of the Commission. The parties present at the hearing included ORS, the Complainants, and JRC.<sup>3</sup> The Complainants appeared *pro se* and each gave testimony explaining their grievance with the Respondents over the Technology Fee. JRC was represented by Adelaide D. Kline, Esquire, and Thomas F. Dougall, Esquire, with Kenneth C. Hanson, Esquire, the sole member of JRC and key decision maker and attorney for the HOA, providing testimony. ORS was represented by Nanette Edwards, Esquire, with Christopher J. Rozycki, Program Manager in the ORS Telecommunications Department, providing testimony.

#### **IV. Statement of the Case**

##### **A. ORS Petition for a Declaratory Order in Docket No. 2010-351-C**

On October 19, 2010, prior to the present Complaints being filed, the Commission opened Docket No. 2010-351-C in response to an ORS Petition for a Declaratory Order against Jacobs-Rabons Communications, LLC and Fiber One Consulting, LLC for operating as a telephone utility without certification. In its Petition, ORS alleged that JRC and Fiber One were providing and/or reselling telephone service without first obtaining a Certificate of Public Convenience and Necessity as required by S.C. Code Ann. § 58-9-280. ORS further asserted that, as uncertificated companies, JRC and Fiber One never filed any of the documents, reports, or other instruments that are required

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<sup>3</sup> Under S.C. Code Ann. 58-4-10(B), ORS is automatically a party of record.

under South Carolina law and have not contributed to the State Universal Service Fund, the Telecommunications Relay service funds, or paid gross receipts. JRC and Fiber One never contested ORS's allegations, and the Petition requested that the Commission require the companies to become certified and submit a tariff.<sup>4</sup>

However, before the matter was adjudicated, an agreement was entered between the HOA, JRC, Fiber One, and Time Warner Cable that specified Time Warner Cable would take over services in Rabon Farms. Consequently, a motion to dismiss was filed by JRC, informing the Commission that JRC had dissolved.<sup>5</sup> At the same time, while not opposing the motion, ORS requested that the docket remain open until all customers were transferred to Time Warner Cable. Commission Order No. 2011-73 (January 25, 2011) memorializes this agreement and states that the docket will be closed once all of the customers have been transferred and all of JRC's and Fiber One's operations have ceased entirely. Docket No. 2010-351-C remains open pending resolution of the Complaints in Docket Nos. 2011-55-C, 2011-63-C, 2011-66-C, and 2011-67-C.

## **B. Overview**

Complainants are residents of the Rabon Farms Subdivision located in Richland County. Although the Subdivision's covenants require membership in a homeowners' association, and voting rights accompany membership, it seems the homeowners had little voice in the management of their community. The developer of the Subdivision never appointed a board of directors, and instead it hired MJS Property Management to

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<sup>4</sup> In his testimony, Hanson admits that JRC was not certificated. Tr. 108.

<sup>5</sup> Articles of Termination specify that JRC dissolved on May 18, 2011.

function as the homeowners' association and manage Rabon Farms. Tr. 111, 118. MJS as the HOA established JRC, and in a closed meeting at the offices of MJS that included no homeowners, the HOA assessed all homeowners the Technology Fee at issue. Tr. 132-133. The Technology Fee was then refunded in the monthly bill for telecommunications service to the residents who were JRC customers, thereby subsidizing those customer/residents for that service. Tr. 86.

### **C. Facts Leading to the Assessment of the Technology Fee**

The initial provider of telecommunications services in the Subdivision was the company YRT<sup>2</sup> (pronounced YRT Squared), and residents were contractually required to use this company when they purchased their homes.<sup>6</sup> Tr. 81. However, late in the year of 2008 or early in 2009, YRT<sup>2</sup> had stopped performing, and according to Hanson, service problems were hurting the reputation of the home builder because real estate agents had stopped showing homes in the neighborhood over uncertainty regarding the telecommunications system. Tr. 81-82, 139. Ultimately, YRT<sup>2</sup>, who had never attained the regulatory approvals to operate, defaulted in providing service, and the entire telecommunications infrastructure of the development reverted in ownership to the HOA. Tr. 143.

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<sup>6</sup> The bundled services by YRT<sup>2</sup> included phone, television, and internet offerings, and there was no option of providers. If someone wanted to live in the neighborhood, he or she was required to sign up for services with this company. Tr. 55-56. This Order does not address whether Respondents violated S.C. Code Ann. § 58-9-295, which prohibits restricting the choice of communications service providers and preventing service providers from obtaining easements or rights-of-way for the installation of facilities or equipment to provide communications services.

Attempting to remedy the situation, Hanson states he and the HOA “jumped from the frying pan into the fire” by contracting with Fiber One, which was the same company that had run the Subdivision’s services for YRT<sup>2</sup>. Tr. 82. Fiber One also failed to obtain regulatory approval to operate and, by early 2010, Hanson was receiving numerous complaints because service had not improved. Tr. 82, 114-115, 156. Moreover, while YRT<sup>2</sup> charged a flat fee for bundled services, Fiber One allowed residents to choose their services and pay for them separately or even opt out of services all together. Tr. 81, 85, 157. Yet, since residents could pay less or opt out under this new method of offering telecommunications services in Rabon Farms, not enough money was collected to pay for maintenance of the system.<sup>7</sup> Tr. 85, 136-137, 157. According to Hanson, the HOA “went from somewhere over 200 houses at \$115 a month to somewhere like 100 houses at \$50 a month.” Tr. 137.

This change left Hanson and the HOA with the realization that they would have to take over the system and devise a method to pay for maintenance while they looked into selling it. Tr. 83. To that end, as they struggled with Fiber One, Hanson and HOA began negotiating with potential buyers AT&T and Time Warner Cable, among others, but no companies wanted it because the infrastructure had to be overlaid. Tr. 83-84, 122. As Hanson explains, the entire system that defaulted to the HOA from YRT<sup>2</sup> was

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<sup>7</sup> Although residents could now opt out of receiving telecommunications service from Fiber One, it is important to note that residents who owed a balance on their homeowners’ association dues (which included the Technology Fee) were prevented from enrolling with Fiber One. This fact seems to be a contributing factor in why too few residents were receiving service to support the system. *See* Tr. 24.

“worthless,” and fewer people were paying for the services that allowed for its upkeep.

*Id.*

**D. Jacobs-Rabons Communications, LLC and the Technology Fee**

Hanson’s and the HOA’s solution to pay for the system’s upkeep was to create a company that handled the remaining customers, but spread the cost to do so among all of the Subdivision’s residents by an additional charge to their homeowners’ association dues. Tr. 86-88; *See* Tr. 169-171. To accomplish this solution, on December 1, 2009, the HOA informed residents by letter that dues were going to be assessed quarterly and include a Technology Fee which would be passed on to JRC. Tr. 86, 132-133, 169-170.

Specifically, the letter states:

The reason for this change is the fact that there has been a significant change in the Budget for the Association beginning with the 2010 Budget period. In the past, you paid all of the cost of the bundled services (telephone, internet, cable, etc.) directly to a service provider (first YRT2 and then Fiber One). These payments billed by the service provider underwrote the cost of the services that were provided, as well as the maintenance cost for the fiber optic lines and the other infrastructure required to provide these services throughout the community. Beginning in January, you will pay a technology fee as part of your assessment. This fee will be passed on to a new entity that will not provide these bundled services, but will only maintain the infrastructure, as opposed to that maintenance being provided by the prior providers. Since this cost is no longer the responsibility of the service provider that provides the bundled services, if you have signed on for their services, you will be given a credit by that bundled service provider on your monthly bill that equals what you pay to the Association for that month. This means that you get a credit monthly, but pay the same amount as three (3) months credit to the Association in your Quarterly payment to the Association. Since this funding supports the infrastructure that allows the bundled services to be available to all lot owners throughout the community, if you have not

signed on for bundled services, you will receive no credit, but will still be required to pay the technology fee as part of your quarterly assessment. The Developer and the Association are aware that the service that some of you have received has been less than what was expected at times and is doing what can be done to try to improve the service that you are receiving.

Hearing Exhibit 2 (Exhibit 1 of ORS Investigative Report to the Commission). At the hearing, Hanson confirmed that the Technology Fee was an attempt to subsidize service for the remaining customers “in order to keep the system afloat.” (Tr. 145-146):

Q: So is it accurate to say then that the homeowners then were subsidizing the cost of the communications customers that JR Communications retained?

A: Yeah, it – that’s correct, and it was just for maintenance purposes.

Tr. 158.

Following the HOA letter, in March of 2010, Hanson incorporated Jacobs-Rabons Communications, LLC at the direction of the HOA and became its sole member. Tr. 83, 94-96, 139. JRC was the “new entity” referred to in the HOA letter that the Technology Fee was “passed on to.” Tr. 86 According to Hanson, the reason for the creation of JRC was to salvage the developer’s reputation and try to make the communication system better. Tr. 83, 94-95. Hanson further states that Fiber One remained the underlying operator with JRC billing for services and maintaining the infrastructure. Tr. 147. He asserts the intention was not for JRC to operate as a competitive local exchange carrier, but rather to continue services in the neighborhood until another provider could be found. Tr. 94, 95, 122.

Nevertheless, JRC never obtained regulatory approval, and each homeowner was billed an annual \$420 Technology Fee (\$35 per month) as a part of their annual \$595 HOA dues to maintain the neighborhood's telecommunications infrastructure. Tr. 171. Even though the Fee was charged by the HOA, if a resident received telecommunications service supplied by JRC, then JRC would credit the \$35 Technology Fee from his monthly bill for that service. Tr. 86-88, 171. Homeowners who did not subscribe to the service offered by JRC did not receive a credit and did not receive a refund. Tr. 171.

In other words, all the residents of the Rabon Farms Subdivision partially paid the bill for the subset of those residents who remained JRC customers as the way for those remaining customers to continue receiving affordable telecommunications service. Tr. 156-157. In addition, the Technology Fee as a part of the HOA dues was considered a "personal and legal obligation of each owner of a lot or home," and if residents did not pay this subsidy, then they were subject to a "foreclosable lien" on their property. Tr. 121; Hearing Exhibit 2 (Exhibit 3-M of the ORS Investigative Report to the Commission).

Each of the Complainants owe a balance on their homeowners' association dues related to the Technology Fee, while three of the Complainants are subject to a potential lien, and Complainant Robinson has an actual lien against her property. During his testimony, Hanson stated he did not know if he and the HOA would pursue liens to collect the Technology Fee. Tr. 149. However, it seems more likely than not given the fact that a resident already has a lien based on the Fee, and at the time JRC was dissolved, it was over \$1 million in debt to the developer of the Rabon Farms Subdivision. Tr. 89.

Furthermore, a letter regarding annual assessments for 2011 was sent to homeowners, informing them that “the [HOA] plans to aggressively attempt to collect both current and past due Technology Fees...” Hearing Exhibit 2 (Exhibit 2 of the ORS Investigative Report to the Commission).

#### **V. ORS Investigation and Report**

On March 8, 2011, Hearing Examiner Minges issued a request, pursuant to S.C. Code Ann. § 58-3-200 and 58-4-50(A)(2), that the Office of Regulatory Staff investigate whether the Technology Fee was either directly or indirectly an unlawful charge for telecommunications services. In performing its investigation, ORS made eighteen information requests to JRC and followed those inquiries with two conference calls. A report was issued at the conclusion of the investigation on April 15, 2011.

In its analysis, ORS reasoned that, for the Technology Fee to be unlawful, the HOA would have to violate a Commission statute, regulation, or order, which would be determined by whether it meets the definition of a “telephone utility” as that term is defined by S.C. Code Ann. § 58-9-10(6). Under this definition, a telephone utility broadly includes any entity that owns or operates equipment used to transmit telephone service for hire, including all things incident thereto and related to the operation of telephones. According to the ORS report, when YRT<sup>2</sup> defaulted, the HOA assumed ownership and control of the telecommunications facilities in the Rabon Farms Subdivision and charged a maintenance fee for the facilities upkeep without first obtaining a Certificate of Public Convenience and Necessity.

However, in its report ORS concludes that the HOA was not acting as a telephone utility because JRC, not the HOA, was billing for telephone service. ORS Report at 4. ORS states that, while it could be argued the HOA was acting as a billing agent for JRC, the other side of the argument is that the HOA was paying JRC to maintain the existing infrastructure. *Id.*

At the close of its report, ORS asserts:

This Commission has no jurisdiction over the HOA unless the HOA is found to be operating as a telephone utility, and the facts of this case do not rise to the level of finding that the HOA in fact operated as a telephone utility. The HOA collected a [Technology] fee which it paid to JRC, but whether it was unlawful for the HOA to collect that fee under its covenants is not within the purview of the Commission. *Id.*

Under this view, it then recommended that the Commission hold a hearing to determine if JRC should return any remaining funds to the HOA upon termination of JRC's services.<sup>8</sup> ORS explained that JRC should not be permitted to operate as an unlicensed utility and then pocket any unexpended revenues generated from the Technology Fee. *Id.*

On the other hand, ORS noted the line of separation between the HOA and JRC was blurred by the fact that JRC provided a credit equal to the Technology Fee to those customers who subscribed to at least one of JRC's services. ORS Report at 3. To this point, ORS's opinion evolved after Hanson had testified at the hearing. Tr. 179-180. According to ORS witness Rozycki, this further information led him to conclude that the HOA and JRC were basically indistinguishable. Tr. 180. He further stated that it seems

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<sup>8</sup> This Order does not address this recommendation because there was insufficient evidence in the record to make a determination regarding any remaining funds retained by JRC.

as if the HOA was “taking the [Technology Fee], putting it in one pocket, taking it out of that pocket, and switching it over to the other pocket where it goes to J-R Communications, and then pulling it out of that pocket to pay whoever [was] maintaining the network at that point.” *Id.*

#### **VI. Respondents’ Motion to Dismiss**

Respondents filed a Motion to Dismiss on June 8, 2011, that was held in abeyance until after the hearing by Hearing Examiner Directive on June 24, 2011. Respondents’ Motion first asserts that the Complaints are moot because JRC has been dissolved, and the Technology Fee is no longer being assessed. This Order denies that ground for dismissal. While it is true the Technology Fee is no longer assessed, Complainants still owe homeowners’ association dues based on that Fee, which either could result in a lien on their property or already has resulted in a lien.

Respondents’ Motion next asserts that the Complaints should be dismissed as a matter of law because Complainants have failed to state a claim within the Commission’s jurisdiction. Specifically, Respondents state the Complaints are against a fee charged by a homeowners’ association, which is a subject matter outside the purview of the Commission. Tr. 7. Since a closer inquiry into the facts was required to make a determination, this Order also rejects that ground for dismissal.

The Motion to Dismiss is denied.

#### **VII. Discussion**

As indicated by the various Respondents that are named in the Complaints, it is evident that the Complainants were unsure who the responsible entity was that charged

the Technology Fee. However, testimony shows that the common factor to all of the Complaints when addressing the Fee is Mr. Hanson and his close link to the HOA. For instance, Hanson incorporated JRC at the direction of the HOA, was JRC's sole member, and was instrumental in determining how much residents should be assessed by the HOA for the Technology Fee, while reimbursing the Fee to JRC's customers. Tr. 139-140, 153-154. Moreover, the close link between Hanson and the HOA is illustrated by the fact that Hanson continuously refers to "we" when discussing the HOA. Tr. 82, 83, 84, 86, 88, 108, 116, 129, 132-133, 138-141, 143, 145, 149, 153, 154.

Further, Hanson filled a number of other roles and was a key decision maker in the Subdivision. See Tr. 124, 139-140, 143, 144-145, 153-154. These roles included acting as an attorney/advisor to the HOA, closing loans for the developer Great Southern Homes, and fielding complaints and solving problems for the homeowners. Tr. 155, 156, 139-142, 82, 114-115. In addition, the separation between the HOA, Hanson, and JRC is even more clouded by the fact that it is unclear who the actual entity was that owned the Subdivision's telecommunications infrastructure. Hanson initially stated that it belonged to the HOA after YRT<sup>2</sup> defaulted but later described JRC as the owner. Tr. 143, 147. Taken together, these facts make it clear that there was little practical distinction between JRC and the HOA. However, despite these connections, the Commission is unable to conclude that there is sufficient evidence that the legal responsibilities of one could be imputed to the other under the laws of corporations, agency, or other legal principles.

**VIII. Conclusion**

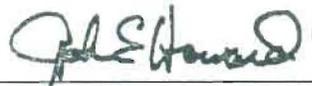
While there was no allegation on the face of the two Complaints that claimed the property management company, MJS, was a telephone utility, testimony at the hearing raised the question as to whether this entity might be considered one. However, due process requires that this Commission not address allegations regarding an entity which is not legally before the Commission.

As Hanson stated at the hearing, it was MJS who actually charged the Technology Fee, and it is MJS who would be responsible for refunding the Fee if a determination was finally made that refunds or reparations were due. Tr. 157, 159. Since the only party capable of providing a refund of the Technology Fee was not before the Commission, no determination can be made on this issue.

**IT IS THEREFORE ORDERED THAT:**

The Complaints are dismissed without prejudice.

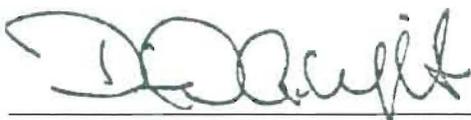
BY ORDER OF THE COMMISSION:



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John E. Howard, Chairman

ATTEST:



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David A. Wright, Vice Chairman  
(SEAL)