

STATE OF TENNESSEE

Office of the Attorney General



LUCY HONEY HAYNES
CHIEF DEPUTY ATTORNEY GENERAL

LAWRENCE HARRINGTON
CHIEF POLICY DEPUTY

ROBERT E. COOPER, JR.
ATTORNEY GENERAL AND REPORTER
CORDELL HULL AND JOHN SEVIER STATE
OFFICE BUILDINGS

MAILING ADDRESS
P.O. BOX 20207
NASHVILLE, TN 37202

MICHAEL E. MOORE
SOLICITOR GENERAL

TELEPHONE (615) 741-3491
FACSIMILE (615) 741-2009

February 11, 2011

Mr. Richard Collier
General Counsel
c/o Sharla Dillon
Docket Manager
Tennessee Regulatory Authority
460 James Robertson Pkwy.
Nashville, TN 37243-0505

Re: Consumer Advocate's Petition for a Declaratory Order that Berry's Chapel Utility Inc., Is a Public Utility Under Tennessee Law and Should be Regulated by the TRA
Docket No. 11-00005 - Notice of Filing Informal Discovery Request

Dear Mr. Collier:

Our Office, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), recently filed a Petition for a Declaratory Order at the Tennessee Regulatory Authority ("TRA") in a case involving Berry's Chapel Utility, Inc., the utility formerly known as Lynwood Utility Corporation. On January 24, 2010, a panel of the TRA directors appointed Director Roberson as hearing officer in the Berry's Chapel matter. In order to move the case as rapidly as possible, the Consumer Advocate is submitting the enclosed discovery requests and requests for admission to Berry's Chapel even though no discovery schedule has yet been established. These requests were submitted to Berry's Chapel with a separate cover letter explaining that at this point these requests are considered to be "informal."

TRA Rule 1220-1-2-.11(1) provides that

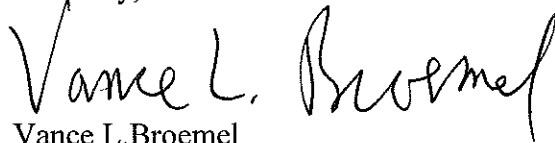
Any party to a contested case may petition for discovery. In any case where discovery is sought, no discovery shall be undertaken until a discovery schedule is set in accordance with these rules. Parties are encouraged where practicable to attempt to achieve any necessary discovery informally in order to

avoid undue expense and delay in the resolution of the matter at hand. When such attempts have failed or where the complexity of the case is such that informal discovery is not practicable, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure.

Accordingly, the Consumer Advocate is submitting a copy of the discovery requests and request for admission with the recognition that at this point the discovery is informal only. By submitting these requests at this time we hope both Berry's Chapel and the TRA will be in a better position to gauge the time needed to prepare this case. In addition, there will hopefully be no need for a special status conference to discuss discovery issues; this can all be done at the first status conference.

Thank you for your time and consideration of this matter. If you have questions regarding this request, please contact me at (615) 741-8733.

Sincerely,

A handwritten signature in black ink that reads "Vance L. Broemel". The signature is written in a cursive, slightly slanted style.

Vance L. Broemel
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202-0270

CC: Director Roberson, Hearing Officer
Donald L. Scholes, Esq., Attorney for Berry's Chapel Utility, Inc.

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

IN RE:	)	
	)	
CONSUMER ADVOCATE'S PETITION	)	DOCKET NO. 11-00005
FOR A DECLARATORY ORDER THAT	)	
BERRY'S CHAPEL UTILITY, INC., IS A	)	
PUBLIC UTILITY UNDER TENNESSEE	)	
LAW AND SHOULD BE REGULATED	)	
BY THE TRA		

**CONSUMER ADVOCATE'S REPLY TO THE ANSWER OF BERRY'S CHAPEL
UTILITY, INC. TO PETITION FOR DECLARATORY ORDER**

On February 9, 2011, pursuant to Tennessee Regulatory Authority ("TRA") General Counsel Richard Collier's request, Berry's Chapel Utility, Inc., ("Berry's Chapel") responded with an *Answer* to the Consumer Advocate and Protection Division's ("Consumer Advocate") *Petition for a Declaratory Order that Berry's Chapel Utility, Inc., Is a Public Utility Under Tennessee Law and Should Be Regulated by the TRA*. In order to expedite this matter as much as possible, rather than waiting for the next TRA Conference the Consumer Advocate hereby sets forth its position with regard to the *Answer* of Berry's Chapel. A motion for leave to file this reply has been filed contemporaneously.

REPLY

First, Berry's Chapel's *Answer* completely fails to address the central points of the Consumer Advocate's *Petition for a Declaratory Order*:

(1) Berry's Chapel Utility, Inc. ("Berry's Chapel"), is not, in fact, a nonprofit corporation but is merely incorporated under the Tennessee Nonprofit Corporation Act.

(2) Berry's Chapel has misconstrued the statute under which it claims exemption from T.R.A. regulation, Tenn. Code Ann. § 65-4-101(6)(E), because this statute exempts only nonprofit cooperatives, not mere nonprofit corporations.

Berry's Chapel's position is that the TRA can do nothing to regulate a company that simply asserts, without more, that it is a non-utility. See the *Answer of Berry's Chapel Utility, Inc., to Petition for Declaratory Order*, Affirmative Defenses at paragraph 2. According to Berry's Chapel, once it asserts that it is a nonprofit corporation, the TRA must relinquish its regulatory role. Such a position, of course, defies logic and is without merit. The issue in this case is not whether Berry's Chapel is incorporated under the Nonprofit Corporation Act, but (1) whether Berry's Chapel is, in fact, a true nonprofit entity; and (2) whether Tenn. Code Ann. § 65-4-101(6)(E) indeed exempts all nonprofits from regulation rather than being limited to cooperatives as the Consumer Advocate maintains.

The Consumer Advocate's position that Tenn. Code Ann. § 65-4-101(6)(E) should not be construed as Berry's Chapel maintains is obviously a matter for a declaratory order because it seeks to determine the "applicability of a statute, rule or order within the primary jurisdiction of the agency." Tenn. Code Ann. § 4-5-223(a). It is impossible to imagine what could be more "primary" to the TRA than what is and is not a utility and thus subject to the regulation of the TRA. The TRA, therefore, should rule whether it accepts or rejects the Consumer Advocate's position on this statutory interpretation rather than passing the question to another state body as Berry's Chapel requests. The Consumer Advocate maintains the TRA is perfectly capable in law and fact of deciding both of the questions presented in the *Petition for a Declaratory Order*.

Even though Berry's Chapel does not state it directly, its position is that mere incorporation under the Nonprofit Corporation Act is sufficient to exempt a utility from TRA

regulation. As set forth in the Consumer Advocate's *Petition for a Declaratory Order*, such a construction presumes that the Tennessee Legislature intended the result of allowing a utility to escape TRA regulation by merely filing nonprofit papers, a presumption the Consumer Advocate roundly rejects.

A further indication of the untenable position of Berry's Chapel is the fact that the merger of Lynwood Utility Corporation ("Lynwood") into Berry's Chapel still left the Lynwood Certificate of Convenience ("CCN") intact. Berry's Chapel claims that Lynwood went out of existence when it merged into Berry's Chapel. The CCN, however, was not transferred to Berry's Chapel. The Consumer Advocate has reviewed the TRA dockets since Berry's Chapel announced the merger of Lynwood into Berry's Chapel and has found no indication that the CCN has ever been canceled. In fact, the Consumer Advocate has found no record that the TRA has ever publicly considered whether the merger of Lynwood into Berry's Chapel was valid under Tennessee law.

In its letter of September 17, 2010, to Mary Freeman, Chairman of the TRA, Berry's Chapel stated that "[u]nder the T.C.A. §65-4-112(b), the merger of Lynwood Utility Corporation into Berry's Chapel Utility, Inc. did not require any approval of the Authority since Berry's Chapel Utility, Inc. is a nonutility." (Emphasis added.) A copy of the letter is attached as **Exhibit A**. Tenn. Code Ann. §65-4-112(b) provides as follows:

(b) Any public utility as defined in § 65-4-101, may, without the approval or consent of the state of Tennessee or the authority, or any other agency of the state, sell, lease, or otherwise dispose of any of its property, including, but without limitation, franchises, rights, facilities, and other assets, and its capital stock, to any of the nonutilities defined in § 65-4-101.

It should be noted, however, that although the term "merger" does appear in §65-4-112(a), the term "merger" does not appear in §65-4-112(b):

§ 65-4-112. Property; utility leases, merges or consolidation

(a) No lease of its property, rights, or franchises, by any such public utility, and no merger or consolidation of its property, rights and franchises by any such public utility with the property, rights and franchises of any other such public utility of like character shall be valid until approved by the authority, even though power to take such action has been conferred on such public utility by the state of Tennessee or by any political subdivision of the state.

(b) Any public utility as defined in § 65-4-101, may, without the approval or consent of the state of Tennessee or the authority, or any other agency of the state, sell, lease, or otherwise dispose of any of its property, including, but without limitation, franchises, rights, facilities, and other assets, and its capital stock, to any of the nonutilities defined in § 65-4-101.

The Consumer Advocate maintains that in this situation there is an important difference between a "merger" and the decision of a utility to "sell, lease, or otherwise dispose of any of its property." If a public utility merges with another unregulated utility, the result is generally the disappearance of the first utility into the second one (this was the case in the merger of Lynwood into Berry's Chapel). As a result of the first utility's disappearance, the public being served by that public utility no longer has a fully functioning regulated utility to look to for service. Furthermore, the Certificate of Convenience and Necessity ("CCN") is no longer viable and has, in effect, been abandoned without a hearing. In a sale, lease, or disposal of any property, on the other hand, the first utility would still be alive and viable and the TRA and the public could use the CCN to effectively call on the utility to continue serving the public. Thus, if a utility chooses to sell or dispose of all or virtually all of its property it does so at its own peril because the requirement to serve the public would still be in place.

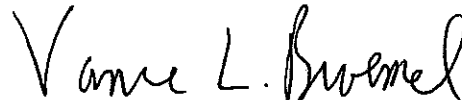
Accordingly, the persons who controlled Lynwood can still be called to account for the obligations imposed by a CCN to provide utility service because the merger of Lynwood into Berry's Chapel, whether or not it required TRA approval, had no effect on the CCN. If,

improbable as it seems, Berry's Chapel maintains that it may simply walk away from a CCN without TRA approval, the Consumer Advocate very much wants to be heard on that issue.

CONCLUSION

For the foregoing reasons, the TRA should reject the arguments of Berry's Chapel, convene a contested case, and set a hearing for the Consumer Advocate's Petition for a Declaratory Order.

RESPECTFULLY SUBMITTED,



VANCE L. BROEMEL (BPR #11421)

MARY LEIGH WHITE (BPR #26659)

Assistant Attorney General

Office of the Attorney General

Consumer Advocate and Protection Division

P.O. Box 20207

Nashville, Tennessee 37202-0207

(615) 741-8733

Dated: February __, 2011.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

Donald L. Scholes
Branstetter, Stranch & Jennings, PLLC
227 Second Avenue North, Fourth Floor
Nashville, TN 37201-1631

Vojin Janjic (vojin.janjic@tn.gov)
Department of Environment and Conservation
401 Church Street
L&C Annex 6th Floor
Nashville, Tennessee 37243

Gary Davis (gary.davis@tn.gov)
Wade Murphy (wade.murphy@tn.gov)
Department of Environment and Conservation
401 Church Street
L&C Annex 6th Floor
Nashville, Tennessee 37243

This the 11th day of February, 2011.

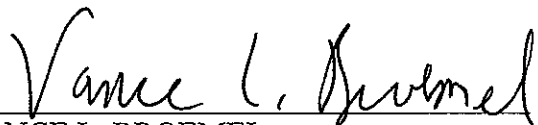

VANCE L. BROEMEL

EXHIBIT A

Received
MARY W. FREEMAN

SEP 17 2010

TN Regulatory Authority

BRANSTETTER, STRANCH & JENNINGS, PLLC

ATTORNEYS AT LAW
227 SECOND AVENUE NORTH
FOURTH FLOOR

NASHVILLE, TENNESSEE 37201-1631
TELEPHONE (615) 254-8801
FACSIMILE (615) 250-3937

CECIL D. BRANSTETTER, SR.
C. DEWEY BRANSTETTER, JR.
RANDALL C. FERGUSON
R. JAN JENNINGS *
JOE P. LENISKI, JR.
DONALD L. SCHOLES
JAMES G. STRANCH, III
J. GERARD STRANCH, IV
JANE B. STRANCH

ASSOCIATES:
B. DENARD MICKENS
STEVEN J. SIMERLEIN *
STACEY K. SKILLMAN **
MIKE STEWART
J. D. STUART
MICHAEL J. WALL

OF COUNSEL:
ROBERT J. RICHARDSON, JR. ***

*ALSO ADMITTED IN CA
**ALSO ADMITTED IN KY
***ONLY ADMITTED IN OH

September 17, 2010

*ALSO ADMITTED IN GA

Mary W. Freeman, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Via Hand Delivery

Re: Lynwood Utility Corporation – Berry's Chapel Utility, Inc.

Dear Chairman Freeman:

Effective September 1, 2010, the ownership of the sewer treatment and collection system of the Lynwood Utility Corporation became vested in Berry's Chapel Utility, Inc., a Tennessee nonprofit corporation. On September 1, 2010, Lynwood Utility Corporation merged into Berry's Chapel Utility, Inc. with Berry's Chapel Utility, Inc. assuming all of the assets and liabilities of Lynwood Utility Corporation. Lynwood Utility Corporation ceased to exist on the effective date of the merger. I have enclosed copies of the charter of Berry's Chapel Utility, Inc. and the Articles of Merger of Lynwood Utility Corporation into Berry's Chapel Utility, Inc. as filed with the Tennessee Secretary of State.

Pursuant to T.C.A. § 65-4-101(6)(E), Berry's Chapel Utility, Inc. is a nonutility because it is a nonprofit corporation. Under the T.C.A. § 65-4-112(b), the merger of Lynwood Utility Corporation into Berry's Chapel Utility, Inc. did not require any approval by the Authority since Berry's Chapel Utility, Inc. is a nonutility.

Please cancel the certificate of public convenience and necessity issued to Lynwood Utility Corporation. Thank you for your assistance in this matter.

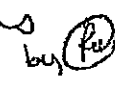
RECEIVED

Sincerely yours,

SEP 20 2010

TN REGULATORY AUTHORITY

Enclosures UTILITIES DIVISION
c: General Ryan McGehee
Tyler Ring
Jim Ford

DONALD L. SCHOLES by 



FILED
RECEIVED
STATE OF TENNESSEE

2010 JUL 16 PM 4:08

TRC HARGETT
SECRETARY OF STATE

**CHARTER
OF
BERRY'S CHAPEL UTILITY, INC.**

The undersigned, acting as the incorporator of a corporation under the Tennessee Nonprofit Corporation Act, adopts the following Charter for such corporation:

1. The name of the corporation is Berry's Chapel Utility, Inc.
2. This corporation is a mutual benefit corporation.
3. The initial registered agent for the corporation is Tyler L. Ring whose street address is 321 Billingsly Court, Suite 4, Franklin, Tennessee 37065.
4. The name and address of the incorporator is:

Tyler L. Ring
321 Billingsly Court, Suite 4
Franklin, TN 37065
5. The street address of the principal office of the corporation is 321 Billingsly Court, Suite 4, Franklin, Tennessee 37065.
6. This corporation is not for profit.
7. This corporation is not a religious corporation.
8. This corporation will not have members.
9. This corporation's initial directors and their addresses are:

John Ring
321 Billingsly Court, Suite 4
Franklin, TN 37065

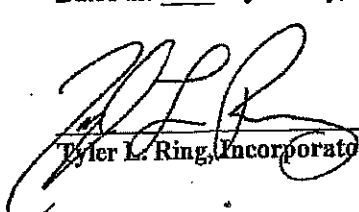
Tyler L. Ring
321 Billingsly Court, Suite 4
Franklin, TN 37065

James B. Ford
9679 Aurora Court
Brentwood, TN 37027

6745.2513

10. The purpose of the corporation shall be to own and operate a sanitary sewer collection and treatment system and to engage in any other lawful business.
11. Upon dissolution, after all creditors of the corporation have been paid, its assets shall be distributed to any person, partnership, limited partnership, limited liability company or corporation engaged in the sanitary sewer business or to the State of Tennessee or any county, municipality or political subdivision of the State of Tennessee.
12. To the extent allowed by the laws of the State of Tennessee, no present or future director of the corporation (or his or her estate, heirs and personal representatives) shall be liable to the corporation for monetary damages for breach of fiduciary duty as a director of the corporation. Any liability of a director (or his or her estate, heirs and personal representatives) shall be further eliminated or limited to the fullest extent allowed by the laws of the State of Tennessee, as may hereafter be adopted or amended.
13. With respect to claims or liabilities arising out of service as a director or officer of the corporation, the corporation shall indemnify and advance expenses to each present and future director and officer (and his or her estate, heirs and personal representatives) to the fullest extent allowed by the laws of the State of Tennessee, both as now in effect and as hereafter adopted or amended.

Dated the 14th day of July, 2010.


Tyler L. Ring, Incorporator

BK/PG:5103/363-365

10024679

CHARTER	
07/27/2010	11:22 AM
BATCH	184116
MIG TAX	0.00
TRN TAX	0.00
REC FEE	5.00
DP FEE	2.00
ARC FEE	0.00
TOTAL	7.00

STATE OF TENNESSEE, HILLMANSON COUNTY

SADIE WADE
REGISTER OF DEEDS

RECEIVED
STATE OF TENNESSEE
2010 JUL 16 PM 4:08
TRE HARGETT
SECRETARY OF STATE

Branstetter



STATE OF TENNESSEE
Tre Hargett, Secretary of State
Division of Business Services
312 Rosa L. Parks Avenue
6th Floor, William R. Snodgrass Tower
Nashville, TN 37243

Berry's Chapel Utility, Inc.
321 Billingsly Court
Suite 4
Franklin, TN 37065 USA

July 16, 2010

Filing Acknowledgment

Please review the filing information below and notify our office immediately of any discrepancies.

Control # :	635712	Formation Locale:	Williamson County
Filing Type:	Corporation Non-Profit - Domestic	Date Formed:	07/16/2010
Filing Date:	07/16/2010 4:08 PM	Fiscal Year Close	12
Status:	Active	Annual Rpt Due:	04/01/2011
Duration Term:	Perpetual	Image # :	6745-2519
Public/Mutual Benefit:	Mutual		

Document Receipt

Receipt #: 221470
Payment: Check/MO - BRANSTETTER STRANCH & JENNINGS, PLLC, NASHVILLE, TN

Filing Fee:	\$100.00
	\$100.00

Registered Agent Address

Tyler L. Ring
321 Billingsly Court
Suite 4
Franklin, TN 37065 USA

Congratulations on the successful filing of your Charter for Berry's Chapel Utility, Inc. in the State of Tennessee which is effective on the date shown above. You must also file this document in the office of the Register of Deeds in the county where the entity has its principal office if such principal office is in Tennessee.

You must file an Annual Report with this office on or before the Annual Report Due Date noted above and maintain a Registered Office and Registered Agent. Failure to do so will subject the business to Administrative Dissolution/Revocation.

Tre Hargett, Secretary of State
Business Services Division

Processed By: Cheryl Donnell

FILED
STATE OF TENNESSEE

**ARTICLES OF MERGER OF LYNWOOD UTILITY CORPORATION
INTO BERRY'S CHAPEL UTILITY, INC.**

2010 AUG 20 PM 3:13

SECRETARY OF STATE

Pursuant to the provisions of Section 48-21-107 of the Tennessee Business Corporation Act and Section 48-61-104 of the Tennessee Nonprofit Corporation Act, the undersigned domestic corporations hereby submit these Articles of Merger and state as follows:

6753-0428

1. The Plan of Merger is attached hereto and was approved by each of the herein named corporations in the manner prescribed by Section 48-21-104 of the Tennessee Business Corporation Act and Section 48-61-103 of the Tennessee Nonprofit Corporation Act.
2. As to Lynwood Utility Corporation, approval of the Plan by its shareholders is required by Section 48-21-101, *et seq.*, of the Tennessee Business Corporation Act, and the Plan was duly approved by the affirmative vote of all of the votes entitled to be cast, there being no voting by voting group.
3. As to Berry's Chapel Utility, Inc., which is the surviving corporation of the merger, the Plan was duly approved by a unanimous vote of its board of directors. Berry's Chapel Utility, Inc. has no members; therefore, no vote by the corporation's members was required.
4. These Articles of Merger shall not be effective upon filing by the Secretary of State, but the delayed effective date and time they are to become effective, and the merger is to take effect, is September 1, 2010, at 12:00 a.m.

Dated this 18th day of August, 2010.

LYNWOOD UTILITY CORPORATION

By: _____

Tyler L. Ring, President

BERRY'S CHAPEL UTILITY, INC.

By: _____

Tyler L. Ring, President