

STATE OF TENNESSEE

Office of the Attorney General



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February 11, 2011

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

FILED ELECTRONICALLY IN DOCKET OFFICE ON
02/11/11

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. Scholes:

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.

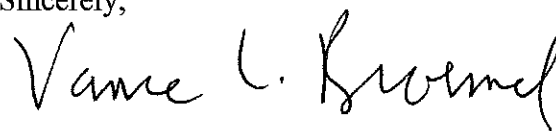
TRA Rule 1220-1-2-.11(1) provides that

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, with the hope that by submitting these requests now you will have more time to answer them.

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 style with a large, stylized 'V' and 'B'.

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

**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 DISCOVERY REQUESTS AND REQUESTS FOR
ADMISSION**

The Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”), pursuant to Tenn. Code Ann. § 4-5-311 (Uniform Administrative Procedures Act –Discovery); Tennessee Rules of Civil Procedure Nos. 26 (General Provisions Regarding Discovery), 33 (Interrogatories to Parties), 34 (Production of Documents), and 36 (Requests for Admission); and Rule 1220-1-2-.11 (Discovery) of the Tennessee Regulatory Authority (“TRA”), respectfully submits the following discovery requests and requests for admission to Berry’s Chapel Utility, Inc. (“Berry’s Chapel”).

DISCOVERY REQUESTS

1. Please state the reason(s) for merging Lynwood Utility Corporation into Berry’s Chapel Utility, Inc. (“Berry’s Chapel”)
2. In its letter of September 17, 2010, to Mary Freeman, Chairman of the TRA, Berry’s Chapel stated “[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.

In light of Berry's Chapel's claim that the "merger" did not require any approval by the Authority, please indicate what provision in §65-4-112(b) exempts a "merger" from the requirement of approval by the Authority¹. In responding to this request, it should be noted 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,

¹ 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.

rights, facilities, and other assets, and its capital stock, to any of the nonutilities defined in § 65-4-101.

3. Please state all reasons or evidence for Berry's Chapel's contention that it is a nonprofit corporation.

4. Please provide any evidence of a ruling or determination by the Internal Revenue Service that Berry's Chapel is a nonprofit corporation or is otherwise exempt from certain federal taxation based on nonprofit status. If no such ruling or determination has been made or requested, state whether and when Berry's Chapel intends to make such a request.

5. Please provide any evidence of a ruling or determination by the state Property Assessor or Department of Revenue that Berry's Chapel is a nonprofit corporation or is otherwise exempt from certain state taxation based on nonprofit status. If no such ruling or determination has been made or requested, state whether and when Berry's Chapel intends to make such a request.

6. Is Berry's Chapel using any accounting system or procedures specific to nonprofit corporations, including but not limited to Generally Accepted Accounting Principles (GAAP) for nonprofits? If so, describe the system and/or procedures.

7. Please produce all corporate records of Berry's Chapel, including but not limited to the corporate minute book and documents filed with the Secretary of State.

8. Please produce all accounting and financial records of Berry's Chapel, including but not limited to accounting ledgers and journals, chart of accounts, tax returns, and checking and banking accounts.

9. Has Berry's Chapel filed a Form 990 federal tax return? If not, state whether and when Berry's Chapel intends to file a Form 990.

10. In *Berry's Chapel Utility, Inc. Rate Change Notice*, Berry's Chapel stated that "[b]ased on our rate study as of September 1, 2010, we are not producing enough revenue to meet the requirements as set forth in our TDEC (Tennessee Dept. Environment & Conservation) permit." Please provide a copy of the "rate study" referred to. In addition, state the amount of the "requirements as set forth in our TDEC (Tennessee Dept. Environment & Conservation) permit."

11. In *Berry's Chapel Utility, Inc. Rate Change Notice*, Berry's Chapel stated:

[t]his, along with the repairs and replacement required by the flood damages to the Treatment Plant not covered by our national Flood Insurance Plan will require an increase in our annual revenues.

Describe and provide documentation for "the repairs and replacement required by the flood damages to the Treatment Plant." In addition, describe and provide documentation for what part of the cost of the repairs and replacement required by the flood damages were covered by the National Flood Insurance Plan or any other insurance, and what costs were not so covered.

12. Please list the names, titles, and salaries or other remuneration, or expense accounts of anyone employed by, acting as a consultant to, or otherwise acting on behalf of Berry's Chapel.

13. Has the salary, remuneration, consultant's fee, or expense accounts of anyone employed by, acting as consultant to, or otherwise acting on behalf of Berry's Chapel been increased or decreased from the amount when employed by or acting on the behalf of Lynwood Utility? If so, state the amount.

14. Paragraph 4(c) of the *Agreement and Plan of Merger* of Berry's Chapel states that ...the Lynwood sewer treatment and collection system shall be transferred to the books and records of Berry's Chapel at the fair

market value on the effective date with an approximate value of \$5,580,000.

In the last rate case before the TRA, Docket No. 09-00034, Lynwood set its total assets at \$2,020,694.15, with an approximate \$1.2 million in debt to a bank. Please explain the basis of the \$5,580,000 valuation and provide all supporting documentation.

15. Paragraph 4 (Covenants) of the *Agreement and Plan of Merger* of Berry's Chapel provides that

Berry's Chapel shall issue a promissory note to John Ring in the approximate amount of \$1,200,000 and a promissory note to Tyler L. Ring in the approximate amount of \$1,200,000, John Ring and Tyler Ring being the shareholders of Southern Utility Corporation, the sole shareholder of Lynwood, with such promissory notes to be secured by a second mortgage on the real property and a first lien on the personal property of Berry's Chapel.

Please state the basis of determining that John Ring and Tyler L. Ring should each be issued a promissory note by Berry's Chapel, and provide all supporting documentation.

16. The charter of Berry's Chapel, numbered item 2, states that "[t]his corporation is a mutual benefit corporation." Please provide the names of the person(s) or entities that mutually benefit and describe the manner in which they benefit, including but not limited to any financial benefit.

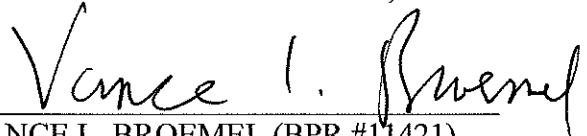
17. Please state whether Berry's Chapel contends that it has exclusive franchise authority in its service area. In addition, please provide a copy of the Certificate of Convenience and Necessity ("CCN") of Lynwood Utility Corporation as well as any evidence of any act of cancellation of that CCN by the TRA.

18. Please provide any notices of rate increases occurring after September 1, 2010, directed to consumers of Berry's Chapel.

REQUESTS FOR ADMISSION

1. Admit that there has been no ruling or determination by the Internal Revenue Service that Berry's Chapel is a nonprofit corporation or is otherwise exempt from certain federal taxation based on nonprofit status.
2. Admit that there has been no ruling or determination by the state Property Assessor or Department of Revenue that Berry's Chapel is a nonprofit corporation or is otherwise exempt from certain taxation based on nonprofit status.
3. Admit that Berry's Chapel is not using any accounting system or procedures specific to nonprofit corporations, including but not limited to Generally Accepted Accounting Principles (GAAP) for nonprofits.
4. Admit that Berry's Chapel does not intend to file a Form 990 federal tax return for the year 2010.
5. Admit that Berry's Chapel no longer has exclusive franchise authority over wastewater services in the area it serves.

RESPECTFULLY SUBMITTED,



VANCE L. BROEMEL (BPR #11421)

Senior Counsel

MARY LEIGH WHITE (BPR #26659)

Assistant Attorney General

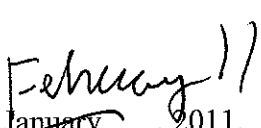
Office of the Attorney General

Consumer Advocate and Protection Division

P.O. Box 20207

Nashville, Tennessee 37202-0207

(615) 741-8733


Dated: January, 2011.

CERTIFICATE OF SERVICE

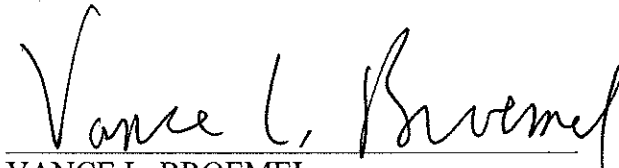
I hereby certify that a true and correct copy of the foregoing Discovery Requests and Requests for Admission was served via U.S. Mail or electronic mail upon:

Donald L. Scholes
Branstetter, Stranch & Jennings, PLLC
227 Second Avenue North, Fourth Floor
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Gary Davis (gary.davis@tn.gov)
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401 Church Street
L&C Annex 6th Floor
Nashville, Tennessee 37243

This the 11 day of February, 2011


VANCE L. BROEMEL