IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	
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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**

CONSUMER ADVOCATE'S INITIAL BRIEF THAT BERRY'S CHAPEL UTILITY, INC., IS A PUBLIC UTILITY UNDER TENNESSEE LAW AND SHOULD BE REGULATED BY THE TRA

The Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to the Hearing Officer's Notice of February 11, 2011, hereby submits its Initial Brief on the issue of whether Berry's Chapel Utility, Inc., is a public utility under Tennessee law and should be regulated by the Tennessee Regulatory Authority ("TRA"). The Hearing Officer's Notice directed the parties to address three issues:

1. Whether the TRA has the authority under Tennessee law to make a determination with respect to whether Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company is a nonprofit corporation or a public utility as defined in Tenn. Code Ann. § 65-4-101(6).

2. Whether Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company is a public utility under Tennessee law and subject to regulation by the TRA.

3. Whether customers of Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company are entitled to a refund of any increase in rates that was put into place through the Rate Change Notice, which called for a $20 per month increase effective November 1, 2010.

The Consumer Advocate's position on these three issues is as follows:

1. Yes, the TRA does have authority under Tennessee law to make a determination with respect to whether Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company is a nonprofit corporation or a public utility as defined in Tenn. Code Ann. § 65-4-101(6).

2. Yes, Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company is a public utility under Tennessee law and subject to regulation by the TRA.

3. Yes, customers of Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company are entitled to a refund of any increase in rates that was put into place through the Rate Change Notice, which called for a $20 per month increase effective November 1, 2010.

INTRODUCTION

Berry's Chapel Utility, Inc. ("Berry's Chapel") is a utility formed by the merger of Lynwood Utility Corporation into Berry's Chapel. Prior to the merger, Lynwood Utility Corporation ("Lynwood Utility" or "Lynwood") was a Tennessee corporation providing wastewater services to the Cottonwood residential community near Franklin, Tennessee. Lynwood Utility had a Certificate of Convenience and Necessity granted by the TRA and was subject to regulation by the TRA as a public utility authorized to earn a just and reasonable rate of return, including a profit. According to a letter filed by counsel for Lynwood Utility, effective September 1, 2010, Lynwood Utility was merged into Berry's Chapel, a company with a charter stating that it is incorporated under the Tennessee Nonprofit Corporation Act as a "mutual benefit corporation." Furthermore, according to the same letter from counsel for Lynwood Utility, Berry's Chapel is a "nonutility because it is a nonprofit corporation." Therefore, according to Berry's Chapel, it should be exempt from regulation by the TRA.

The Consumer Advocate disputes Berry's Chapel's claim that it is not a public utility and that it is exempt from TRA regulation. Accordingly, the Consumer Advocate has filed the

present *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*. The TRA has now set a hearing in this matter and requested the parties to set forth their positions on these issues.

1. **The TRA Has Authority to Determine that Berry's Chapel Is a Nonprofit Corporation or a Public Utility**

In Tenn. Code Ann. § 65-4-104, the Tennessee Legislature expressly granted the TRA the power to regulate all public utilities. Inherent in and necessary to the power to regulate utilities is the power to determine what a utility is. It is, therefore, no accident that the first section in the Tennessee Code Chapter that sets forth the TRA's regulatory powers, "Regulation of Public Utilities by Commission," is entitled "Public utilities defined." *See* Tenn. Code. Ann. § 65-4-101. If the TRA does not have the authority to apply the definition of what a public utility is, any public utility could simply declare itself to be some form of entity that is not subject to TRA regulation and the TRA would be prohibited from inquiring into whether the entity was really what it claimed to be.

Accordingly, the TRA has ample authority under Tennessee law to determine whether Berry's Chapel is a nonprofit corporation or a public utility.

2. **Berry's Chapel Is a Public Utility Under Tennessee Law and Subject to Regulation by the TRA**

The statute under which Berry's Chapel claims to be exempted from regulation by the TRA is inapplicable to a corporation such as Berry's Chapel. Berry's Chapel claims that it is a nonutility under Tenn. Code Ann. § 65-4-101(6)(E) because it is a "nonprofit corporation." Tenn. Code Ann. § 65-4-101(6)(E) provides as follows:

> . . . . (6) "Public utility" as defined in this section shall not be construed to include the following nonutilities:

(E) Any cooperative organization, association or corporation not organized or doing business for profit.

Berry's Chapel, however, is not a "cooperative" corporation not organized or doing business for profit as required by this statute. A plain reading of Tenn. Code Ann. § 65-4-101(6)(E) shows that the only kind of "nonprofit" that can be excluded from the definition of a "public utility" is one that is "cooperative" in nature because the word "cooperative" must be read in front of each of the terms "organization," "association," and "corporation" for the statute to make sense and to effectively protect Tennessee consumers from utilities operating in a monopolistic environment. Otherwise, under Berry's Chapel's reading of the statute, any utility simply calling itself an "association," for example, would be free from TRA regulation. A cooperative is an organization composed of and responsible to the members it serves. The Charter of Berry's Chapel, however, shows that there are no members. There are only three persons listed on the incorporation papers of Berry's Chapel and two of them, the Rings, are the main creditors or, in effect, the owners of the company: John Ring; Tyler L. Ring; and James B. Ford. The persons who would ordinarily be "members" of the cooperative corporation are Berry's Chapel's captive customers who have virtually no input into or control over Berry's Chapel and cannot opt for another service provider since their wastewater system has long operated in a state-sanctioned monopoly environment. Accordingly, Berry's Chapel does not meet the definition of a cooperative corporation.

Thus, the emphasis on the term "cooperative" in interpreting the statute under which Berry's Chapel is seeking to avoid regulation by the TRA is absolutely critical. Because if a utility is a true cooperative composed of the members it serves there is a built-in mechanism to ensure that the persons served by the utility are not completely at its mercy. If, however, Berry's

Chapel's position is accepted there is nothing to stop those persons who control and benefit by the utility from charging its captive customers as much as those persons want.

This case, therefore, goes to the very heart of public utility regulation. Governmental regulation of utilities is supposed to serve as a proxy for regulation by the market place because in a monopoly situation such as exists in the case of Berry's Chapel there is no true market. Berry's Chapel's customers cannot simply contract for other sewer service; they are literally tied to their service provider. So if Berry's Chapel's interpretation of the law is accepted, their customers do not have the protection of the market, the government, or a self-governing cooperative. Surely the Legislature did not intend such a result. Therefore, the Consumer Advocate requests the TRA to interpret the law as the Legislature intended and protect the customers of Berry's Chapel.

In addition, the new company formed by the merger, Berry's Chapel, has presented to the TRA no indicia of a nonprofit corporation other than a form submitted to the Tennessee Secretary of State. The Consumer Advocate, therefore, maintains that the TRA should disregard the mere **form** of nonprofit corporate status alleged by Berry's Chapel and find that the **substance** of the corporation is that of a for-profit utility and that Berry's Chapel is therefore subject to the regulation of the TRA.

3. Customers of Berry's Chapel Are Entitled to a Refund of any Increase in Rates

Finally, since Berry's Chapel is a public utility under Tennessee law and subject to TRA regulation, any rate increases it imposes are subject to approval of the TRA. Berry's Chapel, however, did not obtain such approval before imposing a $20 per month rate increase on its customers. Accordingly, the rate increase was improper and the money obtained from the improper increase should be returned to the customers.

I. THE TRA HAS THE AUTHORITY UNDER TENNESSEE LAW TO MAKE A DETERMINATION WITH RESPECT TO WHETHER BERRY'S CHAPEL UTILTY, INC. F/K/A LYNWOOD UTILITY COMPANY IS A NONPROFIT CORPORATION OR A PUBLIC UTILITY AS DEFINED IN TENN. CODE ANN. § 65-4-101(6)

In Tenn. Code Ann. § 65-4-104, the Tennessee Legislature expressly granted the TRA the power to regulate all public utilities. Inherent in and necessary to the power to regulate utilities is the power to determine what business activities constitute that of a utility? It is, therefore, no accident that the first section in the Tennessee Code Chapter that sets forth the TRA's regulatory powers, "Regulation of Public Utilities by Commission," is entitled "Public utilities defined." *See* Tenn. Code. Ann. § 65-4-101. If the TRA does not have the authority to apply the definition of what a public utility is, any public utility could simply declare itself to be some form of entity that is not subject to TRA regulation and the TRA would be prohibited from inquiring into whether the entity was really what it claimed to be.

Tenn. Code Ann. § 65-4-104, the statute that gives the TRA the power to regulate all public utilities, provides as follows:

> The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter. However, such general supervisory and regulatory power and jurisdiction and control shall not apply to street railway companies.

In addition, the Tennessee Legislature expressly granted the TRA the power to issue declaratory orders. *See* Tenn. Code Ann. § 65-2-104 which provides as follows:

> On the petition of any interested person, the authority may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it or with respect to the meaning and scope of any order of the authority. A declaratory ruling, if issued after argument and stated to be binding, is binding between the authority and the petitioner on the state of facts alleged in the petition, unless it is altered or set

> aside by a court in a proper proceeding. Such rulings are subject to review in the chancery court of Davidson County in the manner provided in this chapter for the review of decisions in contested cases. The authority shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

So in addition to the TRA's own Rule governing declaratory orders, TRA Rule 1220-1-2-.05, the Consumer Advocate is before the TRA with its *Petition for a Declaratory Order that Berry's Chapel Is a Public Utility Under Tennessee Law and Should Be Regulated by the TRA* pursuant to this statute, Tenn. Code Ann. § 65-2-104.

Moreover, the Tennessee Legislature has expressly provided that the chapter containing the statute regarding declaratory orders is to be liberally construed:

> This chapter shall not be construed as in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or the extent of a power shall be resolved in favor of the existence of the power.

Tenn. Code Ann. § 65-2-121.

With regard to whether the TRA has ever exercised its authority to determine whether a specific entity is or is not a public utility as defined in Tenn. Code Ann. § 65-4-101, the TRA has to look no further than letters written by its own legal staff on this very issue of a nonprofit corporation. In the course of preparing its *Petition for a Declaratory Order*, the Consumer Advocate learned that in 2008 attorneys for the TRA wrote letters allowing a homeowners association which operated a wastewater system to avoid regulation by the TRA on the ground that it was a nonprofit corporation. A copy of these letters is attached as **Collective Exhibit A (A-1, A-2, A-3).** This matter, which involved the Fairfield Glade Homeowners Association, was not a contested case, nor did it involve public deliberations by the TRA directors. Furthermore, the Consumer Advocate was unaware at the time of this position taken by attorneys for the TRA. It should also be noted that the Fairfield Glade matter is distinguishable from the present case in

that there were actual members of the association as opposed to Berry's Chapel which has no members, and the association was a 501(C)(4) nonprofit. *See* **Exhibit A-1**. Therefore, in its *Petition for a Declaratory Order*, the Consumer Advocate requested the TRA Directors to give the position expressed in the Fairfield Glade letters no precedential weight.

Even so, the letters clearly show that the TRA believed itself capable of determining and applying the definition of a public utility. For example, the letter of June 26, 2008, from counsel for the TRA, attached as **Exhibit A-3**, states that "[o]nce we established that Fairfield Glade Community Club was operating as a nonprofit corporation, the issue became whether Fairfield Glade Community Club would be acting beyond the authority in its charter as a nonprofit corporation by performing a utility function." The word "established" indicates the counsel for the TRA did not merely take the word of the utility as to its corporate status but actually looked into how the utility "operated." Furthermore, in a letter from counsel for the homeowners association dated April 16, 2008, attached as **Exhibit A-1**, counsel states that Fairfield Glade Community Club "has been recognized as a tax-exempt not-for-profit 501(c)(4) corporation by the IRS." Counsel for the association also attached a copy of the association's charter which indicates the association did in fact have members. These elements, how the entity actually operates, whether it has federal tax-exempt status, and whether it has members, are all factors the Consumer Advocate has asked the TRA to consider in the present case.

Now that the Consumer Advocate has come before the TRA and asked for a similar exercise of determining the definition of a public utility in specific circumstances, it is hoped that the TRA will not follow the practice of using the definition of public utility to grant **exemptions** from regulatory authority but not use the definition of public utility to determine that the **application** of regulatory authority is warranted.

Another example of how the TRA uses its authority to go behind the mere surface of a utility's request is the process by which requests for Certificates of Convenience and Necessity ("CCN") are handled. When a company applies to the TRA for a CCN it states that it has sufficient managerial, financial and technical abilities to provide the services it intends to offer. *See, e.g., BellSouth BSE, Inc. v. Tennessee Regulatory Authority*, 2003 WL 354466 (February 18, 2003), attached as **Exhibit B**. The TRA, however, does not merely take the company at its word but generally conducts a hearing to test the validity of the statements in the application. *Id.*

If agencies such as the TRA did not have the authority to make a determination of whether a company should be regulated, agencies' ability to regulate would be severely restricted. There are, however, examples in Tennessee law where agencies exercised their regulatory powers in the face of claims by companies that they were not subject to regulation. *See ,e.g., H&R Block Eastern Tax Services, Inc. v. State of Tennessee, Department of Commerce and Insurance*, 267 S.W.3d 848 (Tenn. Ct. App. 2008). In *H&R Block*, the Department of Commerce and Insurance asserted that a product sold by H&R Block was insurance and, therefore, H&R Block should be subject to regulation by the Department. *Id.* at 849, 852. H&R Block opposed the Department's position and sought a declaratory order that their product was not insurance and that it was not subject to regulation by the Department. *Id.* at 849, 852. In the *H&R Block* case, the Court of Appeals ultimately held that the product was not insurance, but there was no challenge to the Department's authority to assert that a previously unregulated company should be subject to Department regulation.

In summary, the TRA has the following basis for the authority to act regarding Berry's Chapel: (1) the TRA has clear statutory authority to issue declaratory orders construing and applying its own statutes such as the one defining public utilities; and (2) the TRA has the staff,

expertise, and actual experience in similar situations such as the Fairfield Glade matter and CCN proceedings to determine if the entity is what it claims to be, in this case, if Berry's Chapel is truly a not for profit entity.

Finally, the Consumer Advocate would also note that the TRA has authority to act in this situation based on its power over CCNs. In the present case, the CCN of Lynwood is apparently still in effect because when Lynwood was merged into Berry's Chapel the CCN was not transferred or even attempted to be transferred. *See* the letter of September 17, 2010, attached as **Exhibit C**, from Donald Scholes to Mary Freeman, Chairman of the TRA.

In previous filings with the TRA the Consumer Advocate has drawn attention to the fact that the merger of Lynwood into Berry's Chapel needed approval by the TRA because the statute under which Berry's Chapel claimed authority to consummate the merger, Tenn. Code Ann. § 65-4-112(b) does not specifically refer to mergers. *See, e.g., Consumer Advocate's Reply to the Answer of Berry's Chapel Utility, Inc., to Petition for Declaratory Judgment.* 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 C**. Tenn. Code Ann. §65-4-112(b) provides as follow:

> (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 <u>any</u> property, on the other hand, the first utility would still be alive and viable and the TRA and the public could use the CNN 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.

For the foregoing reasons, the TRA should determine that it has the authority under Tennessee law to make a determination with respect to whether Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company is a nonprofit corporation or a public utility as defined in Tenn. Code Ann. § 65-4-101(6).

II. BERRY'S CHAPEL F/K/A LYNWOOD UTILITY COMPANY IS A PUBLIC UTILITY UNDER TENNESSEE LAW AND SUBJECT TO REGULATION BY THE TRA

A. BERRY'S CHAPEL IS NOT A "COOPERATIVE" CORPORATION AS REQUIRED BY THE STATUTE EXCLUDING CERTAIN ENTTITIES FROM THE DEFINITION OF PUBLIC UTILITIES

The statute under which Berry's Chapel claims to be exempted from regulation by the TRA is inapplicable to a corporation such as Berry's Chapel. In its letter of September 17, 2010, attached as **Exhibit C**, Berry's Chapel claims that it is a nonutility under Tenn. Code Ann. § 65-4-101(6)(E) because it is a "nonprofit corporation." Tenn. Code Ann. § 65-4-101(6)(E) provides as follows:

> . . . . (6) "Public utility" as defined in this section shall not be construed to include the following nonutilities:
>
> (E) Any cooperative organization, association or corporation not organized or doing business for profit.

A copy of Tenn. Code Ann. § 65-4-101 is attached as **Exhibit D** for convenience of reference.

Berry's Chapel, however, is not a "cooperative" corporation as required by this statute. A plain reading of Tenn. Code Ann. § 65-4-101(6)(E) shows that the only kind of nonprofit that is to be excluded from the definition of a "public utility" is one that is "cooperative" in nature. Thus, the word "cooperative" must be read in front of each of the terms "organization," "association," and "corporation" for the statute to make sense and to effectively protect Tennessee consumers from utilities operating in a monopolistic environment. Berry's Chapel, on the other hand, wants to isolate the words "corporation not organized or doing business for profit" from the rest of the sentence and not give any meaning to the term "cooperative." In

effect, this would create a stand-alone exclusion from the definition of public utility. As will be shown, however, such a reading is contrary to the well-accepted rules of statutory construction.

Any reading of subsection (E) other than the one advanced by the Consumer Advocate which reads the word "cooperative" before each of the terms "organization," "association," and "corporation" would lead to absurd results. For example, if the terms "association" and "corporation" are read as being unmodified by the term "cooperative," any utility currently regulated by the TRA could simply change its name to include the word "association" and then, as if by magic, it would become an unregulated utility because "associations," so the argument would go, are to be excluded from the definition of public utility. After all, just look at the word "association" in the statute, so the logic of Berry's Chapel would dictate, and the conclusion is obvious, that an "association" should be unregulated:

> . . . . (6) "Public utility" as defined in this section shall not be construed to include the following nonutilities:
>
> (E) Any cooperative organization, association or corporation not organized or doing business for profit.

Tenn. Code Ann. § 65-4-101(6)(E). The law, however, abhors such absurd results when construing statutes. *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010). Furthermore, as will be discussed below, even if the term "association" were read as being linked to the words "not organized or doing business for profit," that would not eliminate the problem of absurd results. In particular, subsection (E) would conflict with a later provision in the statute, namely, section (7) which provides that the term "'[p]ublic utility'" does not mean nonprofit homeowners associations or organizations . . . ." In short, if an "association" were construed as being a non-utility under subsection (E), there would be no need for the later section (7) which exempts associations of homeowners.

Moreover, unless the word "cooperative" is read as modifying each of the terms, "organization," "association" and "corporation," the word "cooperative" would have only a confused purpose at best in the statute. In fact, if the term "cooperative" is read as applying only to the term "cooperative organization," subsection (E) would have to be read as excluding from the definition of public utility an entity that was not necessarily a nonprofit because there is nothing inherently nonprofit about a "cooperative organization." In fact, the statute governing electric cooperatives recognizes that unless an electric cooperative is formed under the act governing such cooperatives, there is a virtual presumption that it is not a nonprofit. Tenn. Code Ann. § 65-25-223 provides as follows:

> Cooperatives and foreign corporations transacting business in this state pursuant to this part shall be deemed to be not-for-profit cooperatives and nonutilities, and, except as provided in § 65-25-222, exempt in all respects from the jurisdiction and control of the Tennessee regulatory authority.

However, as will be seen below, one of the stated purposes of the original legislation that created the exclusion in subsection (E) was to exempt "certain non-profit organizations" from the definition of public utility. Accordingly, it is the Consumer Advocate's reading of the word "cooperative" in subsection (E) that gives true meaning to that word; and when the Legislature used the word "cooperative," it is to be presumed "that the Legislature used each word in the statute purposely and that the use of these words conveyed some intent and had a meaning and a purpose." *Anderson Fish & Oyster Company, Inc. v. Olds*, 277 S.W.2d 344, 345 (Tenn.1955).

As stated above, if subsection (E) is read so as to exclude from the definition of public utility a mere "association," whether for-profit or not, there would be a conflict with section (7) of Tenn. Code Ann. § 65-4-101 which provides as follows:

> (7) "Public utility" does not mean nonprofit homeowners associations or organizations whose membership is limited to

> owners of lots in residential subdivisions, which associations or organizations own, construct, operate or maintain water, street light or park maintenance service systems for the exclusive use of that subdivision; provided, however, that the subdivisions are unable to obtain such services from the local utility district. None of the property, property rights or facilities owned or used by the associations or organization for the rendering of such services shall be under the jurisdiction, supervision or control of the Tennessee regulatory authority.

That is, if a mere "association," as opposed to a "cooperative association," were to be excluded from the definition of public utility as must be the case if the term "cooperative" is not read as modifying "association," any homeowner's association, certainly a non-profit one, would already be a non-utility and not subject to the jurisdiction of the TRA. Clearly, however, the Legislature did not believe that associations of homeowners were already excluded when they added section (7). Otherwise, section (7) would be superfluous and it is presumed "that the General Assembly did not intend to enact a useless statute." *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010). Furthermore, a statute should be construed "in a way that avoids conflict and facilitates the harmonious operation of the law." *See Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010).

The reading of subsection (E) advanced by the Consumer Advocate is also consistent with another statute involving nonprofit entities, Tenn. Code Ann. § 48-58-601(c), which provides as follows:

> (c) All directors, trustees or members of the governing bodies of nonprofit cooperatives, corporations, clubs, associations and organizations described in subsection (d), whether compensated or not, shall be immune from suit arising from the conduct of the affairs of such cooperatives, corporations, clubs, associations or organizations. Such immunity from suit shall be removed when such conduct amounts to willful, wanton or gross negligence. Notwithstanding other provisions of this subsection to the contrary, all directors, trustees or members of the governing bodies of nonprofit cemetery corporations, associations and organizations

> referred to in subdivision (d)(6) shall be immune from personal liability only if such cemetery corporations, associations or organizations carry liability insurance coverage in an amount to be determined by the department of commerce and insurance; provided, that such requirement shall not apply in any county having a population of not less than six thousand (6,000) nor more than six thousand one hundred twenty-five (6,125) according to the 1980 federal census or any subsequent federal census. Nothing in chapters 51-68 of this title shall be construed to grant immunity to the nonprofit cooperative, corporation, association or organization. (Emphasis added)

In Tenn. Code Ann. § 48-58-601(c) the word "nonprofit" in the phrase "governing bodies of nonprofit cooperatives, corporations, clubs, associations and organizations" clearly modifies each of the terms in the phrase. Otherwise the phrase could be read to mean that all corporations or clubs, not just nonprofit ones, would have the immunity described in the statute, an obviously absurd result. Similarly, in subsection (E) of Tenn. Code Ann. § 65-4-101(6)(E), the word "cooperative" must be read as modifying each of the terms in the phrase "[a]ny cooperative organization, association or corporation not organized or doing business for profit" in order to avoid the absurd results previously discussed.

The section of the Tennessee Code which excludes certain nonprofits from regulation as "public utilities" was passed in 1935, 1935 Public Acts, Chapter 42. As in the current Tennessee Code Annotated, Public Chapter 42 contains an exclusion from the definition of "public utility" for "(e) any cooperative organization, association or corporation not organized or doing business for profit." A copy of 1935 Public Acts, Chapter 42 is attached as **Exhibit E**. The Preamble to Chapter 42 provides as follows:

> AN ACT to define and limit the authority, powers and jurisdiction of the Railroad and Public Utilities Commission so as to exempt therefrom certain Federal and State Corporations, Agencies, Instrumentalities, and other public bodies and **certain non-profit organizations** herein defined as non-utilities; to authorize utilities to sell, lease or otherwise dispose of their property to non-utilities;

> and as a part hereof to amend sections 5380 to 5508, inclusive, of the official code of Tennessee, passed at the regular session of the General Assembly of the State of Tennessee in 1931, known as the Code of Tennessee of 1932, said section of the code defining the "Public Utility." (Emphasis added)

Significantly, the Preamble provides that "certain non-profit organizations" are to be excluded from the definition of "public utilities." Thus, it is clear from the Preamble that as regards subsection (E), any entity wishing to be excluded from the definition of public utility must be a nonprofit. However, unless the word "cooperative" is read as applying to each of the terms "organization," "association," and "corporation" the result would be that a mere cooperative organization (regardless of whether it was nonprofit or not) and a mere association (regardless of whether it was nonprofit or not) would be considered nonutilities contrary to the intent of the statute. Such, however, cannot be the case given the clear intent of the Legislature that only "nonprofits" would be excluded from regulation under subsection (E).

References to cases in Tennessee establish that there are numerous "cooperative corporations" in Tennessee, so the reading of subsection (E) putting the term "cooperative" before the term "organization," "association," and "corporation" is consistent with actual corporate practice. *See, e.g., Franklin Power & Light Company v. Middle Tennessee Electric Membership Corporation*, 434 S.W.2d 829, 830 (Tenn.1968) ("The complainant is a co-operative, non-profit electric membership corporation chartered in 1936"); and *City of South Fulton v. Hickman-Fulton Counties Rural Electric Cooperative Corporation*, 976 S.W.2d 86 (Tenn.1998)(a printout from Secretary of State noting nonprofit status is attached as **Exhibit F**).

In addition, the case of *Tiger Creek Bus Line v. Tiger Creek Transp. Ass'n, Inc.*, 216 Sw.2d 348 (Tenn. 1948), dealt explicitly with the issue of whether a non-profit cooperative was exempt from regulation pursuant to the exemption first promulgated under 1935 Public Acts,

Chapter 42 for "any cooperative organization, association or corporation not organized or doing business for profit." In *Tiger Creek*, a bus line organized as a non-profit cooperative sought exemption from regulation on the basis that it was not a "public utility." The Court apparently agreed that the entity in question was a non-profit cooperative, but then held that it was subject to regulation under the Motor Carrier Act. The relevant point here, however, is that this case demonstrates entities in Tennessee have been organized as non-profit cooperatives and have sought exemption on that basis, not on the basis that they were mere non-profits.

Black's Law Dictionary, Seventh Edition (1999), defines "cooperative corporation" as "[a]n entity that has a corporate existence, but is primarily organized for the purpose of providing services and profits to its members and not for corporate profit." That is, it is an organization composed of and responsible to the members it serves. As stated above, however, the Charter of Berry's Chapel, **Exhibit G**, states that it has no members. There are only three persons listed in the Charter of Berry's Chapel and two of them, the Rings, are the main creditors or, in effect, the owners of the company: John Ring; Tyler L. Ring; and James B. Ford. The persons who would ordinarily be "members" of the cooperative corporation are Berry's Chapel's captive customers who have virtually no input into or control over Berry's Chapel and cannot opt for another service provider since their wastewater system has long operated in a state-sanctioned monopoly environment. Accordingly, Berry's Chapel does not meet the definition of a cooperative corporation.

The emphasis on the term "cooperative" in interpreting the statute under which Berry's Chapel is seeking to avoid regulation by the TRA is absolutely critical. Because if a utility is a true cooperative composed of the members it serves there is a built-in mechanism to ensure that the persons served by the utility are not completely at its mercy. If, however, Berry's Chapel's

position is accepted there is nothing to stop those persons who control and benefit by the utility from charging its captive customers as much as those persons want.

The main purpose of Tenn. Code Ann. § 65-4-101(6)(E) is to exempt "cooperatives" such as electric cooperatives from regulation by the TRA, a fact long recognized by the TRA. The fact that Tenn. Code Ann. § 65-4-101(6)(E) exempts "cooperatives" from regulation by the TRA is shown in Tenn. Code Ann. § 65-25-234, which governs electric cooperatives, and which provides as follows:

> (a) Every cooperative has the power and is authorized, acting through its board of directors, to acquire, construct, own, improve, operate, lease, maintain, sell, mortgage, pledge or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications services, or any other like system, plant, or equipment within and/or without the service area of such cooperative in compliance with title 65, chapters 4 and 5, and all other applicable state and federal laws, rules and regulations. Notwithstanding § 65-4-101(6)(E) or any other provision of this code or of any private act to the contrary, to the extent that any cooperative provides any of the services authorized by this section, such cooperative shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, without limitation, rules or orders governing anti-competitive practices, and shall be considered as and have the duties of a public utility, as defined in § 65-4-101, but only to the extent necessary to effect such regulation and only with respect to such cooperative's provision of telephone, telegraph and communication services. (Emphasis added.)

Thus, as long as "cooperatives" (and, significantly, there is no reference to mere "nonprofits" in this Code section) operate in the utility sphere in which they originated, they will be exempt from TRA regulation pursuant to Tenn. Code Ann. § 65-25-234.

The Consumer Advocate is aware that in 2008 attorneys for the TRA wrote letters allowing a homeowners association which operated a wastewater system to avoid regulation by the TRA on the ground that it was a nonprofit corporation. A copy of these letters is attached as

Collective Exhibit A (A-1, A-2, A-3). This matter, which involved the Fairfield Glade Homeowners Association, was not a contested case, nor did it involve public deliberations by the TRA directors. Furthermore, the Consumer Advocate was unaware at the time of this position taken by attorneys for the TRA. It should also be noted that the Fairfield Glade matter is distinguishable from the present case in that there were actual members of the association as opposed to Berry's Chapel which has no members, and the association was a 501(C)(4) nonprofit. *See* **Exhibit A-1**. Therefore, based on the analysis previously set forth herein, the Consumer Advocate believes the position reflected in the letters is mistaken and requests that the TRA Directors give that position no precedential weight.

In conclusion, Berry's Chapel has not demonstrated that it is the kind of nonprofit that is to be excluded from the definition of "public utility." Accordingly, Berry's Chapel is still a public utility and, therefore, subject to the regulation of the TRA.

B. BERRY'S CHAPEL HAS SHOWN NO PROOF THAT IT IS A NONPROFIT CORPORATION OTHER THAN THE MERE LANGUAGE OF ITS CHARTER

In a letter dated September 17, 2010, from Donald L. Scholes announcing the merger of Lynwood into Berry's Chapel, Mr. Scholes states that Berry's Chapel is a "nonprofit corporation" and a "nonutility." A copy of this letter is attached as **Exhibit C**. The letter, however, provides no proof of Berry's Chapel's "nonprofit" status other than a Charter of Berry's Chapel Utility, Inc.

Since that letter was sent to the TRA, Berry's Chapel has had ample opportunity to provide the TRA with some evidence indicating that it is, in fact, a nonprofit corporation. Examples of evidence indicating nonprofit status include such items as: proof of 501(c)(3) status under the federal Internal Revenue Code **(Exhibit H)**; proof of tax exempt status with the State

of Tennessee (**Exhibit I**); and proof that Berry's Chapel uses the procedures for nonprofit corporations set forth in Generally Accepted Accounting Principles ("GAAP") (**Exhibit J**). While none of these items is necessarily conclusively determinative of nonprofit status, and all can certainly be looked at by this agency to see if they are well-founded and still valid, they would at least give the agency something more to look at than the mere charter submitted by Berry's Chapel.

Berry's Chapel, however, apparently believes that all it needs to do to go from a being utility regulated by the TRA to a being an unregulated utility is to go to the Secretary of State and file papers under the Nonprofit Corporation Act. Such a situation cannot possibly have been the intent of the Legislature when it set forth the definition of public utility in Tenn. Code Ann. § 65-4-101(6)(E).

In addition, while the absence of filing proof of how or whether a company intends to forgo or otherwise distribute profits is not necessarily dispositive of nonprofit status, Berry's Chapel has still not provided any proof of how or whether it intends to forgo or otherwise distribute the profits it would have made as a company regulated by the TRA and authorized to earn a just and reasonable rate of return, i.e., a profit.

Under Tennessee law, a corporation's separate identity may be ignored when that separate identity is shown to be a sham or where necessary to accomplish justice. *Oceanics Schools, Inc. v. Barbour*, 112 S.W. 3d 135, 140 (Tenn.Ct.App.2003). In the present case, it is necessary to disregard the alleged nonprofit status of Berry's Chapel in order to accomplish the just end of providing the residents of Cottonwood who are served by Berry's Chapel with the protections of properly regulated utility service intended under Tennessee law.

Furthermore, the Tennessee Supreme Court has held that "a regulatory body, such as the Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure or stock ownership in regulating a public utility, and in fixing fair and reasonable rates for its operations." *BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Commission*, 79 S.W.3d 506, 516 (Tenn.2002), citing *Tennessee Public Service Commission v. Nashville Gas Co.*, 551 S.W.2d 315, 319-20 (Tenn.1977). *BellSouth Advertising* involved a petition for a declaratory order by AT&T in which AT&T requested the TRA to convene a contested case and make BellSouth Telecommunications, Inc. ("BellSouth"), and BellSouth Advertising & Publishing Corporation ("BAPCO") parties. BellSouth was a public utility regulated by the TRA and BAPCO was an unregulated affiliate. *BellSouth Advertising & Publishing* at 509-10. In holding that the TRA did in fact have jurisdiction over BAPCO, an unregulated affiliate, the Tennessee Supreme Court again cited *Nashville Gas*, stating that holding otherwise would allow the regulated utility, "through the device of holding companies, spinoffs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers."

Similarly, the TRA should not allow those persons who control Berry's Chapel to take the "cream" from the Cottonwood customers and "strip" the TRA of its regulatory jurisdiction. Accordingly, the TRA should find that Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company is a public utility under Tennessee law and subject to regulation by the TRA.

III. CUSTOMERS OF BERRY'S CHAPEL UTILITY, INC., F/K/A LYNWOOD UTILITY COMPANY ARE ENTITLED TO A REFUND OF ANY INCREASE IN RATES THAT WAS PUT INTO PLACE THROUGH THE RATE CAHANGE NOTICE, WHICH CALLED FOR A $20 PER MONTH INCREASE EFFECTIVE NOVEMBER 1, 2010

Since Berry's Chapel is a public utility under Tennessee law and subject to TRA regulation, any rate increases it imposes are subject to approval of the TRA. Berry's Chapel, however, did not obtain such approval before imposing a $20 per month rate increase on its customers. Accordingly, the rate increase was improper and the money obtained from the improper increase should be returned to the customers.

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 25, 2011.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief 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 25th day of February, 2011.

Vance L. Broemel
VANCE L. BROEMEL

COLLECTIVE

EXHIBIT

A

(A-1, A-2, A-3)

A-1

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J. GERARD STRANCH, IV
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B. DENARD MICKENS
J. D. STUART
MICHAEL J. WALL

*ALSO ADMITTED IN GA

April 16, 2008

J. Richard Collier, General Counsel
Shilina Chatterjee Brown, Legal Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: Inquiry regarding Wastewater Services Provided by Fairfield Glade Community Club

Dear Mr. Collier and Ms. Brown:

I am writing you in follow up to your letter to Gerry Miller of March 28, 2008, at the request of the Fairfield Glade Community Club. In that letter, you express an opinion that Fairfield Glade Community Club would not exempt from regulation as a public utility by the Tennessee Regulatory Authority (TRA) under T.C.A. § 65-4-101(7), as a "nonprofit homeowners association," in the event it contracts to provide wastewater treatment service beyond the property owners within the Fairfield Glade residential community.

Fairfield Glade Community Club is a Tennessee not-for-profit corporation and has been recognized as a tax-exempt not-for-profit 501(c)(4) corporation by the IRS. I have enclosed a copy of its corporate charter which states that it is a not-for-profit corporation. Under T.C.A. § 65-4-101(6)(E), "[a]ny cooperative organization, association or corporation not organized or doing business for profit" is a nonutility and is not subject to regulation by the TRA as a public utility. Because Fairfield Glade Community Club is a not-for-profit corporation, it clearly fits within this exemption and is not subject to regulation by the TRA.

Unlike the exemption from TRA regulation for a homeowners association set forth in T.C.A. § 65-4-101(7), the exemption for a not-for-profit corporation under T.C.A. § 65-4-101(6)(E) does not limit the exemption from regulation to a specific subdivision or geographic territory. Therefore, to the extent the wastewater system of Fairfield Glade Community Club provides sewer service to a commercial or residential customer outside of the Fairfield Glade residential community does not affect its classification as a nonutility as determined by the Tennessee legislature.

I hope this letter explains why the sewer system of Fairfield Glad Community Club is not subject to economic regulation by the TRA. As a community wastewater system, Fairfield Glade Community Club is subject to all statutes and regulations of the Tennessee Department of Environment and Conservation for community wastewater systems.

Because Fairfield Glad Community Club is a nonutility under T.C.A. § 65-4-101(6)(E), I have advised it that it does not need to file an application for a certificate of public convenience and necessity. I am sending a copy of this letter to Darlene Standley since she received a copy of your March 28, 2008, letter to Gerry Miller.

I wanted to make you aware that Gerry Miller is not an authorized representative of Fairfield Glade Community Club. He is neither a board member nor officer of Fairfield Glade Community Club. He has not been authorized to speak on behalf of Fairfield Glade Community Club.

If you would like to discuss this issue further, please do not hesitate to contact me.

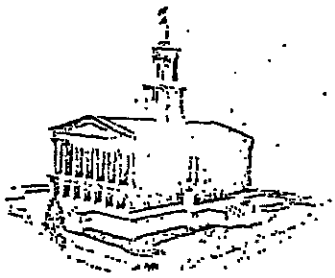
Sincerely yours,

Donald L. Scholes

DONALD L. SCHOLES

Enclosure
c: Harvey Hoffman (via fax and first class mail)
Darlene Standley

State of Tennessee



Department of State

CERTIFICATE

The undersigned, as Secretary of State of the State of Tennessee, hereby certifies that the attached document was received for filing on behalf of FAIRFIELD GLADE COMMUNITY CLUB
(Name of Corporation)
was duly executed in accordance with the Tennessee General Corporation Act, was found to conform to law and was filed by the undersigned, as Secretary of State, on the date noted on the document.

THEREFORE, the undersigned, as Secretary of State, and by virtue of the authority vested in him by law, hereby issues this certificate and attaches hereto the document which was duly filed on MAY FOURTH, *1970.*

Secretary of State

CHARTER

OF

FAIRFIELD GLADE COMMUNITY CLUB

The undersigned natural person, having capacity to contract and acting as the incorporator of a corporation under the Tennessee General Corporation Act, adopts the following charter for such corporation:

1. The name of the corporation is

Fairfield Glade Community Club.

2. The duration of the corporation is perpetual.

3. The address of the principal office of the corporation in the State of Tennessee shall be P. O. Box 293, Crossville, County of Cumberland.

4. The corporation is not for profit.

5. The purposes for which the corporation is organized are:

To construct, maintain and operate recreational facilities, including marinas, golf courses, tennis courts, club houses, swimming pools, parks, playgrounds, streets, common areas and like facilities for the benefit of its members, and to do all other things incidental or desirable in connection therewith.

6. This corporation is to have members.

7. The directors of the corporation shall be divided into three (3) classes for terms of office which expire at different times.

8. One-tenth (1/10) of the members of the corporation entitled to vote shall constitute a quorum.

Dated May 1, 1970.

Charles K. Winn
Incorporator

STATE OF TENNESSEE, CUMBERLAND COUNTY.
The foregoing instrument and certificate were noted in Note Book E, Page 33 at 1:25 O'clock P M May 11 1970
and recorded in Misc. Book 52, Series ____ Page 45 State Tax Paid $ ____ Fee ____ Recording Fee 5.00 Total $ 5.00
Witness My hand.
Receipt No. 855

Register

45

A-2

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*ALSO ADMITTED IN GA

June 24, 2008

Via Hand Delivery

J. Richard Collier, General Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: Inquiry regarding Sewer Services Provided by Fairfield Glade Community Club

Dear Richard:

I am writing you in follow up to our telephone conversation a couple of weeks ago regarding the position taken by me in my April 16, 2008, letter to you in which I asserted that the sewer collection and treatment system operated by Fairfield Glade Community Club is not subject to regulation by the Tennessee Regulatory Authority (TRA). I asserted that Fairfield Glade Community Club is a nonutility under T.C.A. § 65-4-101(6)(E) because it is a Tennessee nonprofit corporation.

You did not question whether a Tennessee nonprofit corporation is exempt from regulation by the TRA under T.C.A. § 65-4-101(6)(E). Instead you raised an issue about whether Fairfield Glade Community Club could actually provide sewer service under its charter as a Tennessee nonprofit corporation. Under its corporate charter Fairfield Glade Community Club was organized:

> To construct, maintain and operate recreational facilities, including marinas, golf courses, tennis courts, club houses, swimming pools, parks, playgrounds, streets, common areas and like facilities for the benefit of its members, and to do all other things incidental or desirable in connection therewith.

Under T.C.A. § 48-53-101 (copy enclosed), a Tennessee nonprofit corporation "has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the charter." The legislature used very broad language when it described the type of businesses in which a nonprofit corporation can engage. A Tennessee nonprofit corporation can engage in *any lawful business*. The provision of sewer service is a lawful business. Therefore, Fairfield Glade

Community Club has the right and power to provide sewer service as a Tennessee nonprofit corporation.

Fairfield Glade Community Club was created before the legislature adopted the Tennessee Nonprofit Corporation Act in 1987. Paragraph 4 of its charter provides that the corporation is a not-for-profit corporation. Fairfield Glade Community Club became subject to the Tennessee Nonprofit Corporation Act pursuant to T.C.A. §§ 48-68-101(a) and 48-68-104 (4)(copies enclosed). Together these statutes operated to subject Fairfield Glade Community Club to the Tennessee Nonprofit Corporation Act and to designate Fairfield Glade Community Club as a mutual benefit corporation.

The sewer collection and treatment system operated by Fairfield Glade Community Club has been and is operated for the benefit of its members. The construction and operation of a sewer system certainly falls within the scope of "like facilities for the benefit of its members" as used in the purpose provision of its charter. The purpose provision of its charter permits Fairfield Glade Community Club "to do all other things incidental or desirable in connection" with its purposes. The supermarket to which Fairfield Glade Community Club is providing sewer service is an integral part of the Fairfield Glade Community. The supermarket is to be located on real property which is contiguous to the Fairfield Glade Community.

The extension and expansion of sewer service to any person or business who is not a member of the Fairfield Glade Community Club benefits the corporation's sewer system and is incidental and desirable in connection with the operation of its sewer system. Economically feasible expansions of the corporation's sewer system to obtain new customers increase the system's revenues and enhance the financial operation of the sewer system. Increased revenues from expansions of the sewer system provide a benefit to all the corporation's members who are served by the sewer system.

I hope that this letter has adequately addresses your concern about whether Fairfield Glade Community Club has the power to operate a sewer system as a Tennessee nonprofit corporation. A Tennessee nonprofit corporation can engage in any lawful business, including providing sewer service. No question should exist that the operation of the sewer system by the Fairfield Glade Community Club benefits its members and that service to persons or businesses outside the development is incidental and desirable to its members. To the extent any question exists about whether Fairfield Glade Community Club has the power to own and operate a sewer system is a corporate issue not a regulatory issue and is outside the scope of the TRA's authority granted to it by the legislature.

If I can provide any further information to you for you to response to my April 16, 2008, letter, please let me know.

Sincerely yours,

Donald L. Scholes

DONALD L. SCHOLES

Enclosures
c: Harvey Hoffman

LEXSTAT TCA 48-53-101

Title 48 Corporations And Associations
Nonprofit Corporations
Chapter 53 Purposes and Powers

Go to the Tennessee Code Archive Directory

Tenn. Code Ann. § 48-53-101 (2008)

48-53-101. Purposes.

(a) Every corporation incorporated under chapters 51-68 of this title has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the charter.

(b) A corporation engaging in an activity that is subject to regulation under another statute of this state may incorporate under chapters 51-68 of this title only if permitted by, and subject to all limitations of, the other statute.

HISTORY: [Acts 1987, ch. 242, § 3.01.]

NOTES:

Cross-References.

Application of nonprofit corporation law, title 48, chs. 51-67, to corporations existing on January 1, 1988, § 48-68-101.

Business corporations, purposes and powers, title 48, ch. 13.

Section to Section References.

Chapters 51-68 are referred to in *§§ 4-52-105, 37-10-209, 45-8-204, 48-51-101 -- 48-51-104, 48-51-201, 48-51-202, 48-51-301 -- 48-51-304, 48-51-306, 48-51-401, 48-51-402, 48-51-601, 48-51-701, 48-52-102, 48-52-104, 48-52-105, 48-53-101, 48-53-102, 48-54-101, 48-54-103, 48-56-101, 48-56-302, 48-57-104, 48-57-106, 48-57-203, 48-57-204, 48-58-101, 48-58-202, 48-58-204, 48-58-205, 48-58-302, 48-58-304, 48-58-509, 48-58-601, 48-60-102, 48-60-103, 48-60-202, 48-60-203, 48-60-302, 48-61-102, 48-61-103, 48-62-102, 48-64-109, 48-64-201, 48-64-205, 48-65-105, 48-66-102, 48-67-101, 48-67-102, 48-68-101 -- 48-68-104, 48-101-702, 48-101-802, 48-101-805, 48-101-806, 49-4-105, 49-9-1301, 65-25-201, 65-25-225, 66-27-102, 67-5-212, 69-6-148.*

Chapters 51-67 are referred to in *§§ 48-68-101 -- 48-68-104.*

This chapter is referred to in *§ 65-25-205.*

This section is referred to in *§ 48-54-101.*

Comparative Legislation.

Nonprofit corporations, purposes, powers:
Ala. Code § 10-3A-20 et seq.
Ark. Code § 4-28-205.
Ga. *O.C.G.A. § 14-3-301* et seq.

1 of 2 DOCUMENTS

TENNESSEE CODE ANNOTATED

*** CURRENT THROUGH THE 2007 REGULAR SESSION ***
*** ANNOTATIONS CURRENT THROUGH MARCH 25, 2008 ***

Title 48 Corporations And Associations
Nonprofit Corporations
Chapter 68 Transition Provisions
Part 1 --General Provisions

Go to the Tennessee Code Archive Directory

Tenn. Code Ann. § 48-68-101 (2008)

48-68-101. Application to existing domestic corporations.

(a) Chapters 51-68 of this title apply to all domestic nonprofit corporations in existence on January 1, 1988, that were incorporated under any general statute of this state providing for incorporation of nonprofit corporations. The provisions of chapters 51-68 of this title shall, however, not apply to corporations, the charters of which were granted by special legislative act prior to the adoption of the Constitution of 1870. Such corporations may amend their charters for any purposes consistent with chapters 51-68 of this title and in the manner set out in chapters 51-68 of this title. Such amendments and the particular rights, obligations, duties, and privileges conferred or imposed by the amendments shall be subject to *§ 48-51-102*.

(b) The provisions of *§ 48-52-102(a)* do not apply to the charter of any corporation existing on January 1, 1988, unless and until a charter amendment is filed. The first charter amendment filed by a corporation following January 1, 1988, shall include any information required by *§ 48-52-102(a)* not otherwise on file in the office of the secretary of state, except that the name and address of each incorporator may be excluded, and the information required by *§ 48-52-102(a)(4)* shall be provided for the current registered agent and registered office. Until such a charter amendment is filed, a corporation's registered agent shall be that agent specified in the office of the secretary of state on January 1, 1988, and such corporation's registered office shall be deemed to be that office specified as the address of its registered agent unless such agent or office is changed thereafter pursuant to the provisions of chapter 55 or 65 of this title.

(c) The provisions of chapters 51-68 of this title shall not apply to municipal corporations; provided, that this chapter shall apply to any public governmental corporation or authority created by or established under the authority of a municipal corporation or county or both for the performance of public functions, including industrial development boards created pursuant to the provisions of title 7.

(d) The provisions of Acts 1968, ch. 523, § 1 (3.06 -- 3.11), as amended, in effect on January 1, 1988, shall apply to any claims, applications, or proceedings for indemnification, or any corporate action authorizing indemnification, made or begun before January 1, 1988.

(e) The provisions of Acts 1968, ch. 523, § 1 (12.01 -- 12.12, 12.14) and Acts 1969, ch. 66, §§ 1 and 2, in effect on January 1, 1988, shall apply to any dissolution as to which a statement of intent to dissolve has been filed or a court proceeding filed before January 1, 1988.

HISTORY: [Acts 1987, ch. 242, § 18.01.]

NOTES:

Cross-References.

Business corporations, transition provisions, title 48, ch. 27.

Tenn. Code Ann. § 48-68-104

Title 48 Corporations And Associations
Nonprofit Corporations
Chapter 68 Transition Provisions
Part 1 --General Provisions

Go to the Tennessee Code Archive Directory

Tenn. Code Ann. § 48-68-104 (2008)

48-68-104. Public benefit and mutual benefit corporations.

On January 1, 1988, each domestic corporation existing on January 1, 1988, that is or becomes subject to chapters 51-68 of this title, shall be designated as a public benefit or a mutual benefit corporation as follows:

(1) Any corporation designated by statute as a public benefit corporation or a mutual benefit corporation is the type of corporation designated by statute;

(2) Any corporation which does not come within subdivision (1) but which is recognized as exempt under *§ 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501*(c)(3)), or any successor section, is a public benefit corporation;

(3) Any corporation which does not come within subdivision (1) or (2), but which is organized for a public or charitable purpose and which upon dissolution must distribute its assets to the United States, a state or a person which is recognized as exempt under *§ 501(c)(3) of the Internal Revenue Code*, or any successor section, is a public benefit corporation; and

(4) Any corporation which does not come within subdivision (1), (2) or (3) is a mutual benefit corporation.

HISTORY: [Acts 1987, ch. 242, § 18.06.]

NOTES:

Section to Section References.

This section is referred to in *§ 48-51-201*.

Textbooks.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 5-1401.

A-3

TENNESSEE REGULATORY AUTHORITY

460 James Robertson Parkway
Nashville, Tennessee 37243-0505

June 26, 2008

VIA FACSIMILE AND U.S. MAIL

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

Re: Inquiry Regarding Sewer Services Provided by Fairfield Glade Community Club

Dear Don:

Thank you for your letters of April 16, 2008 and June 24, 2008 and the discussion we have had during the time period between those two letters. Your letter of June 24, 2008 is especially helpful in addressing the remaining concerns regarding the operation of the wastewater treatment system by Fairfield Glade Community Club. The documentation provided with your letters demonstrates that Fairfield Glade Community Club is a nonprofit corporation, not merely a nonprofit homeowners association, a premise which was relied upon in our letter of March 28, 2008 to Gerry Miller. Once we established that Fairfield Glade Community Club was operating as a nonprofit corporation, the issue became whether Fairfield Glade Community Club would be acting beyond the authority in its charter as a nonprofit corporation by performing a utility function. Your letter of June 24, 2008 points out that a nonprofit corporation can engage in "any lawful business unless a more limited purpose is set forth in the charter." (Tenn. Code Ann. § 48-53-107). You have interpreted the language in the charter of Fairfield Glade Community Club as broad enough to include the provision of wastewater treatment service to the supermarket in question because the supermarket "is an integral part of the Fairfield Glade Community" and "is to be located on real property which is contiguous to the Fairfield Glade Community."

The position set forth in our March 28, 2008 letter was not based on the fact that Fairfield Glade Community Club was operating the wastewater treatment system as a nonprofit corporation. In our prior review, as requested by a resident of Fairfield Glade, we examined only Tenn. Code Ann. § 65-4-101(7) and not Tenn. Code Ann. § 65-4-101(6)(E) in reaching our the conclusion that a Certificate of Convenience and Necessity ("CCN") was required for the operation of the wastewater treatment system.

Based on the information you have provided in your April 16, 2008 and June 24, 2008 letters and through our discussion of this matter, the Legal Division of the Tennessee Regulatory Authority is of the opinion that because Fairfield Glade Community Club is a nonprofit corporation, a CCN is not required for its operation of a wastewater treatment system as you have described. The question of whether Fairfield Glade Community Club is operating beyond the scope of its nonprofit corporation charter is sufficiently addressed in your letter of June 24, 2008.

Should you have any questions regarding this letter, please do not hesitate to contact me.

Very truly yours,

J. Richard Collier

J. Richard Collier
General Counsel

C: Shilina Chatterjee, Counsel
Darlene Standley, Chief, Utilities Division

Exhibit B

Not Reported in S.W.3d, 2003 WL 354466 (Tenn.Ct.App.)
(Cite as: 2003 WL 354466 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
BELLSOUTH BSE, INC.,
v.
TENNESSEE REGULATORY AUTHORITY.

No. M2000-00868-COA-R12-CV.
Feb. 18, 2003.

Tennessee Regulatory Authority, No. 98-00879.
Guilford F. Thornton, Jr., Nashville, Tennessee, for the appellant, Bellsouth BSE, Inc.

Henry Walker, Nashville, Tennessee, for the appellees, MCI WorldCom, Southeastern Competitive Carriers Association, Time Warner Communications of the South, L.P., and U.S. LEC of Tennessee, Inc.

J. Richard Collier, Jonathan N. Wike, Nashville, Tennessee, for the appellee, Tennessee Regulatory Authority.

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., joined.

OPINION

PATRICIA J. COTTRELL, J.

***1** BellSouth BSE, Inc. appeals from an order of the Tennessee Regulatory Authority denying BSE's application for certification as a competing local exchange company in those areas where BSE's affiliate, BellSouth Telecommunications, is the incumbent provider of local services. Because the TRA denied the petition on the basis that such certification may be inconsistent with the goal of fostering competition and could be potentially adverse to competition, as opposed to establishing conditions or requirements designed to ensure that anticompetitive practices did not occur, we vacate the order as beyond the agency's statutory authority.

Before the state legislature made significant changes in the law governing telecommunications services in 1995, local telephone service was provided to consumers in a locality by one company under a regulated monopoly system. The adoption of the Tennessee Telecommunication Act, 1995 Tenn. Pub. Acts 408 (effective June 6, 1995), abolished monopolistic control of local telephone service and opened that market to competition. It also changed the way in which providers of such services, and the rates they charge, were regulated.

As part of the implementation of local service competition, a company which was providing basic local exchange telephone service, as defined by statute, prior to June 6, 1995, was designated as the "incumbent local exchange telephone company," or ILEC. Tenn.Code Ann. § 65-4-101(d). New entrants into the market after June 6, 1995, were known as "competing telecommunications service providers" or CLECs. Tenn.Code Ann. § 65-4-101(e). To become a CLEC, a provider is required to be certificated pursuant to Tenn.Code Ann. § 65-4-201, which provides in pertinent part:

After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable authority policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

Tenn.Code Ann. § 65-4-201(c).

BellSouth BSE, Inc. applied for a certificate as a **CLEC** (First Application) to provide local telephone services on a statewide basis. BellSouth BSE, Inc. is a wholly owned subsidiary of BellSouth BSE Corporation which, in turn, is a wholly owned subsidiary of BellSouth Corporation. BellSouth Telecommunications ("BST"), another wholly-owned subsidiary of BellSouth Corporation, is the incumbent local exchange provider for portions of Tennessee. The Tennessee Regulatory Authority ("TRA") granted BellSouth BSE, Inc. ("BSE") authority to provide local services only in those territories where its affiliate, BST, was not the ILEC. The TRA concluded that the potential for anticompetitive harm outweighed the benefits to consumers if BSE were permitted to operate as a CLEC in those areas where its affiliate was providing local service as the ILEC.

*2 BSE, however, was invited to re-open the issue if at any time in the future it believed it could "carry the public interest burden herein raised and alleviate the Agency's concerns with regard to Tenn.Code Ann. § 65-5-208(c)...." BellSouth BSE, Inc. did just that and sought expanded authority to operate as a CLEC (Second Application). Competitors were allowed to intervene, [FN1] and a hearing was held. The TRA denied the petition. It is that denial which is the subject of this appeal.

> FN1. The intervenors who are also appellees in this appeal are MCI WorldCom, Inc., Southeastern Competitive Carriers Association, Time Warner Telecom of the Mid-South, L.P., and U.S. LEC of Tennessee, Inc.

BSE did not propose to offer any services that could not be offered by BST. BSE intended to provide "any and all services that are or may be provided by a local exchange carrier."

I. The TRA's Concerns

In denying BSE's application for a certificate of convenience and necessity to provide expanded intrastate telecommunications services, the TRA recounted that the Second Application proceedings were held to provide BSE the opportunity to alleviate the concerns which led to the TRA's order on the First Application. Those concerns are related to the potential for anticompetitive behavior and the potential for BST to avoid controls imposed upon it because of its status as an ILEC, as well as its status under federal law as a "Bell operating company," through the use of an affiliate. The TRA expressed several specific areas of concern, which can only be examined in the context of the regulatory framework, both state and federal, for telecommunication services providers.

By enactment of the Telecommunications Act of 1996, Congress made fundamental changes in local telephone markets by, among other things, prohibiting states from enforcing laws that impede competition. In order to facilitate the transition from regulated monopolies to true competition, the Act imposes upon the incumbent provider or ILEC, who formerly enjoyed the monopoly, a number of duties intended to facilitate entry into the market by other, formerly excluded, providers. *AT & T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 371-72, 119 S.Ct. 721, 726-27 (1999). As more specifically ex- plained:

Until the passage of the 1996 Act, state utility commissions continued to regulate local telephone service as a natural monopoly. Commissions typically granted a single company, called a local exchange carrier (LEC), an exclusive franchise to provide telephone service in a designated area. Under this protection the LEC built a local network-made up of elements such as loops (wires), switches, and transmission facilities-that connects telephones in the local calling area to each other and to long distance carriers.

The 1996 Act brought sweeping changes. It ended the monopolies that incumbent LECs held over local telephone service by preempting state laws that had protected the LECs from competition. *See* 47 U.S.C. § 253. Congress recognized, however, that removing the legal barriers to entry

would not be enough, given current technology, to make local telephone markets competitive. In other words, it is economically impractical to duplicate the incumbent LEC's local network infrastructure. To get around this problem, the Act allows potential competitors, called competing local exchange carriers (CLECs), to enter the local telephone market by using the incumbent LEC's network or services in three ways. First, a CLEC may build its own network and "interconnect" with the network of an incumbent. *See id.* § 251(c)(2). Second, a CLEC may lease elements (loops, switches, etc.) of an incumbent LEC's network "on an unbundled basis." *See id.* § 251(c)(3). Third, a CLEC may buy an incumbent LEC's retail services "at wholesale rates" and then resell those services to customers under its (the CLEC's) brand. *See id.* § 251(c)(4).

***3** *GTE South, Inc. v. Morrison,* 199 F.3d 733, 737 (4th Cir.1999).

This access is accomplished through an interconnection agreement between the ILEC and a CLEC. In addition, an ILEC is required to provide access to its network elements and various services and to provide dialing parity to competing providers on a nondiscriminatory basis. 47 U.S.C. §§ 251(c)(3) & 251(b)(3). The FCC has promulgated rules and policies implementing those provisions "to require incumbent LECs to provide competition with access to the incumbent LECs' networks sufficient to create a competitively neutral playing field for new entrants...." *In Re Implementation of the Telecommunications Act of 1996, Third Report and Order* in CC Docket No. 96-115, *Second Order on Reconsideration of the Second Report and Order* in CC Docket No. 96-98, and *Notice of Proposed Rulemaking* in CC Docket No. 99-273, at ¶ 6 (rel. Sept. 9, 1999).

Under state law, all providers are required to provide non-discriminatory interconnection to their public networks under reasonable terms and conditions, and all are to be provided "desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications providers." Tenn.Code Ann. § 65-4-124(a).

At the state level, incumbent providers are also governed by specific provisions, again designed to facilitate entry into the local telephone service market by competitors. For example, rates to be charged by incumbent providers opting to be under a price regulation plan are subject to a requirement that such rates be just and reasonable, defined as "affordable", as determined by the TRA. Tenn Code Ann. § 65-5-209(a). These rates are subject to limitations, including safeguards to ensure universal service and nondiscrimination among customers. Tenn.Code Ann. § 65-5-209(b).

After the initial qualification of a price regulation plan, an ILEC's ability to increase rates is subject to limitations. Essentially, a price regulated ILEC can adjust rates for specific services subject to an overall maximum annual adjustment to aggregate revenues for such services. Tenn.Code Ann. § 65-5-209(e). However, rates for basic services cannot be increased for four (4) years after implementation of the plan, and annual increases for basic services are thereafter limited to annual rates of inflation. Tenn.Code Ann. § 65-5-209(f).

ILECs not under a price regulation plan are subject to traditional rate regulation. ILECs have unique, carrier-of-last-resort obligations and universal service obligations. Tenn.Code Ann. § 65-5-207(c)(2) & (8). ILECs, upon request, are required to provide interconnection services to CLECs. Tenn.Code Ann. § 65-5-209(d). None of these burdens apply to CLECs.

Another requirement for ILECs which was the subject of argument herein and part of the TRA's reasoning is that found in Tenn.Code Ann. § 65-5-208(c), which provides:

Effective January 1, 1996, an incumbent local exchange telephone company shall adhere to a price floor for its competitive services subject to such determination as the authority shall make pursuant to

§ 65-5-207.[FN2] The price floor shall equal the incumbent local exchange telephone company's tariffed rates for essential elements utilized by competing telecommunications service providers plus the total long-run incremental cost of the competitive elements of the service. When shown to be in the public interest, the authority shall exempt a service or group of services provided by an incumbent local exchange telephone company from the requirement of the price floor. **The authority shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anticompetitive practices.**

> FN2. Tenn.Code Ann. § 65-5-207 authorizes the TRA to establish policies, rules, and orders requiring all telecommunications service providers to contribute to the support of universal service, which consists of residential basic local exchange telephone service at affordable rates and carrier-of-last-resort obligations.

*4 (emphasis added).

It is the highlighted language which provides the primary basis for the TRA's denial of BSE's application for CLEC status in those areas where its affiliate is the incumbent provider. The TRA expressed concerns that the relationship between BSE and BST fostered the potential for the enumerated, or other, anticompetitive activities, as well as the opportunity for BST to avoid the limitations placed on it as an ILEC. The six concerns, or issues for resolution, expressed by the TRA were:

1. Whether there exists the potential for discriminatory treatment of other **CLECs** or for preferential treatment of BSE by **BellSouth** when there are no safeguards being offered to monitor affiliate transactions or performance;

2. Whether BellSouth seeks to avoid its ILEC obligations through BSE's ability to select BellSouth's best customers and offer special deals that BellSouth cannot offer due to statutory prohibi- tions;

3. Whether there exists the potential for the prohibited acts of price squeezing and cross-subsidization;

4. Whether in the solicitation of BellSouth business customers by BSE, those customers will continue to be offered the same services under the same utility's name, with the same personnel over the same local network as employed by BellSouth;

5. Whether BSE presented substantial and material evidence that it would provide services to consumers that could not be offered by BellSouth; and

6. Whether it is in the public interest for a Regional Bell Operating Company ("RBOC") such as **BellSouth**, to have an affiliated **CLEC** operating within its territory.

The last issue involves **BellSouth's** status as a RBOC, and that issue again requires some background explanation. In 1974, the U.S. Department of Justice brought an antitrust action against AT & T for monopolization of telecommunications services and equipment. *United States v. American Tel. and Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom. Maryland v. United States*, 406 U.S. 1001, 103 S.Ct. 1240 (1983). That long and complex litigation resulted in a settlement reflected in a consent decree. This consent decree required AT & T to divest itself of the twenty or so Bell operating companies ("BOCs") that provided local telephone service as monopolies. Under the court-approved plan, these BOCs were spun off from AT & T and grouped into seven regional holding companies, or RBOCs, who continued to provide local service as regulated monopolies until the 1996 Telecommunications Act and/or similar legislation in various states. *See AT & T Corp. v. Federal Communica-*

tions Comm'n, 220 F.3d 607, 611 (D.C.Cir.2000). Bell South is a RBOC. *Id.; see also* 47 U.S.C. § 153(4) (defining "Bell operating company" by listing twenty companies by name, including South Central Bell Telephone Company, the predecessor of BST). Although the Bell operating companies were allowed to retain their state-regulated monopolies on local service, they were prohibited by the consent decree from entering other parts of the telecommunications business, including long distance, equipment sales, and specified other services. *United States v. American Tel. and Tel. Co.,* 552 F.Supp. at 224.

***5** The Telecommunications Act of 1996 rescinded the consent decree. While a number of key provisions apply to all incumbent local exchange carriers, such as the requirement that they offer nondiscriminatory access and interconnection to local competitors, 47 U.S.C. § 251, the Act also includes "Special Provisions Concerning Bell Operating Companies," 47 U.S.C. §§ 271 to -276, which apply only to the BOCs and their affiliates. Some of these provisions allow BOCs to enter into formerly prohibited areas of the telecommunications market, but only under specifically enumerated conditions. Of primary importance, § 271 establishes requirements that a BOC or its affiliate must meet before it can provide long distance, or InterLATA, services. Those requirements relate primarily to interconnection and include a competitive checklist insuring, among other things, nondiscriminatory access to network elements and other facilities and services. 47 U.S.C. § 271(c). [FN3]

> FN3. The Act further provides that the FCC cannot approve a BOC or BOC affiliate application to provide interLATA services unless it finds that the applicant has met the requirements with respect to access and interconnection, has fully implemented the competitive checklist, "the requested authorization will be carried out in accordance with the requirements of section 272," and the approval is consistent with the public interest, convenience and necessity. 47 U.S.C. § 271(d)(3).

BOCs and their affiliates are barred from manufacturing and selling equipment until they have received authorization to provide interLATA services, which, of course, requires demonstrated compliance with the nondiscriminatory access requirements and the competitive checklist. 47 U.S.C. § 273. That section includes additional strictures on such manufacturing activities. Section 276 includes nondiscrimination safeguards for provision of payphone services by a BOC and a requirement that a BOC may not subsidize its payphone services directly or indirectly from its telephone exchange service operations. In addition, BOCs may provide electronic publishing only through a separate affiliate or through a joint venture operated according to specific requirements, including structural separation. 47 U.S.C. § 274.[FN4]

> FN4. This required structural separation, or line-of-business restriction, has been upheld in a bill of attainder and first amendment challenge. *BellSouth Corp. v. F.C.C.,* 144 F.3d 58, 61 (D.C.Cir.1998), *cert. denied,* Apr. 26, 1999.

Most relevant to our analysis of the issues herein, because of the parties' references to and arguments about "Section 272 affiliates" is the requirement of 47 U.S.C. § 272, which the FCC has described as follows:

Section 272(a) provides that a BOC (including any affiliate) that is a LEC subject to the requirements of section 251(c) may provide certain services only through a separate affiliate. Under section 272, BOCs (or BOC affiliates) may engage in the following activities only through one or more affiliates that are separate from the incumbent LEC entity: (A) manufacturing activities; (B) interLATA telecommunications services that originate in-region; and (C) interLATA information services.

In the Matter of Implementation of the Non-

Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, CC Docket No. 96-149, First Report and Order, at ¶ 50 (rel. Dec. 24, 1996) (footnotes omitted).

The statute establishes "structural and transactional requirements" for § 272 separate affiliates, including independent operation, maintenance of separate books and records, totally separate officers, directors and employees, and no credit arrangement whereby recourse may be had against the assets of the BOC. 47 U.S.C. § 272(b)(1)-(4). In addition, the affiliate is required "to conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." 47 U.S.C. § 272(b)(5). Nondiscrimination safeguards also exist. 47 U.S.C. § 272(c).

*6 It is this structural and operational separation between the BOC and its affiliate which has been determined on the federal level to provide protection against anticompetitive practices. It allows a BOC affiliate to provide some services that the BOC itself would be prohibited from providing. This separation is a critical element in understanding the TRA's position herein.

II. ILEC Affiliation

The TRA has previously granted certificates to over thirty competing local exchange carriers to provide local services on a statewide basis. In addition, the TRA has granted certificates as CLECs to two affiliates of ILECs, namely Citizens Telecommunications Company of Tennessee and United Telephones-Southeast, Inc.[FN5] BSE asserts that these prior approvals establish precedent which the TRA must follow and require that BSE's statewide application be granted because the TRA is required by federal and state law to certificate CLECs on a competitively neutral basis.

> FN5. At BSE's request, at the hearing involved herein the TRA took judicial notice of its grant of these certificates, and the records from those proceedings have been included in the record herein. Those records reflect that the TRA granted to Sprint Communications Company, L.P. a certificate to provide intrastate service based upon an application to provide a full array of telecommunications services normally provided by an incumbent local exchange telephone company throughout the State of Tennessee in all geographic locations permitted under Tenn.Code Ann. § 65-4-201. Similarly, Citizens Telecommunications Company filed an application for certification as a CLEC seeking authority to operate statewide to provide a full array of telecommunications services as would normally be provided by an incumbent local exchange telephone company. The TRA granted the application.

The TRA responds that its prior decisions, involving other companies in other situations, do not bind it in this situation. It also asserts, and found, that BellSouth and its affiliate BST or **BellSouth** are different from other **CLECs** and their affiliates and present unique issues. The TRA found:

In Tennessee, Citizens, Sprint, and their affiliated companies are not similarly situated to BellSouth and BSE. Neither Citizens nor Sprint are RBOCs, and neither possesses the historical market dominance so closely associated with RBOCs such as BellSouth. Unlike Citizens and Sprint, BellSouth maintains approximately eighty percent (80%) of the access lines in Tennessee. Therefore, since BSE is the affiliate of the dominant local exchange carrier in Tennessee, the actions which BSE seeks to take must be evaluated by assessing whether such actions will truly foster competition in Tennessee. The authority finds that Citizens and Sprint are not similarly situated to BSE and BellSouth.

(footnotes omitted).

If the TRA had determined that BSE was ineligible to be certified statewide as a CLEC on the

basis that an affiliate was disqualified from certification in the same market where its affiliate was the incumbent provider, the two prior approvals would pose serious problems to affirming the TRA's order herein. However, the TRA did not find that such a *per se* disqualification existed, and we can find none in the statute. The prior approvals indicate that the TRA interpreted the Telecommunications Act as authorizing affiliates of ILECs to be certified as CLECs statewide, including in those markets where the affiliate was the incumbent.

The prior approvals also serve to rebut an argument made herein by the intervenors. Those intervenors argue that it is illegal under Tennessee law for **BellSouth** to operate as both an ILEC and a **CLEC** in the same service territory. They assert that because the Telecommunications Act defines a CLEC as a carrier providing service before June 6, 1995, and defines an ILEC as a provider of services certified after June 6, 1995, an ILEC cannot be a CLEC. We do not disagree that the statute envisions an ILEC and a CLEC as being different entities.

*7 However, the intervenors argue that because BST cannot be a **CLEC**, **BellSouth** should not be allowed to accomplish the same illegal result through use of an affiliate; i.e., BST cannot do indirectly what it is prohibited from doing directly. While much of the intervenors' argument is addressed to BellSouth's market dominance and position, their argument is also based upon the statutory distinctions between ILECs and **CLECs**. To that extent, the intervenors' assertions that **BellSouth** cannot operate both an ILEC and a **CLEC** would apply equally to any other affiliate relationship. Obviously, the TRA has rejected that interpretation of the statute by certifying as CLECs at least two other entities affiliated with ILECs. We find no basis for rejecting the TRA's interpretation. In fact, the legislature apparently foresaw the possibility of an ILEC providing services to an "affiliated entity." *See* Tenn.Code Ann. § 65-5-208(c).

As the TRA's order makes clear, its denial of BSE's request for a certificate for statewide CLEC status was not based upon BSE's status as an affiliate of an ILEC *per se*. Instead, it was related to the unique position enjoyed by BellSouth as the dominant provider of local exchange services and as a Bell operating company.

We agree with the TRA that each application must be considered on its own merits and upon the facts of each individual situation. In the instant situation, the facts raise issues as to the effect of certification on competition which may differ from those raised by other incumbent affiliate applications. However, the TRA cannot apply legal requirements arbitrarily or capriciously and must have a factual basis for its actions. Tenn.Code Ann. § 4-5-322(h).

III. BOC Status

As set out earlier, BellSouth, BST and BSE (as an affiliate of a BOC) are subject to specific provisions of the Telecommunications Act of 1996 not applicable to other CLECs. The question is whether that status justifies a differing approach or standard for BSE's qualification as a CLEC than that applied to affiliates of other ILECs who are not also BOCs.

BSE argues that the FCC has recognized or authorized affiliates of ILECs and BOCs. The TRA has acknowledged and referred to the FCC's rulings on specific arrangements, but has distinguished the situation covered by those rulings from the situation presented by BSE's application herein.

The FCC has considered the question of the provision of local exchange and exchange access by Section 272 BOC affiliates and reached the following conclusion:

Based on our analysis of the record and the applicable statutory provisions, we conclude that section 272 does not prohibit a section 272 affiliate from providing local exchange services **in addition to** interLATA services, nor can such a prohibition be read into this section. Specifically, section 272(a)(1) states that-

A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) may not provide any service described in [section 272(a)(2)] unless it provides that service through one or more affiliates that ... are separate from any operating company entity that is subject to the requirements from section 251(c) ...

*8 We find that the statutory language is clear on its face-a BOC section 272 affiliate is not precluded under section 272 from providing local exchange service, **provided that the affiliate does not qualify as an incumbent LEC subject to the requirements of section 251(c).**

In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, CC Docket No. 96-149, First Report and Order, at ¶ 312 (rel. Dec. 24, 1996) (emphasis added).

It is clear that the FCC's comments are addressed to those BOC affiliates which are Section 272 affiliates and are operated independently from an ILEC affiliate. They apply where the BOC incumbent has been authorized to provide long distance services. This means that the BOC incumbent has demonstrated to the FCC's satisfaction that it has complied with the various competition requirements set out in 47 U.S.C. § 271.

We agree with the TRA that the FCC rulings relied upon by BSE do not directly apply to an application by an affiliate of a BOC which is not a Section 272 affiliate to provide local service in an area where the BOC is the incumbent. While BSE is not incorrect in asserting that these FCC rulings do not prohibit the grant of its application, they also do not require it. The FCC, based on federal statutory law, has found that BOC affiliates may provide certain kinds of services when circumstances not present in the case before us exist.

BSE is not a Section 272 affiliate, and does not claim to be. Section 272 affiliate status only applies to affiliates of a BOC which have received Section 271 approval. The TRA determined that BSE "remains a type of affiliate not contemplated under § 272." In addition, the TRA explained:

It is appropriate that BSE has not requested in its Application to provide non-incidental services, because BSE cannot satisfy the requirements for a Section 272 affiliate, for those services, until interLATA permission is granted pursuant to Section 271. The Authority concludes that BSE cannot, at this time, as a matter of law, provide Section 272(a)(2) non-incidental services, does not intend to provide Section 272(a)(2) incidental services, and is, therefore, not a Section 272 affiliate. Having concluded as such it is difficult to embrace the position that the safeguards established under Section 272 are applicable to BSE. It is equally difficult to accept that an entity such as BSE is of the type contemplated by the FCC's pronouncement that Section 272 does not prohibit a Section 272 affiliate from providing local exchange services in addition to interLATA services.

(footnotes omitted).

The TRA asserts that BSE's lack of Section 272 status is important is considering the competitive goals of both federal and state legislation. The Authority contends that Section 271 approval indicates satisfaction of the requirements for entry into the long distance market, including compliance with the competitive checklist. As of the date of the proceedings herein, BellSouth did not have Section 271 approval, and the TRA states that BellSouth has been denied that approval several times by the FCC and in other states. [FN6] Consequently, the TRA found that BSE had not been required to show that it has adequate operations support systems with performance measurements in place which would "provide assurance that the public welfare is protected by ensuring that competing carriers have a means to compete and are treated in a competitively neutral manner by the ILEC [BST]." The TRA also found that not only does the denial of such approval indicate that the required proof of compliance with

competitive safeguards was not provided in those proceedings, the TRA found that BSE did not demonstrate such compliance in the hearing herein.

FN6. For example:

In the Matter of Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd 539, 547 P 14 (1997) (failure to (1) provide nondiscriminatory access to operations support systems, (2) provide unbundled network elements in a manner that permits competing carriers to combine them through collocation, and (3) offer certain retail services at discounted rates), *aff'd, BellSouth Corp. v. FCC,* 333 U.S.App. D.C. 253, 162 F.3d 678 (D.C.Cir.1998); *In the Matter of Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana,* 13 FCC Rcd 6245, 6246-47 P 1 (1998) (failure to provide nondiscriminatory access to operations support system and to make telecommunications services available for resale); *In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana,* 13 FCC Rcd 20599, 20605 P 10 (1998) (failure to provide nondiscriminatory access to operations support system and unbundled network elements).

AT & T Corp.v. FCC, 220 F.3d at 613.

***9** The TRA did not deny the application for statewide CLEC certification because of BSE's status as a BOC or BOC affiliate. It did, however, consider that status as a factor in its consideration of the competitive effect of allowing BSE to compete with its affiliate where the competition protections assured by Section 272 affiliate status are not present. We conclude that neither BSE's status as an ILEC affiliate nor its status as a BOC affiliate was the basis for the TRA's denial. That status did, however, influence the standards applied by the TRA to BSE in its consideration of the competitive effect of granting BSE's application.

IV. The Issues Presented and The Standard of Review

As the list of TRA concerns set out earlier in this opinion demonstrates, the TRA focused its decision on the potential for anticompetitive activities and conduct if an affiliate of the Regional Bell Operating Company and ILEC were certified as a CLEC, especially in the absence of the protections provided by federal law to Section 272 affiliates. In the order now under appeal, the TRA noted that in its previous denial "one critical area of concern was that the affiliate relationship between BST and BSE could be potentially and irreversibly adverse to competition." The TRA found without Section 271 approval of BellSouth, there was still no evidence that BellSouth had the necessary safeguards in place to ensure fair treatment among all CLECs and further stated:

Exacerbating our concern is that no other performance measurements have been established, which arguably help to serve as support to the existence of competitive neutrality in the relationship between **BellSouth**, BSE and other **CLECs**. Without these safeguards and measurements the Authority would have difficulty determining whether **BellSouth** in fact afforded preferential treatment to its affiliate **CLEC** in Tennessee.

It was on the basis of these concerns that the TRA determined that approval of BSE's application was not in the public interest and "may, in fact" be inconsistent with the goal of competition. The TRA concluded that BSE offered little convincing evidence or testimony to diminish its concerns regarding potentially abusive collusive behavior.

On appeal, our review of the TRA's order is governed by Tenn.Code Ann. § 4-5-322(h), which provides:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

***10** In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

The TRA may exercise only that authority given it expressly by statute or arising by necessary implication from an express grant. *BellSouth Adver. & Publ'g Corp. v. Tennessee Regulatory Auth.*, 79 S.W.3d 506, 512 (Tenn.2002); *Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn.1977). The General Assembly has given the TRA "practically plenary authority over the utilities within its jurisdiction." *BellSouth Adver. & Publ'g Corp.*, 79 S.W.3d at 312 (quoting *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (Tenn.Ct .App.1992)). The TRA has "general supervisory and regulatory power, jurisdiction, and control over all public utilities." Tenn.Code Ann. § 65-4-104. The General Assembly has given the TRA, in addition to other jurisdiction conferred, the authority to "investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408 [the Tennessee Telecommunications Act]." Tenn.Code Ann. § 65-5-210(a).

BSE asserts, however, that the TRA's order was contrary to governing statutory provisions. In reviewing BSE's request, the TRA was required to apply Tenn.Code Ann. § 65-4-201(c), quoted earlier, which establishes the requirements for certification as a competing provider. BSE asserts that it met the two requirements by demonstrating: (1) that it will adhere to all applicable TRA policies, rules and orders; and (2) that it possesses managerial, financial and technical abilities to provide the services. BSE cites the TRA's approval of it as a CLEC in some territories in Tennessee as proof the TRA has found that BSE meets these statutory qualifications. Accordingly, BSE argues, the TRA was required to grant its application for statewide certification because of the mandatory language of the statute.

There is no dispute that BSE met the two requirements of Tenn.Code Ann. § 65-4-201(c). The TRA, however, determined that its other statutorily assigned responsibilities required it to examine the application in light of its effect on competition, including its responsibility under Tenn.Code Ann. § 65-4-201(a) to consider the present and future public interest in determining whether to grant a certificate of convenience and necessity. In the case herein, however, the TRA defined that public interest in terms of the impact of BSE's application on competition. It is clear from the order that the TRA's reason for denying BSE certification as a CLEC in those areas where its affiliate was the ILEC was its determination that such certification could adversely impact the development of competition in the provision of local telephone service.

***11** The TRA maintains that it was required to consider the effect on competition. The TRA relied upon its obligations set out in Tenn.Code Ann. § 65-5-208(c), also quoted above, to prohibit anti-competitive practices in dealings between the incumbent and competitors. The TRA was also mindful of the General Assembly's policy of fostering competition, as set out in the Tennessee Telecommunications Act of 1995:

> The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn.Code Ann. § 65-4-123. In the preamble to the Tennessee Telecommunications Act, the General Assembly stated a policy that "Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination to each." 1995 Tenn. Pub. Acts ch. 408.

In addition, federal law places a duty on the TRA to promote or insure competition in the provision of telecommunication services. In particular, the Telecommunications Act of 1996 requires removal of barriers to entry into that business and states:

> (a) In general. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority. Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> 47 U.S.C. § 253.

We agree with the TRA that it has the authority to consider the effect on competition of an application for statewide certification as a CLEC. In addition to its general almost plenary authority to regulate public utilities and the authority granted by the statutes quoted herein, it also has specific authority to adopt rules or issue orders to prohibit anticompetitive practices. Tenn.Code Ann. § 65-5-208(c). Thus, we conclude the TRA did not act in excess or in contravention of relevant statutory authority in considering the effect on competition.

However, the authority to consider the effect on competition does not remove the requirements that the agency base its decisions on substantial and material evidence and that those decisions not be arbitrary or capricious. The determinative issues in this appeal are framed by BSE's arguments that the TRA's decision was arbitrary because it differentiated among ILEC affiliates and that the decision was based upon speculation and not upon the evidence and, therefore, is not supported by substantial and material evidence. In addition, BSE asserts that the TRA's order is actually anticompetitive and prevents BSE's entry into the market as a competing local exchange service provider by establishing more stringent requirements for it than those applied to other ILEC affiliates. The intervenors assert that BST is already dominant in the local services market, making removal of barriers to entry irrelevant. The TRA asserts its order was designed to further the competition envisioned by both federal and state law.

***12** The TRA did, in fact, treat BSE's application differently from applications for statewide CLEC certification other affiliates of ILECs. They based this differing treatment on BSE's relationship to BellSouth, which has undisputed market dominance in the state and which is a BOC. Regional Bell Operating Companies have been subject to strictures and limitations not applicable to other companies since the consent order was entered in *United States v. American Tel. and Tel. Co.* The 1996 Telecommunications Act has special provisions relating to RBOCs. Because RBOCs had gained control of the local services markets through a monopoly, such measures were considered necessary if true competition were to develop as a practical matter.

The FCC has recognized the authority of state regulatory agencies to treat certain BOC related entities differently because of the potential impact on competition.

State regulation. As mentioned above, several BOCs have already submitted applications to state regulatory commissions seeking authority to provide both local exchange services and interLATA services from the same affiliate. Although we conclude that the 1996 Act permits section 272 affiliates to offer local exchange service in addition to interLATA service, we recognize that individual states may regulate such integrated affiliates differently than other carriers.[FN7]

> FN7. BSE's application does not include a proposal to provide interLATA (long distance) services. As discussed earlier, the FCC's pronouncements have involved Section 272 affiliates who propose to provide both local and long distance services. Thus, in our earlier discussion of BOC status, we have agreed with the TRA that the FCC's recognition of BOC and ILEC affiliates is not dispositive of the question of whether an affiliate which is not a Section 272 affiliate may qualify as a CLEC where its affiliate is the ILEC. However, while the finding that state regulatory agencies may regulate integrated affiliates differently from other entities is not directly applicable to a non-272 affiliate becoming a CLEC, we think the principles involved are similar enough to warrant reliance on the FCC's recognition of state agencies' authority to regulate BOC affiliates differently.

In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, CC Docket No. 96-149, First Report and Order, at ¶ 317 (rel. Dec. 24, 1996) (footnotes omitted).

Although state statues do not make reference to RBOCs, we conclude that the TRA had the authority to consider BellSouth's market dominance in the state and its status as a BOC in analyzing the competitive effects of its affiliate's application. We also conclude that Tenn.Code Ann. § 65-5-208(c) gave the TRA the authority to issue orders which would prohibit the specific anticompetitive practices listed in the statute, as well as others. Because the relationship between BST, BSE, and BellSouth provides a situation where such practices can develop, the TRA was authorized to examine this situation differently from other applications and to adopt rules or to establish by order standards or requirements to fulfill its responsibility to further competition.

However, that is not what the TRA did. Instead of "regulating" a BOC affiliate differently, the TRA denied the certification. BSE describes the TRA's decision as "Rather than engage with BSE in a reasonable framework of regulation for its services in the market, the TRA has chosen to simply deny BSE a place at the table." The question is whether the TRA could deny certification under the facts presented.

V.

The TRA had previously expressed its concerns

about the potential for anticompetitive conduct between BSE and its affiliates. The second hearing was held to allow BSE to address those concerns. In the hearing, BSE offered to submit itself to various requirements to alleviate the concerns of the TRA. In specific, BSE offered:

***13** (1) To operate independently from BST;

(2) To maintain its books, records, and accounts separate from the books, records, and accounts maintained by BST;

(3) To have separate officers, directors, and employees from BST;

(4) Not to obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of BST;

(5) To conduct all transactions with BST on an arms' length basis with any such transactions reduced to writing and available for public inspection; [FN8]

> FN8. Items 1-5 replicate the structural separation requirements set out in 47 U.S.C. § 272(b).

(6) Not to engage in cross-subsidization, granting preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements, or other anticompetitive practices as prohibited by Tenn.Code Ann. § 65-5-208(c);

(7) To set its price floor equal to the wholesale price it pays to BST;

(8) To file and resell its Contract Service Agreements;

(9) To be bound by the non-discrimination requirements of 47 U.S.C. §§ 251 and 252;

(10) To file tariffs;

(11) To consent to regular audits of its operations by the TRA;

(12) To provide cost allocation data of its operations;

(13) To accept advertising restrictions assuring that any advertising would properly identify "BellSouth BSE";

(14) To submit to any other applicable ILEC Rules in the event BSE undertakes the activities of its ILEC affiliate BST; and

(15) To abide by any and all of the applicable TRA policies, rules and orders.

The TRA found these promises insufficient, primarily for three reasons. It determined that BSE's failure to file a cost allocation manual prevented the Authority from determining whether appropriate safeguards were in place to prevent cross-subsidies between regulated and non-regulated services.[FN9] Similarly, BSE did not file a business plan, and the TRA stated it routinely examined such plans when considering CLEC applications. The TRA found that "The lack of a business plan and cost allocation manual prevents the Authority from determining the extent to which BSE intends to operate, and whether such operation and the provisioning of telecommunications services on an expanded level is compatible with the public interest."

> FN9. There is proof in the record that with regard to BSE's operation in the Tampa, Florida area, cost allocations between BSE and BellSouth's cellular phone company were not very strict, even though the companies shared some costs. For example, the cellular provider paid all advertising costs, and BSE did not pay a portion of that.

Although BSE did not file a business plan, an Intervenor introduced into evidence a report prepared for BellSouth by a consultant regarding the benefits to **BellSouth** of sending a **CLEC** affiliate into various markets. BSE disavowed the report,

stating that it did not serve as BSE's business plan. In its brief, the TRA argues the report is "significant, not as a representation of BSE's current or future business practices, but for its indication of the most obvious opportunities that a **CLEC** affiliate would provide for **BellSouth** and for the fact that BellSouth was studying these opportunities in great detail." The brief continues:

> The report is replete with statements that **BellSouth** viewed its " **CLEC** " as an extension of **BellSouth**, which would benefit from maximum identification with **BellSouth**, that the **CLEC** would be operated as part of a comprehensive business strategy that would pertain to all **BellSouth** companies, and that the **CLEC** would offer many ways of circumventing regulatory restraints on **BellSouth's** incumbent LEC operations.... Elsewhere, the report states that the rationale for establishing a **CLEC** is that " **BellSouth** needs alternatives to gain pricing and packaging freedoms."

***14** We do not disagree with the TRA's description of the report. Although BSE denied the report was ever its business plan, the TRA argues that "The existence of this report submitted by the Intervenors and the absence of a business plan from BSE creates a reasonable presumption that BST intended to let loose its affiliate 'CLEC' upon the market not as a truly independent competitor and in order to circumvent regulatory requirements."

The final, and apparently most significant, reason given by the TRA is its interpretation of BSE's offer to be bound by a price floor equal to the resale price it pays to BST for the purchase of its telecommunications services. As discussed above, Tenn.Code Ann. § 65-5-208(c) requires an ILEC to adhere to a price floor for its competitive services which must equal the ILEC's rates for essential services used by CLECs plus the total long-run incremental cost of the competitive elements of the service.

One of the major concerns of the intervenors was the price floor issue. On appeal, they argue that Tennessee has established a "price floor" for certain ILEC services and prohibited the ILEC from charging customers less than that amount for the purpose of preventing ILECs from engaging in predatory pricing, *i.e.*, pricing services below cost. The intervenors' expert testified that the price floor statute prevents an incumbent provider with market power from pricing services at less than cost and thereby discouraging potential competitors from building their own networks. Essentially, the intervenors argue that since an ILEC is restricted by law to a price floor, the same public policy requires that an affiliate of an ILEC be subject to the same restriction because the ILEC should not be allowed to avoid the statutory price floor by operating through an affiliate.[FN10]

> FN10. The intervenors' position is explained in their brief as follows:
>
> > Based on the testimony at the second hearing, here is how BSE's scheme would work: Under federal law, BellSouth is required to make all services available for resale at a discounted, wholesale rate. In Tennessee, state regulators have determined that BellSouth's wholesale rate should be 16% less than the carrier's retail rate. Thus, if **BellSouth's** retail rate for local service were $12.15, a **CLEC** may purchase that service for a discounted price of $10.31.
> >
> > During cross-examination, [BSE] was asked to assume, for the sake of argument, that BellSouth's $12.15 rate was also the price floor for that service, as calculated in accordance with section 208(c). Under those circumstances he repeatedly maintained that BSE could legally purchase BellSouth's service at the wholesale rate and resell it for $10.31 or $10.81, substantially less than BellSouth's price floor. In an effort to persuade the TRA to approve BSE's proposal, [BSE] said BSE would agree to price

> its services at no less than $10.31-the wholesale price it paid to BellSouth-but would not agree to abide by BellSouth's price floor of $12.15.

The TRA was also unconvinced that BSE's offer regarding the price floor was sufficient to alleviate its concerns about anticompetitive conduct and found:

> In an effort to lessen the anti-competitive effect of its expanded certification, BSE agreed to be bound by a price floor equal to the resale price paid to BellSouth for the purchase of its telecommunications services. However, BSE failed to demonstrate whether the resale price it will pay to BellSouth will or will not include operator service costs, administrative costs, or marketing and advertising costs. Absent an evidentiary demonstration of all costs to be included in the resale price paid to BST, the "price floor" promised by BSE may not be comparable to that set for incumbents under Tenn.Code Ann. § 65-5-208(c). Furthermore, the Authority is of the opinion that if a price floor is to act as a deterrent against price squeezing, the floor must be set in a manner that will ensure that all of the costs of providing the services are included therein. Thus, a meaningful promise to be bound to a price floor will not only include the rate paid to BellSouth by BSE, but will also include additional costs incurred by BSE in providing such services. Under BSE's proposal to set the price floor at the resale rate paid to BellSouth, BSE would still be free to sell a service below the total cost that BSE must incur to provide that service.

***15** On appeal, the TRA contends that the danger of a price squeeze is presented by the possibility that BSE would lower its resale price, "as long as the cost components of that price are undisclosed or are subject to manipulation," to a level that competitors of BSE and BST would be unable to match. The TRA found BSE's promise to set its price floor at the resale rate it pays BST would still allow BSE to resell a service below the overall cost to BSE of providing the service. The TRA contends this situation results in an "obvious opportunity" for a price squeeze. *See Town of Norwood v. New England Power Co.*, 202 F.3d 408, 418 (1st Cir.2000) (explaining the "traditional price squeeze").

The TRA points out that BSE has never agreed to apply the price floor as described by the TRA. BSE argues that its price floor agreement must be considered in conjunction with the other safeguards it promised to comply with, which will "ensure that all of the costs of providing its services are included in its pricing."

The price floor statute only applies to incumbent providers and does not by its terms apply to CLECs. In fact, in situations where an affiliate relationship with the incumbent is not present, the issue would simply not arise. Consequently, the TRA must rely upon its authority to promote competition and prevent anticompetitive practices as authority for its decision. There is no evidence in the record that in the other situations where the TRA has approved an affiliate of the incumbent provider as a CLEC that any such price floor requirement has been imposed.

It is the relationship between BSE and BellSouth and BellSouth's market dominance and status as a RBOC that created the "concerns" that led the TRA to determine that anticompetitive practices might occur. It is actually the potential for BellSouth to use a subsidiary to circumvent restrictions placed on its operation by federal and state law and regulation, to the detriment of competition, which is at the core of the TRA's action. The fact that it is the affiliate relationship that is the problem is exemplified in the TRA's finding that, "Counterbalancing these proposals [BSE's agreement to the listed restrictions] in the record before the TRA are BSE's numerous demonstrations of its close ties to BST. Further, as BSE's witness admitted, BSE and BST will remain affiliates. BSE will be nominally independent of BST, but neither will be truly independent of BellSouth Corporation." [FN11] Although the TRA did not decide that no af-

filiate of **BellSouth** or BST could be certified as a **CLEC** in those areas where BST is the incumbent provider, it did not by rule or order establish minimum requirements to insure the type of independent operation it felt necessary to prevent "possibilities" for anticompetitive conduct.

> FN11. The Intervenors assert that this case is simply about whether **BellSouth** can be both an ILEC and a **CLEC** at the same time and in the same service territory. "Since BSE does not propose to offer any services to Tennessee customers that BellSouth itself cannot also offer, the only apparent reason for BSE's creation is to allow BellSouth to do indirectly, through an affiliate, what it cannot do directly, i.e., to engage in otherwise prohibited pricing and marketing strategies." The intervenors assert that the BellSouth companies are attempting to avoid the effect of those statutes which prohibit **BellSouth** itself from obtaining a **CLEC** certificate and which regulate **BellSouth** as the incumbent provider. This argument presupposes, among other things, that there is no structural and operational separation between the affiliates.

The FCC has addressed concerns similar to those raised by the TRA in the context of a Section 272 affiliate (an affiliate of a BOC which meets the structural separation requirements of 47 U.S.C. § 272) in its report entitled *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended,* CC Docket No. 96-149, First Report and Order (rel. Dec. 24, 1996) wherein it made the following findings:

***16** We also conclude as a matter of policy that regulations prohibiting BOC section 272 affiliates from offering local exchange service do not serve the public interest. The goal of the 1996 Act is to encourage competition and innovation in the telecommunications market. We agree with the BOCs that the increased flexibility resulting from the ability to provide both interLATA and local services from the same entity serves the public interest, because such flexibility will encourage section 272 affiliates to provide innovative new services. To the extent that there are concerns that the BOCs will unlawfully subsidize their affiliates or accord them preferential treatment, we reiterate that improper cost allocation and discrimination are prohibited by existing Commission rules and sections 251, 252, and 272 of the 1996 Act, and that predatory pricing is prohibited by the antitrust laws. Our affiliate transaction rules, as modified by our companion Accounting Safeguards Order, address the BOCs' ability to engage in improper cost allocation. The rules in this Order and our rules, in our First Interconnection Order and our Second Interconnection Order ensure that BOCs may not favor their affiliates. In sum, we find no basis in the record for concluding that competition in the local market would be harmed if a section 272 affiliate offers local exchange service to the public that is similar to local exchange service offered by the BOC.

Id. at ¶ 315 (footnotes omitted).

Of course, BSE is not a Section 272 affiliate, and the structural separation requirements established in that provision are not automatically imposed upon BSE. There is no impediment, however, to the TRA imposing the same safeguards as a condition to certification, by virtue of its authority under Tenn.Code Ann. § 65-5-208(c).[FN12] In fact, BSE and BellSouth agreed to be bound by those structural separation requirements. The TRA could have included other requirements directly related to preventing anticompetitive practices between BSE and BellSouth. Again, BSE and BellSouth agreed to additional safeguards, including the filing of various documents, accepting advertising restrictions which ensure the proper identification of the affiliate, providing cost allocation data, and setting its price floor equal to the wholesale price it pays to BST.

> FN12. The Georgia Public Service Com-

mission, in ruling on a similar application by BSE in Georgia, stated that:

> The critical issue that is raised in this proceeding stems from the affiliate relationship the Applicant has with the predominant incumbent local exchange carrier in Georgia, BellSouth Telecommunications, Inc. Testimony presented by the intervenors raises questions as to whether the service expected to be provided by the Applicant will indeed be in competition with BST. Or, will the entry of the Applicant into the local exchange market simply garner for the parent corporation an even larger share of the market in Georgia and thereby thwart the movement toward telecommunications competition in the state.
>
> After finding that there was not sufficient cause to deny the application, the Commission found that certain conditions would be imposed. Those included use of the same operating system support as other CLECs, a prohibition of favoring treatment to BSE by the incumbent, and certain reporting requirements.

The TRA determined these offers were not sufficient. However, it did not, by order or rule, establish the minimum requirements or safeguards it thought necessary. Instead, it determined that BSE did not sufficiently allay concerns that anticompetitive practices might occur. The TRA found that approval of BSE's application "may" be inconsistent with the goal of fostering competition, that potentially abusive, collusive behavior "might" occur, and that the relationship "could be potentially" adverse to competition.

Additionally, the TRA is not bound by the FCC's judgment that competition in local markets would not be harmed, considering the safeguards provided elsewhere, if Section 272 affiliates were to offer local service. The TRA is authorized to make its own determination about the effect of competition in this state. However, the TRA did not make a determination that competition would be adversely affected by certification of BSE statewide. It merely found that certification "may" be contrary to promotion of competition. Apparently, any harm to competition would come only if the affiliated entities acted collusively, in an anticompetitive manner, and in violation of existing prohibitions.

***17** While Tenn.Code Ann. § 65-5-208(c) authorizes the TRA to implement safeguards to prohibit anticompetitive conduct between an ILEC and its affiliated CLEC, we can find nothing in the statute to authorize the TRA to deny certification of a related entity simply because, by its nature, the affiliate relationship may provide the opportunity for anticompetitive practices. The legislature has prohibited anticompetitive conduct, not affiliation relationships. The TRA's responsibility in that situation is to put in place standards or requirements to prohibit and prevent the anticompetitive possibilities from becoming realities and/or to make violations easier to discover so that regulation is effective.

We conclude that the TRA's decision herein must be vacated because it is in excess of the statutory authority of the agency. We remand to the TRA for consideration of BSE's application in light of the principles set out in this opinion. Because the order which is the subject of this appeal does not establish standards, requirements, or conditions, for the certification, we do not rule upon the validity of any such requirement.[FN13] Costs of this appeal are taxed to the Tennessee Regulatory Authority.

> FN13. For example, we decline to address the issue of whether the TRA may impose a minimum charge or price floor on BSE which insures it recoups all its costs.

Tenn.Ct.App.,2003.
Bellsouth BSE, Inc. v. Tennessee Regulatory Authority

Not Reported in S.W.3d, 2003 WL 354466 (Tenn.Ct.App.)
(Cite as: 2003 WL 354466 (Tenn.Ct.App.))

Not Reported in S.W.3d, 2003 WL 354466 (Tenn.Ct.App.)

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Exhibit C

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

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

September 17, 2010

Via Hand Delivery

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

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.

Sincerely yours,

Donald L. Scholes by (fax)

DONALD L. SCHOLES

Enclosures
c: General Ryan McGehee
Tyler Ring
Jim Ford

FILED
STATE OF TENNESSEE

2010 JUL 16 PM 4:08

TRE HARGETT
SECRETARY OF STATE

CHARTER
OF
BERRY'S CHAPEL UTILITY, INC.

87845-2513

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

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
MTG 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, WILLIAMSON COUNTY

SADIE WADE

REGISTER OF DEEDS

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

5745-2528

Branstetter

X

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

July 16, 2010

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

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 — Filing Fee: $100.00

Payment-Check/MO - BRANSTETTER STRANCH & JENNINGS, PLLC, NASHVILLE, TN $100.00

NPO

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

Tre Hargett, Secretary of State
Business Services Division

Processed By: Cheryl Donnell

FILED
STATE OF TENNESSEE
2010 AUG 20 PM 3:13
SECRETARY OF STATE

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

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:

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

5759.0425

Exhibit D

Westlaw.

T. C. A. § 65-4-101

C

West's Tennessee Code Annotated Currentness
Title 65. Public Utilities and Carriers (Refs & Annos)
Chapter 4. Regulation of Public Utilities by Authority (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
→ **§ 65-4-101. Definitions**

As used in this chapter, unless the context otherwise requires:

(1) "Competing telecommunications service provider" means any individual or entity that offers or provides any two-way communications service, telephone service, telegraph service, paging service, or communications service similar to such services and is certificated as a provider of such services after June 6, 1995 unless otherwise exempted from this definition by state or federal law.

(2) "Current authorized fair rate of return" means:

(A) For an incumbent local exchange telephone company operating pursuant to a regulatory reform plan ordered by the former public service commission under TPSC rule 1220-4-2-.55, any return within the range contemplated by TPSC rule 1220-4-2-.55(1)(c)(1) or TPSC rule 1220-4-2-.55(d);

(B) For any other incumbent local exchange telephone company, the rate of return on rate base most recently used by the former public service commission in an order evaluating its rates.

(3) "Gross domestic product-price index (GDP-PI)" used to determine limits on rate changes means the final estimate of the chain-weighted gross domestic product-price index as prepared by the United States department of commerce and published in the Survey of Current Business, or its successor.

(4) "Incumbent local exchange telephone company" means a public utility offering and providing basic local exchange telephone service as defined by § 65-5-208 pursuant to tariffs approved by the former public service commission prior to June 6, 1995.

(5) "Interconnection services" means telecommunications services, including intrastate switched access service, that allow a telecommunications service provider to interconnect with the networks of all other telecommunications service providers.

(6) "Public utility" means 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. "Public utility" as defined in this section shall not be construed to include the following nonutilities:

(A) Any corporation owned by or any agency or instrumentality of the United States;

(B) Any county, municipal corporation or other subdivision of the state of Tennessee;

(C) Any corporation owned by or any agency or instrumentality of the state;

(D) Any corporation or joint stock company more than fifty percent (50%) of the voting stock or shares of which is owned by the United States, the state of Tennessee or by any nonutility referred to in subdivisions (a)(1), (2), and (3);

(E) Any cooperative organization, association or corporation not organized or doing business for profit;

(F) Any individual, partnership, copartnership, association, corporation or joint stock company offering domestic public cellular radio telephone service authorized by the federal communications commission; provided, that the real and personal property of such domestic public cellular radio telephone entities shall be assessed by the comptroller of the treasury pursuant to §§ 67-5-801(a)(1), 67-5-901(a)(1), and § 67-5-1301(a)(2); provided, however, that until at least two (2) entities, each independent of the other, are authorized by the federal communications commission to offer domestic public cellular radio telephone service in the same cellular geographical area within the state, the customer rates only of a company offering domestic public cellular radio telephone service shall be subject to review by the Tennessee regulatory authority pursuant to §§ 65-5-101--65-5-104. Upon existence in a cellular geographical area of the conditions set forth in the preceding sentence, domestic public cellular radio telephone service in such area, for all purposes, shall automatically cease to be treated as a public utility under this title. The Tennessee regulatory authority's authority over domestic public cellular radio telephone service is expressly limited to the above extent and the authority shall have no authority over resellers of domestic public cellular radio telephone service. For the purpose of this subdivision (6)(F), "authorized" means six (6) months after granting of the construction permit by the federal communications commission to the second entity or when the second entity begins offering service in the same cellular geographical area, whichever should first occur. This subdivision (6)(F) does not affect, modify or lessen the regulatory authority's authority over public utilities that are subject to regulation pursuant to chapter 5 of this title;

(G) Any county, municipal corporation or other subdivision of a state bordering Tennessee, but only to the extent that such county, municipal corporation or other subdivision distributes natural gas to retail customers within the municipal boundaries and/or urban growth boundaries of a Tennessee city or town adjoining such

bordering state;

(H) Any of the foregoing nonutilities acting jointly or in combination or through a joint agency or instrumentality; and

(I) For purposes of §§ 65-5-101 and 65-5-103, "public utility" shall not include interexchange carriers. "Interexchange carriers" means companies, other than incumbent local exchange telephone companies, owning facilities in the state which consist of network elements and switches, or other communication transmission equipment used to carry voice, data, image, and video traffic across the local access and transport area (LATA) boundaries within Tennessee.

(7) "Public utility" does not mean nonprofit homeowners associations or organizations whose membership is limited to owners of lots in residential subdivisions, which associations or organizations own, construct, operate or maintain water, street light or park maintenance service systems for the exclusive use of that subdivision; provided, however, that the subdivisions are unable to obtain such services from the local utility district. None of the property, property rights or facilities owned or used by the association or organization for the rendering of such services shall be under the jurisdiction, supervision or control of the Tennessee regulatory authority.

(8) "Telecommunications service provider" means any incumbent local exchange telephone company or certificated individual or entity, or individual or entity operating pursuant to the approval by the former public service commission of a franchise within § 65-4-207(b), authorized by law to provide, and offering or providing for hire, any telecommunications service, telephone service, telegraph service, paging service, or communications service similar to such services unless otherwise exempted from this definition by state or federal law.

CREDIT(S)

1919 Pub.Acts, c. 49, § 3; 1935 Pub.Acts, c. 42, § 1; 1943 Pub.Acts, c. 51, § 1; 1979 Pub.Acts, c. 195, § 1; 1984 Pub.Acts, c. 869, § 1; 1995 Pub.Acts, c. 305, § 14, eff. July 1, 1995; 1995 Pub.Acts, c. 305, § 20, eff. July 1, 1996; 1995 Pub.Acts, c. 408, §§ 2, 3, eff. June 6, 1995; 1999 Pub.Acts, c. 317, § 1, eff. May 26, 1999; 2001 Pub.Acts, c. 27, § 1, eff. March 22, 2001.

Formerly Shannon's Code Supp., § 3059a86; 1932 Code, § 5448; 1950 Code Supp., § 5448; § 65-401.

CROSS REFERENCES

Advertising material affixed to public utility property, see § 2-19-144.

LIBRARY REFERENCES

Key Numbers

Public Utilities ⇐ 103.

Exhibit E

CHAPTER 42

SENATE BILL No. 124

(Moss, Carter, Maxwell, Boyd, Harris, Sprouse, Evins, Cate, Wright, Bramley, Draper, Fowler, Lowe, Abernathy, Atchley, Dodson, Hale, Trotter, Ewell, Howell, Ashley, Carden.)

AN ACT to define and limit the authority, powers and jurisdiction of the Railroad and Public Utilities Commission so as to exempt therefrom certain Federal and State Corporations, Agencies, Instrumentalities, and other public bodies and certain non-profit organizations herein defined as non-utilities; to authorize utilities to sell, lease or otherwise dispose of their property to non-utilities; and as a part hereof to amend sections 5380 to 5508, inclusive, of the official code of Tennessee, passed at the regular session of the General Assembly of the State of Tennessee in 1931, known as the Code of Tennessee of 1932, said section of the code defining the term "Public Utility."

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That Section 5448 of the Code of Tennessee, passed by the regular session of the Legislature of Tennessee of 1931, known as the Code of Tennessee of 1932, which section defines the term "public utility" be, and the same is hereby amended by making said Section 5448 read, as follows: Section 5448:

Public Utilities are Defined.—The term "public utility" is defined to include every individual, copartnership, association, corporation, or joint stock company, their lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the State of Tennessee, any street railway, interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, 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; *Provided, however,* that the term "public utility" as herein defined shall not be construed to include the following (hereinafter called non-utilities): (a) any corporation owned by or any agency or instrumentality of the United States; (b) any county, municipal corporation or other sudivision (subdivision*) of the State of Tennessee; (c) any corporation owned by or any agency or instrumentality of the State of Tennessee; (d) any corporation or joint stock company more than fifty per cent of the voting stock or shares of which is owned by the United State (States*), the State of Tennessee or by any non-utility referred to in (a), (b), and (c) hereof; (e) any cooperative organization, association or corporation not organized or doing business for profit; (f) any of the foregoing non-utilities acting jointly or in combination or through a joint agency or instrumentality.

SEC. 2. *Be it further enacted,* That any public utility as defined in Section 1 of this Act, may, without the approval or consent of the State of Tennessee, or of the Railroad and Public Utilities Commission, or any other agency of the State of Tennessee, 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 foregoing non-utilities.

SEC. 3. *Be it further enacted,* That if any section, sentence, clause or provision of this Act or any application thereof shall be held invalid, the same shall not affect the validity of any other section, sentence, clause or provision of this Act, or of any other application thereof.

SEC. 4. *Be it further enacted,* That this Act

shall continue in force until expressly repealed by the specific provisions of a subsequent enactment.

SEC. 5. *Be it further enacted,* That this Act shall take effect from and after its passage, the public welfare requiring it.

Passed February 13, 1935.

W. P. MOSS,
Speaker of the Senate.

WALTER M. HAYNES,
Speaker of the House of Representatives.

Approved February 19, 1935.

HILL MCALISTER,
Governor.

CHAPTER 43

SENATE BILL No. 123

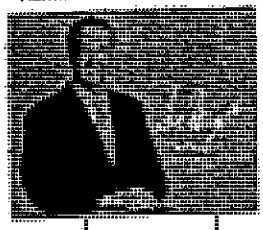
(Moss, Carter, Maxwell, Boyd, Harris, Sprouse, Evins, Loveless, Chambers, Bramley, Cate, Wright, Hale, Howell, Trotter, Draper, Abernathy, Atchley, Ewell, Ashley, Carden, Fowler, Jones, Elkins, Mosby, Dodson.)

AN ACT to provide for the creation and establishment of a State Planning Commission of the State of Tennessee: to provide for the government and maintenance of such commission and to prescribe the powers and duties of such commission; to empower such commission to create and define the boundaries of planning regions within the State and to create, establish and appoint a regional planning commission in any such planning region; to provide the government, procedure and maintenance of regional planning commissions; to prescribe the powers and duties of such regional planning commissions; to provide for the legal effect of a regional plan upon the acquisition, construction or authorization of public and public utility ways, grounds, spaces, buildings and structures within the nonmunicipal territory of such regions and to regulate the supply or appropriation of State aid in such planned regions.

SECTION 1. CREATION AND APPOINTMENT OF STATE PLANNING COMMISSION. *Be it enacted by the General Assembly of the State of Tennessee,* That the State Planning Commission of the State of Tennessee is hereby created and established. It shall consist of nine members, namely the Governor of the State and eight citizens of the State appointed by the Governor. The term of each appointive member shall be four (4) years; except that of the initial appointments by the Governor, two shall be designated by the Governor to serve for two years and three for three years. Of the eight appointive members, two shall be residents of each of the three grand geographical divisions of the State and two shall be from the State at large. Not more than six of these eight appointees shall be members of the same political affiliation. Said appointive members shall hold no full time salaried public office or public employment. All members of the State Planning Commission shall serve as such without compensation; but they shall be allotted necessary travelling and other expenses while engaged in the work of or for the commission. The Governor may remove a member for cause specified in writing and after hearing. Any vacancy in the appointive membership shall be filled by the Governor for the unexpired term.

SEC. 2. ORGANIZATION, RULES, STAFF AND FINANCES. *Be it further enacted,* That the State Planning Commission shall elect its chairman from amongst the appointive members, whose term shall be for one year with eligibility for reelection, and the commission may create and fill such other of-

Exhibit F



Tennessee Department of State

Business Entity Detail

Entity details cannot be edited. This detail reflects the current state of the filing in the system.
Click Here to return to the Business Information Search

000118764: Corporation Non-Profit - Domestic

Name: HICKMAN-FULTON COUNTIES RURAL ELECTRIC COOPERATIVE CORPORATION
Old Name:
Business Type:
Status: Active
Initial Filing: 05/16/1940
Formed in: Tennessee
Delayed Effective Date:
Fiscal Year Close: June
AR Due Date: 10/01/2011
Term of Duration: Perpetual
Inactive Date:
Principal Office: 1702 MOSCOW
HICKMAN, KY 420500190 USA
Annual Report Mailing Address: P.O. BOX 190
HICKMAN, KY 420500000 USA
AR Exempt: No
Mutual Benefit Corporation: Yes

Assumed Names | History | Registered Agent

Name	Status	Date	Expires
No Assumed Names Found...			

Printer Friendly Version

Exhibit G

FILED
STATE OF TENNESSEE

2010 JUL 16 PM 4:08

TRE HARGETT
SECRETARY OF STATE

CHARTER
OF
BERRY'S CHAPEL UTILITY, INC.

8745-2519

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

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
MTG TAX	0.00
TRN TAX	0.00
REG FEE	5.00
DP FEE	2.00
ARC FEE	0.00
TOTAL	7.00

STATE OF TENNESSEE, WILLIAMSON COUNTY

SADIE WADE

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

57745.252PB

Branstetter

X

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

July 16, 2010

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

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

NPO

Receipt #: 221470 — Filing Fee: $100.00

Payment-Check/MO - BRANSTETTER STRANCH & JENNINGS, PLLC, NASHVILLE, TN $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

Tre Hargett, Secretary of State
Business Services Division

Processed By: Cheryl Donnell

FILED
STATE OF TENNESSEE
2010 AUG 20 PM 3:13
SECRETARY OF STATE

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

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:

5759-0426

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

Exhibit I

C
West's Tennessee Code Annotated Currentness
Title 67. Taxes and Licenses (Refs & Annos)
Chapter 5. Property Taxes
Part 2. Exemptions
§ 67-5-212. Property of religious, charitable, scientific or nonprofit educational institutions

(a)(1) There shall be exempt from property taxation the real and personal property, or any part of the real and personal property, owned by any religious, charitable, scientific or nonprofit educational institution that is occupied and actually used by the institntion or its officers purely and exclusively for carrying out one (1) or more of the exempt purposes for which the institution was created or exists. There shall further be exempt from property taxation the property, or any part of the property, owned by an exempt institution that is occupied and actually used by another exempt institution for one (1) or more of the exempt purposes for which it was created or exists under an arrangement in which the owning institution receives no more rent than a reasonably allocated share of the cost of use, excluding the cost of capital improvements, debt service, depreciation and interest, as determined by the board of equalization.

(2) In determining the exemption applicable to a post-secondary educational institution, there shall be a presumption that the entire original campus of an institution chartered before 1930 is an historical and integral entity, and is exempt so long as no particular portion of such campus is used for nonexempt purposes.

(3)(A) The property of such institution shall not be exempt, if:

(i) The owner, or any stockholder, officer, member or employee of such institution shall receive or may be lawfully entitled to receive any pecuniary profit from the operations of that property in competition with like property owned by others that is not exempt, except reasonable compensation for services in effecting one (1) or more of such purposes, or as proper beneficiaries of its strictly religious, charitable, scientific or educational purposes; or

(ii) The organization thereof for any such avowed purpose be a guise or pretense for directly or indirectly making any other pecuniary profit for such institution, or for any of its members or employees, or if it be not in good faith organized or conducted exclusively for one (1) or more of these purposes.

(B) The real property of any such institution not so used exclusively for carrying out thereupon one (1) or more of such purposes, but leased or otherwise used for other purposes, whether the income received therefrom be used for one (1) or more of such purposes or not, shall not be exempt; but, if a portion only of any lot or building of any such institution is used purely and exclusively for carrying out thereupon one (1) or more of such purposes of such institution, then such lot or building shall be so exempt only to the extent of the value

of the portion so used, and the remaining or other portion shall be subject to taxation.

(4) No church shall be granted an exemption on more than one (1) parsonage, and an exempt parsonage may not include within the exemption more than three (3) acres.

(b)(1) Any owner of real or personal property claiming exemption under this section or § 67-5-207, § 67-5-213 or § 67-5-219 shall file an application for the exemption with the state board of equalization on a form prescribed by the board, and supply such further information as the board may require to determine whether the property qualifies for exemption. No property shall be exempted from property taxes under these sections, unless the application has been approved in writing by the board. A separate application shall be filed for each parcel of property for which exemption is claimed. An application shall be deemed filed on the date it is received by the board or, if mailed, on the postmark date. The applicant shall provide a copy of the application with any supporting materials to the assessor of property of the county in which the property is located. An application for exemption pursuant to this section or any other section referring to these procedures shall be treated as an appeal for purposes of § 67-5-1512.

(2) The board shall make an initial determination granting or denying exemption through its staff designee, who shall send written notice of the initial determination to the applicant and the assessor of property. Either the assessor of property or the applicant may appeal the initial determination to the board and shall be entitled to a hearing prior to any final determination of exemption. The assessor shall maintain on file copies of any approved applications. Upon approval of exemption, it is not necessary that the applicant reapply each year, but the exemption shall not be transferable or assignable and the applicant shall promptly report to the assessor any change in the use or ownership of the property that might affect its exempt status. The board may by rule impose a fee for processing applications for exemption. Such fee shall not exceed one hundred twenty dollars ($120) and shall be proportionate to the value of the property at issue. The total fees collected in any fiscal year shall not exceed the cost of processing exemption applications in that fiscal year.

(3)(A) Any institution claiming an exemption under this section that has not previously filed an application for and been granted an exemption for a parcel must file an application for exemption with the state board of equalization by May 20 of the year for which exemption is sought. If the application is approved, the exemption will be effective as of January 1 of the year of application or as of the date the exempt use of such parcel began, whichever is later. If application is made after May 20 of the year for which exemption is sought, but prior to the end of the year, the application may be approved but will be effective for only a portion of the year determined as follows:

(i) If application is filed within thirty (30) days after the exempt use of the property began, exemption will be effective as of the date the exempt use began or May 20, whichever is later; or

(ii) If application is filed more than thirty (30) days after the exempt use began, the exemption will be effective as of the date of application.

(B) If a religious institution acquires property that was duly exempt at the time of transfer from a transferor who had previously been approved for a religious use exemption of the property, or if a religious institution acquires property to replace its own exempt property, then the effective date of exemption shall be three (3) years prior to the date of application, or the date the acquiring institution began to use the property for religious purposes, whichever is later. The purpose of this subdivision (b)(3) is to provide continuity of exempt status for property transferred from one exempt religious institution to another in the specified circumstances. For purposes of this subdivision (b)(3), property transferred by a lender following foreclosure shall be deemed to have been transferred by the foreclosed debtor, whether or not the property was assessed in the name of the lender during the lender's possession.

(4) All questions of exemption under this section shall be subject to review and final determination by the board; provided, that any determination by the board is subject to judicial review by petition of certiorari to the appropriate chancery court. All other provisions of law notwithstanding, no property shall be entitled to judicial review of its status under this statute, except as provided by the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and only after the exhaustion of administrative remedies as provided in this section.

(5) The state board of equalization may revoke any exemption approved under this section, if it determines that the exemption was approved on the basis of fraud, misrepresentation or erroneous information, or that the current owner or use of the property does not qualify for exemption. The executive secretary of the board may initiate proceedings for revocation on the executive secretary's own motion or upon the written complaint of any person upon a determination of probable cause. Revocation shall not be retroactive, unless the order of revocation incorporates a finding of fraud or misrepresentation on the part of the applicant or failure of the applicant to give notice of a change in the use or ownership of the property as required by this section.

(c) As used in this section, "charitable institution" includes any nonprofit organization or association devoting its efforts and property, or any portion thereof, exclusively to the improvement of human rights and/or conditions in the community.

(d)(1) The property, or any part thereof, owned by any religious, charitable, scientific or educational membership nonprofit organization chartered by the United States congress shall not be denied exemption because administrative, social or recreational activities of such organization are conducted thereon, where the activities are:

(A) Agencies for the advancement and enlargement of the purposes for which the organizations exist;

(B) In furtherance of the general purposes of such organization; or

(C) To promote the interest of its membership in such organizations.

(2) When **property** is owned by corporations organized for the exclusive purpose of holding title to **property** for use of any organization that itself qualifies for such **exemption** from taxation under this subsection (d), only such **property** of the corporation, or such parts thereof, as would be entitled to an **exemption** under this subsec-

tion (d) if owned directly by such organization shall not be denied **exemptions**.

(3) The **exemption** of **property** or parts thereof under this subsection (d) shall be applicable only to such part of the **property** on which such organization conducts administrative, social or recreational activities, if it is less than the entire **property**.

(e)(1) There shall be **exempt** from **property** taxation the **property** of labor organizations **exempted** from the payment of federal income taxes by the United States Internal Revenue Code (26 U.S.C. § 501(c)(5)), when such **property** is not used for revenue producing profit, but is used by such organization for **charitable** or educational meetings; but, if part of the **property** is used for revenue producing profit, then the part so used shall not be **exempt** from **property** taxation; provided, that the real **property** on which the building is situated shall be **exempt** from **property** taxation.

(2) No such organization that discriminates against any person based upon race, sex, **religious** beliefs or national origin shall be eligible for the **property tax exemption** authorized by subdivision (e)(1).

(f) There shall be **exempt** from **property** taxation the **property** or any part thereof of nonprofit artificial breeding associations chartered under the provisions of the Tennessee Nonprofit Corporation Act, compiled in title 48, chapters 51-68.

(g)(1) In the case of **property** that is owned by any **religious**, **charitable**, **scientific** or educational institution and on which such institution constructs improvements to be occupied and used by such institution or its officers purely and exclusively for carrying out thereupon one (1) or more of the purposes for which the institution was created or exists, the property, to the extent of the value of the improvements constructed thereon for these purposes, shall be considered to be occupied and used by the institution or its officers purely and exclusively for the institution's purposes from and after, but not before, the commencement of the construction of the improvements and to the extent of such value shall be exempt from taxation; provided, that, if the improvements upon completion are not so occupied and used, then no part of the value of the property shall be exempt from taxation during the construction of the improvements.

(2) If upon completion of the improvements a portion thereof is not so used and occupied, such portion shall not be exempt from taxation during construction.

(3) If the improvements upon completion are not occupied and used by such institution or its officers for a period of ten (10) years, purely and exclusively for carrying out thereupon one (1) or more of the purposes for which such institution was created or exists, the institution shall be liable for the full amount of property taxes that would otherwise have been due and payable during the period of construction, plus penalties and interest as provided in this title.

(4) Construction begun, and having the effect of activating the provisions of this subsection (g), shall be completed within five (5) years or the effect of this subsection (g) shall be null and void.

(h) There shall be exempt from property taxation the property or any part thereof of fraternal organizations exempted from the payment of federal income taxes by the United States Internal Revenue Code (26 U.S.C. § 501(c)), to the extent that such property is used not for revenue-producing profit, but directly, physically and exclusively for religious, charitable, scientific and educational activities.

(i) There shall be exempt from property taxation the property, or any part thereof, of nonprofit county fair associations.

(j) There shall be exempt from property taxation the property or any portion thereof containing one (1) residential dwelling located in a community park that is open to entry by the general public, if such dwelling is owned by a nonprofit religious, charitable, educational or scientific organization that does not receive income from the resident thereof, if such resident does not occupy the dwelling in lieu of a salary, and if such resident, by such resident's presence, would discourage or prohibit damage or destruction by vandalism of the organization's property.

(k) There shall be exempt from property taxation any property upon which a caretaker's dwelling is located, if:

(1) The dwelling is located upon land owned by a nonprofit member organization chartered by the United States congress;

(2) The land immediately surrounding the dwelling is used by such organization for nonprofit religious, charitable, educational or scientific purposes; and

(3) The caretaker's presence is required for the physical security of the users of the property as well as to discourage or prohibit damage or destruction of the organization's property by vandalism.

(*l*) The general assembly finds that public radio broadcasting serves a valid educational purpose so long as the broadcaster holds an educational broadcast license issued by the federal communications commission; and, therefore, that property, or any part thereof, owned by a public radio station that is an affiliate member of the public broadcasting network, and that holds such a license, whether as a transferee, successor, or otherwise, of a license formerly held by the public library board of any county having a metropolitan form of government, shall be exempt from property taxation to the extent the property is used in a manner consistent with the license.

(m) The general assembly finds that public television broadcasting serves a valid educational purpose so long as the broadcaster holds a noncommercial educational broadcast license issued by the federal communications commission. Therefore, that property, or any part thereof, owned by a public television station that is an affiliate member of the public broadcasting network, and that holds such license, whether as a transferee, successor, or otherwise, of a license formerly held by the public school board of any county having a metropolitan form of government shall be exempt from property taxation to the extent the property is used in a manner consistent with the license.

(n) There shall be exempt from property taxation the real and personal property, or any part thereof, that is owned by a religious or charitable institution and that is occupied and used by such institution for a thrift shop; provided, that:

(1) The institution is exempt from payment of federal income taxes under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3));

(2)(A) The thrift shop is operated as a training venue for persons in need of occupational rehabilitation; or

(B) The thrift shop is operated primarily by volunteers;

(3) The inventory of the thrift shop is obtained by donation to the institution that owns and operates the shop;

(4) Goods are priced at levels generally ascribed to used property;

(5) Goods are given to persons whose financial situations preclude payment; and

(6) The net proceeds of the thrift shop are used solely for the charitable purposes of the institution that owns and operates the shop.

(o) Land not necessary to support exempt structures or site improvements associated with exempt structures, including land used for recreation, retreats or sanctuaries, shall not be eligible for exemption beyond a maximum of one hundred (100) acres per county for each religious, charitable, scientific or nonprofit educational institution qualified for exemption pursuant to this section. For purposes of applying this limit, land owned by an exempt institution shall be aggregated with land owned by related exempt institutions having common ownership or control. Qualifying land in excess of the limit shall be classified as forest land upon application submitted pursuant to § 67-5-1006, or as open space land upon application submitted pursuant to § 67-5-1007, and the effective date of the classification shall he the date the property might otherwise have qualified for exemption.

CREDIT(S)

1973 Pub.Acts, c. 226, § 5; 1974 Pub.Acts, c. 771, §§ 5 to 7; 1974 Pub.Acts, c. 774, §§ 1, 2; 1975 Pub.Acts, c. 322, § 1; 1976 Pub.Acts, c. 670, §§ 1, 2; 1976 Pub.Acts, c. 849, § 1; 1977 Pub.Acts, c. 255, §§ 1, 2; 1977 Pub.Acts, c. 421, §§ 1 to 5; 1979 Pub.Acts, c. 22, § 1; 1981 Pub.Acts, c. 96, § 1; 1981 Pub.Acts, c. 218, § 1; 1981 Pub.Acts, c. 306, §§ 1, 2; 1982 Pub.Acts, c. 713, § 1; 1983 Pub.Acts, c. 460, § 1; 1984 Pub.Acts, c. 507, § 1; 1984 Pub.Acts, c. 651, § 1; 1984 Pub.Acts, c. 749, § 1; 1984 Pub.Acts, c. 766, § 1; 1984 Pub.Acts, c. 809, § 1; 1984 Pub.Acts, c. 832, § 4; 1985 Pub.Acts, c. 68, § 1; 1994 Pub.Acts, c. 541, §§ 2 to 8, eff. Jan. 1, 1995; 1997 Pub.Acts, c. 467, § 1, eff. June 13, 1997; 2000 Pub.Acts, c. 628, § 1, eff. April 5, 2000; 2000 Pub.Acts, c. 793, § 1, eff. May 23, 2000; 2000 Pub.Acts, c. 938, § 2, eff. June 21, 2000; 2000 Pub.Acts, c. 993, § 2, eff. June 28, 2000; 2002 Pub.Acts, c. 687, §§ 1, 2, eff. May 1, 2002; 2003 Pub.Acts, c. 251, § 1, eff. June 3, 2003; 2004

Pub.Acts, c. 531, § 2, eff. April 14, 2004; 2004 Pub.Acts, c. 635, § 1, eff. May 10, 2004; 2004 Pub.Acts, c. 732, §§ 1, 2, eff. May 24, 2004; 2005 Pub.Acts, c. 500, § 12, eff. June 22, 2005; 2006 Pub.Acts, c. 740, § 1, eff. May 23, 2006; 2006 Pub.Acts, c. 861, § 1, eff. June 5, 2006; 2007 Pub.Acts, c. 292, § 2, eff. May 30, 2007; 2008 Pub.Acts, c. 1104, §§ 2 to 4, eff. June 5, 2008; 2010 Pub.Acts, c. 1036, § 2, eff. June 11, 2010; 2010 Pub.Acts, c. 1074, § 1, eff. June 21, 2010.

Formerly § 67-513.

HISTORICAL AND STATUTORY NOTES

Section 10 of the 1994 amendatory act provides:

"This act shall take effect on January 1, 1995, the public welfare requiring it; provided, however, that this act shall not be construed to terminate the tax-exempt status of any parcel of property on that date."

1997 Pub.Acts, c. 467, § 2, provides:

"This act shall take effect upon becoming a law, the public welfare requiring it, and shall apply both to applications filed after its effective date and to applications for exemption which are pending or under appeal to the State Board of Equalization on the effective date of this act."

2000 Pub.Acts, c. 628, § 1 which expired July 1, 2000 added two sentences to the end of subsec. (b)(3) which provided: "Notwithstanding the date of application, the exemption shall take effect up to eighteen (18) months earlier than the date of application, where the application was submitted due to relocation by the applicant of a use previously approved for exemption. In no event may the exemption in such cases date back earlier than the date the property subject to the application began to be used for exempt purposes."

2000 Pub.Acts, c. 628, § 2, provides:

"SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it, and shall apply to applications for exemption pending or under appeal to the State Board of Equalization on its effective date, but shall expire and be void and of no effect July 1, 2000."

2000 Pub.Acts, c. 793, § 1 added provisions appearing as subsec. (l).

2000 Pub.Acts, c. 793, § 2, provides:

"This act shall take effect upon becoming a law, the public welfare requiring it and in addition to prospective application it shall apply to applications for exemption pending or under appeal at the State Board of Equalization on the effective date of this act."

Exhibit H

Form **990**

Department of the Treasury
Internal Revenue Service

Return of Organization Exempt From Income Tax

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

▶ The organization may have to use a copy of this return to satisfy state reporting requirements.

OMB No. 1545-0047

2010

Open to Public Inspection

A For the 2010 calendar year, or tax year beginning , 2010, and ending , 20

B Check if applicable:
- ☐ Address change
- ☐ Name change
- ☐ Initial return
- ☐ Terminated
- ☐ Amended return
- ☐ Application pending

C Name of organization

Doing Business As

Number and street (or P.O. box if mail is not delivered to street address) | Room/suite

City or town, state or country, and ZIP + 4

D Employer identification number

E Telephone number

G Gross receipts $

F Name and address of principal officer:

H(a) Is this a group return for affiliates? ☐ Yes ☐ No

H(b) Are all affiliates included? ☐ Yes ☐ No
If "No," attach a list. (see instructions)

H(c) Group exemption number ▶

I Tax-exempt status: ☐ 501(c)(3) ☐ 501(c) ( ) ◀ (insert no.) ☐ 4947(a)(1) or ☐ 527

J Website: ▶

K Form of organization: ☐ Corporation ☐ Trust ☐ Association ☐ Other ▶

L Year of formation:

M State of legal domicile:

Part I Summary

Activities & Governance

1 Briefly describe the organization's mission or most significant activities:

2 Check this box ▶ ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets.

3	Number of voting members of the governing body (Part VI, line 1a)	3	
4	Number of independent voting members of the governing body (Part VI, line 1b)	4	
5	Total number of individuals employed in calendar year 2010 (Part V, line 2a)	5	
6	Total number of volunteers (estimate if necessary)	6	
7a	Total unrelated business revenue from Part VIII, column (C), line 12	7a	
b	Net unrelated business taxable income from Form 990-T, line 34	7b	

Revenue

		Prior Year	Current Year
8	Contributions and grants (Part VIII, line 1h)		
9	Program service revenue (Part VIII, line 2g)		
10	Investment income (Part VIII, column (A), lines 3, 4, and 7d)		
11	Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)		
12	Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)		

Expenses

13	Grants and similar amounts paid (Part IX, column (A), lines 1–3)		
14	Benefits paid to or for members (Part IX, column (A), line 4)		
15	Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)		
16a	Professional fundraising fees (Part IX, column (A), line 11e)		
b	Total fundraising expenses (Part IX, column (D), line 25) ▶		
17	Other expenses (Part IX, column (A), lines 11a–11d, 11f–24f)		
18	Total expenses. Add lines 13–17 (must equal Part IX, column (A), line 25)		
19	Revenue less expenses. Subtract line 18 from line 12		

Net Assets or Fund Balances

		Beginning of Current Year	End of Year
20	Total assets (Part X, line 16)		
21	Total liabilities (Part X, line 26)		
22	Net assets or fund balances. Subtract line 21 from line 20		

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Sign Here

▶ Signature of officer — Date

▶ Type or print name and title

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN

Firm's name ▶ — Firm's EIN ▶

Firm's address ▶ — Phone no.

May the IRS discuss this return with the preparer shown above? (see instructions) ☐ Yes ☐ No

Part III **Statement of Program Service Accomplishments**

Check if Schedule O contains a response to any question in this Part III . . . . . ☐

1 Briefly describe the organization's mission:

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? . . . . . ☐ Yes ☐ No

If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? . . . . . ☐ Yes ☐ No

If "Yes," describe these changes on Schedule O.

4 Describe the exempt purpose achievements for each of the organization's three largest program services by expenses. Section 501(c)(3) and 501(c)(4) organizations and section 4947(a)(1) trusts are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code:) (Expenses $ including grants of $) (Revenue $)

4b (Code:) (Expenses $ including grants of $) (Revenue $)

4c (Code:) (Expenses $ including grants of $) (Revenue $)

4d Other program services. (Describe in Schedule O.)
(Expenses $ including grants of $) (Revenue $)

4e **Total program service expenses** ▶

Part IV Checklist of Required Schedules

			Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1		
2	Is the organization required to complete Schedule B, Schedule of Contributors? (see instructions)	2		
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4		
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Revenue Procedure 98-19? *If "Yes," complete Schedule C, Part III*	5		
6	Did the organization maintain any donor advised funds or any similar funds or accounts where donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D, Part I*	6		
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D, Part III*	8		
9	Did the organization report an amount in Part X, line 21; serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		
10	Did the organization, directly or through a related organization, hold assets in term, permanent, or quasi-endowments? *If "Yes," complete Schedule D, Part V*	10		
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D, Part VI*	11a		
b	Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		
c	Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e		
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f		
12 a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI, XII, and XIII*	12a		
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI, XII, and XIII is optional*	12b		
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		
14 a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, and program service activities outside the United States? *If "Yes," complete Schedule F, Parts I and IV*	14b		
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or assistance to any organization or entity located outside the United States? *If "Yes," complete Schedule F, Parts II and IV*	15		
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or assistance to individuals located outside the United States? *If "Yes," complete Schedule F, Parts III and IV*	16		
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I (see instructions)*	17		
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		
20 a	Did the organization operate one or more hospitals? *If "Yes," complete Schedule H*	20a		
b	If "Yes" to line 20a, did the organization attach its audited financial statements to this return? **Note.** Some Form 990 filers that operate one or more hospitals must attach audited financial statements (see instructions)	20b		

Part IV Checklist of Required Schedules *(continued)*

			Yes	No
21	Did the organization report more than $5,000 of grants and other assistance to governments and organizations in the United States on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21		
22	Did the organization report more than $5,000 of grants and other assistance to individuals in the United States on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5 about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23		
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K. If "No," go to line 25*	24a		
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3) and 501(c)(4) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L, Part I*	25a		
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L, Part I*	25b		
26	Was a loan to or by a current or former officer, director, trustee, key employee, highly compensated employee, or disqualified person outstanding as of the end of the organization's tax year? *If "Yes," complete Schedule L, Part II*	26		
27	Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor, or a grant selection committee member, or to a person related to such an individual? *If "Yes," complete Schedule L, Part III*	27		
28	Was the organization a party to a business transaction with one of the following parties (see Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28a		
b	A family member of a current or former officer, director, trustee, or key employee? *If "Yes," complete Schedule L, Part IV*	28b		
c	An entity of which a current or former officer, director, trustee, or key employee (or a family member thereof) was an officer, director, trustee, or direct or indirect owner? *If "Yes," complete Schedule L, Part IV*	28c		
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Parts II, III, IV, and V, line 1*	34		
35	Is any related organization a controlled entity within the meaning of section 512(b)(13)?	35		
a	Did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2* ☐ Yes ☐ No			
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		
38	Did the organization complete Schedule O and provide explanations in Schedule O for Part VI, lines 11 and 19? **Note.** All Form 990 filers are required to complete Schedule O	38		

Part V **Statements Regarding Other IRS Filings and Tax Compliance**

Check if Schedule O contains a response to any question in this Part V . . . . . ☐

				Yes	No
1a	Enter the number reported in Box 3 of Form 1096. Enter -0- if not applicable	1a			
b	Enter the number of Forms W-2G included in line 1a. Enter -0- if not applicable	1b			
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?		1c		
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return	2a			
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns? .		2b		
	Note. If the sum of lines 1a and 2a is greater than 250, you may be required to e-*file*. (see instructions)				
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?		3a		
b	If "Yes," has it filed a Form 990-T for this year? *If "No," provide an explanation in Schedule O*		3b		
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?		4a		
b	If "Yes," enter the name of the foreign country: ▶ ..... See instructions for filing requirements for Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts.				
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year? . . .		5a		
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?		5b		
c	If "Yes" to line 5a or 5b, did the organization file Form 8886-T?		5c		
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible?		6a		
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?		6b		
7	**Organizations that may receive deductible contributions under section 170(c).**				
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?		7a		
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?		7b		
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?		7c		
d	If "Yes," indicate the number of Forms 8282 filed during the year	7d			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?		7e		
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract? .		7f		
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?		7g		
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?		7h		
8	**Sponsoring organizations maintaining donor advised funds and section 509(a)(3) supporting organizations.** Did the supporting organization, or a donor advised fund maintained by a sponsoring organization, have excess business holdings at any time during the year?		8		
9	**Sponsoring organizations maintaining donor advised funds.**				
a	Did the organization make any taxable distributions under section 4966?		9a		
b	Did the organization make a distribution to a donor, donor advisor, or related person?		9b		
10	**Section 501(c)(7) organizations.** Enter:				
a	Initiation fees and capital contributions included on Part VIII, line 12	10a			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities .	10b			
11	**Section 501(c)(12) organizations.** Enter:				
a	Gross income from members or shareholders	11a			
b	Gross income from other sources (Do not net amounts due or paid to other sources against amounts due or received from them.)	11b			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?		12a		
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year . .	12b			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**				
a	Is the organization licensed to issue qualified health plans in more than one state?		13a		
	Note. See the instructions for additional information the organization must report on Schedule O.				
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans	13b			
c	Enter the amount of reserves on hand	13c			
14a	Did the organization receive any payments for indoor tanning services during the tax year?		14a		
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O* .		14b		

Part VI **Governance, Management, and Disclosure** *For each "Yes" response to lines 2 through 7b below, and for a "No" response to line 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O. See instructions.*

Check if Schedule O contains a response to any question in this Part VI . . . . . ☐

Section A. Governing Body and Management

			Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year . .	1a		
b	Enter the number of voting members included in line 1a, above, who are independent .	1b		
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2		
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person? . .	3		
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?	4		
5	Did the organization become aware during the year of a significant diversion of the organization's assets? .	5		
6	Does the organization have members or stockholders?	6		
7a	Does the organization have members, stockholders, or other persons who may elect one or more members of the governing body?	7a		
b	Are any decisions of the governing body subject to approval by members, stockholders, or other persons?	7b		
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:			
a	The governing body?	8a		
b	Each committee with authority to act on behalf of the governing body?	8b		
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O*	9		

Section B. Policies *(This Section B requests information about policies not required by the Internal Revenue Code.)*

			Yes	No
10a	Does the organization have local chapters, branches, or affiliates?	10a		
b	If "Yes," does the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with those of the organization? .	10b		
11a	Has the organization provided a copy of this Form 990 to all members of its governing body before filing the form?	11a		
b	Describe in Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Does the organization have a written conflict of interest policy? *If "No," go to line 13*	12a		
b	Are officers, directors or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b		
c	Does the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this is done*	12c		
13	Does the organization have a written whistleblower policy?	13		
14	Does the organization have a written document retention and destruction policy?	14		
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	15a		
b	Other officers or key employees of the organization	15b		
	If "Yes" to line 15a or 15b, describe the process in Schedule O. (See instructions.)			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		
b	If "Yes," has the organization adopted a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and taken steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶

18 Section 6104 requires an organization to make its Forms 1023 (or 1024 if applicable), 990, and 990-T (501(c)(3)s only) available for public inspection. Indicate how you make these available. Check all that apply.

☐ Own website ☐ Another's website ☐ Upon request

19 Describe in Schedule O whether (and if so, how), the organization makes its governing documents, conflict of interest policy, and financial statements available to the public.

20 State the name, physical address, and telephone number of the person who possesses the books and records of the organization: ▶

Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response to any question in this Part VII . . . . . ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee, or key employee) who received reportable compensation (Box 5 of Form W-2 and/or Box 7 of Form 1099-MISC) of more than $100,000 from the organization and any related organizations.
- List all of the organization's **former** officers, key employees, and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations.

List persons in the following order: individual trustees or directors; institutional trustees; officers; key employees; highest compensated employees; and former such persons.

☐ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and Title	(B) Average hours per week (describe hours for related organizations in Schedule O)	(C) Position (check all that apply)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(1)										
(2)										
(3)										
(4)										
(5)										
(6)										
(7)										
(8)										
(9)										
(10)										
(11)										
(12)										
(13)										
(14)										
(15)										
(16)										

Part VII **Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees** *(continued)*

(A) Name and title	(B) Average hours per week (describe hours for related organizations in Schedule O)	(C) Position (check all that apply)						(D) Reportable compensation from the organization (W-2/1099-MISC)	(E) Reportable compensation from related organizations (W-2/1099-MISC)	(F) Estimated amount of other compensation from the organization and related organizations
		Individual trustee or director	Institutional trustee	Officer	Key employee	Highest compensated employee	Former			
(17)										
(18)										
(19)										
(20)										
(21)										
(22)										
(23)										
(24)										
(25)										
(26)										
(27)										
(28)										
1b **Sub-total** ▶										
c **Total from continuation sheets to Part VII, Section A** ▶										
d **Total (add lines 1b and 1c)** ▶										

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 in reportable compensation from the organization ▶

			Yes	No
3	Did the organization list any **former** officer, director or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*	3		
4	For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*	4		
5	Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization? *If "Yes," complete Schedule J for such person*	5		

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization.

(A) Name and business address	(B) Description of services	(C) Compensation

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 in compensation from the organization ▶

Part VIII Statement of Revenue

			(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512, 513, or 514
Contributions, gifts, grants and other similar amounts	1a Federated campaigns	1a				
	b Membership dues	1b				
	c Fundraising events	1c				
	d Related organizations	1d				
	e Government grants (contributions)	1e				
	f All other contributions, gifts, grants, and similar amounts not included above	1f				
	g Noncash contributions included in lines 1a-1f: $					
	h **Total.** Add lines 1a–1f ▶					
Program Service Revenue		Business Code				
	2a					
	b					
	c					
	d					
	e					
	f All other program service revenue					
	g **Total.** Add lines 2a–2f ▶					
Other Revenue	3 Investment income (including dividends, interest, and other similar amounts) ▶					
	4 Income from investment of tax-exempt bond proceeds ▶					
	5 Royalties ▶					
		(i) Real	(ii) Personal			
	6a Gross Rents					
	b Less: rental expenses					
	c Rental income or (loss)					
	d Net rental income or (loss) ▶					
		(i) Securities	(ii) Other			
	7a Gross amount from sales of assets other than inventory					
	b Less: cost or other basis and sales expenses					
	c Gain or (loss)					
	d Net gain or (loss) ▶					
	8a Gross income from fundraising events (not including $ _____ of contributions reported on line 1c). See Part IV, line 18 a					
	b Less: direct expenses b					
	c Net income or (loss) from fundraising events ▶					
	9a Gross income from gaming activities. See Part IV, line 19 a					
	b Less: direct expenses b					
	c Net income or (loss) from gaming activities ▶					
	10a Gross sales of inventory, less returns and allowances a					
	b Less: cost of goods sold b					
	c Net income or (loss) from sales of inventory ▶					
	Miscellaneous Revenue	Business Code				
	11a					
	b					
	c					
	d All other revenue					
	e **Total.** Add lines 11a–11d ▶					
	12 **Total revenue.** See instructions. ▶					

Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns.
All other organizations must complete column (A) but are not required to complete columns (B), (C), and (D).

	Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1	Grants and other assistance to governments and organizations in the U.S. See Part IV, line 21				
2	Grants and other assistance to individuals in the U.S. See Part IV, line 22				
3	Grants and other assistance to governments, organizations, and individuals outside the U.S. See Part IV, lines 15 and 16				
4	Benefits paid to or for members				
5	Compensation of current officers, directors, trustees, and key employees				
6	Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7	Other salaries and wages				
8	Pension plan contributions (include section 401(k) and section 403(b) employer contributions)				
9	Other employee benefits				
10	Payroll taxes				
11	Fees for services (non-employees):				
a	Management				
b	Legal				
c	Accounting				
d	Lobbying				
e	Professional fundraising services. See Part IV, line 17				
f	Investment management fees				
g	Other				
12	Advertising and promotion				
13	Office expenses				
14	Information technology				
15	Royalties				
16	Occupancy				
17	Travel				
18	Payments of travel or entertainment expenses for any federal, state, or local public officials				
19	Conferences, conventions, and meetings				
20	Interest				
21	Payments to affiliates				
22	Depreciation, depletion, and amortization				
23	Insurance				
24	Other expenses. Itemize expenses not covered above (List miscellaneous expenses in line 24f. If line 24f amount exceeds 10% of line 25, column (A) amount, list line 24f expenses on Schedule O.)				
a					
b					
c					
d					
e					
f	All other expenses				
25	**Total functional expenses.** Add lines 1 through 24f				
26	**Joint costs.** Check here ▶ ☐ if following SOP 98-2 (ASC 958-720). Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation				

Part X Balance Sheet

			(A) Beginning of year		(B) End of year
Assets	1	Cash—non-interest-bearing		1	
	2	Savings and temporary cash investments		2	
	3	Pledges and grants receivable, net		3	
	4	Accounts receivable, net		4	
	5	Receivables from current and former officers, directors, trustees, key employees, and highest compensated employees. Complete Part II of Schedule L		5	
	6	Receivables from other disqualified persons (as defined under section 4958(f)(1)), persons described in section 4958(c)(3)(B), and contributing employers and sponsoring organizations of section 501(c)(9) voluntary employees' beneficiary organizations (see instructions)		6	
	7	Notes and loans receivable, net		7	
	8	Inventories for sale or use		8	
	9	Prepaid expenses and deferred charges		9	
	10a	Land, buildings, and equipment: cost or other basis. Complete Part VI of Schedule D — 10a			
	b	Less: accumulated depreciation — 10b		10c	
	11	Investments—publicly traded securities		11	
	12	Investments—other securities. See Part IV, line 11		12	
	13	Investments—program-related. See Part IV, line 11		13	
	14	Intangible assets		14	
	15	Other assets. See Part IV, line 11		15	
	16	**Total assets.** Add lines 1 through 15 (must equal line 34)		16	
Liabilities	17	Accounts payable and accrued expenses		17	
	18	Grants payable		18	
	19	Deferred revenue		19	
	20	Tax-exempt bond liabilities		20	
	21	Escrow or custodial account liability. Complete Part IV of Schedule D		21	
	22	Payables to current and former officers, directors, trustees, key employees, highest compensated employees, and disqualified persons. Complete Part II of Schedule L		22	
	23	Secured mortgages and notes payable to unrelated third parties		23	
	24	Unsecured notes and loans payable to unrelated third parties		24	
	25	Other liabilities. Complete Part X of Schedule D		25	
	26	**Total liabilities.** Add lines 17 through 25		26	
Net Assets or Fund Balances		**Organizations that follow SFAS 117, check here ▶ ☐ and complete lines 27 through 29, and lines 33 and 34.**			
	27	Unrestricted net assets		27	
	28	Temporarily restricted net assets		28	
	29	Permanently restricted net assets		29	
		Organizations that do not follow SFAS 117, check here ▶ ☐ and complete lines 30 through 34.			
	30	Capital stock or trust principal, or current funds		30	
	31	Paid-in or capital surplus, or land, building, or equipment fund		31	
	32	Retained earnings, endowment, accumulated income, or other funds		32	
	33	Total net assets or fund balances		33	
	34	Total liabilities and net assets/fund balances		34	

Part XI Reconciliation of Net Assets

Check if Schedule O contains a response to any question in this Part XI . . . . . ☐

1	Total revenue (must equal Part VIII, column (A), line 12)	1	
2	Total expenses (must equal Part IX, column (A), line 25)	2	
3	Revenue less expenses. Subtract line 2 from line 1	3	
4	Net assets or fund balances at beginning of year (must equal Part X, line 33, column (A))	4	
5	Other changes in net assets or fund balances (explain in Schedule O)	5	
6	Net assets or fund balances at end of year. Combine lines 3, 4, and 5 (must equal Part X, line 33, column (B))	6	

Part XII Financial Statements and Reporting

Check if Schedule O contains a response to any question in this Part XII . . . . . ☐

			Yes	No
1	Accounting method used to prepare the Form 990: ☐ Cash ☐ Accrual ☐ Other _____ If the organization changed its method of accounting from a prior year or checked "Other," explain in Schedule O.			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		
b	Were the organization's financial statements audited by an independent accountant?	2b		
c	If "Yes" to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant? If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.	2c		
d	If "Yes" to line 2a or 2b, check a box below to indicate whether the financial statements for the year were issued on a separate basis, consolidated basis, or both: ☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Single Audit Act and OMB Circular A-133?	3a		
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits	3b		

Exhibit J

CHAPTER 52
NOT-FOR-PROFIT ORGANIZATIONS

CONTENTS

OVERVIEW

Historically, accounting principles for not-for-profit organizations have been fragmented into industry-specific pronouncements prepared by

the AICPA and other groups. The result of this fragmentation is that the practices followed by the various types of organizations were inconsistent. The FASB has undertaken a broad project to address many of these inconsistencies and to attempt to improve the accounting and reporting of not-for-profit entities.

GAAP for not-for-profit organizations are found in the following pronouncements:

FAS-93	Recognition of Depreciation by Not-for-Profit Organizations
FAS-99	Deferral of the Effective Date of Recognition of Depreciation by Not-for-Profit Organizations
FAS-116	Accounting for Contributions Received and Contributions Made
FAS-117	Financial Statements of Not-for-Profit Organizations
FAS-124	Accounting for Certain Investments Held by Not-for-Profit Organizations
FAS-136	Transfer of Assets to a Not-for-Profit Organization or Charitable Trust That Raises or Holds Contributions for Others

BACKGROUND

Prior to the issuance of FAS-93, the FASB and its predecessors did not provide guidance on the subject of accounting for not-for-profit organizations. The primary sources of GAAP for these entities were contained in the following AICPA Audit Guides and Statements of Position, such as the following:

- Audits of Colleges and Universities
- Audits of Voluntary Health and Welfare Organizations (1974)
- SOP 78-10, Accounting Principles and Reporting Practices of Certain Non-Profit Organizations (1978)
- Audits of Providers of Health Care Services (1990)

FAS-93 extends the provisions of paragraph 5 of APB-12 (Omnibus Opinion—1967) to not-for-profit organizations, requiring disclosure of information about depreciable assets and depreciation (FAS-93, par. 2). FAS-93 also supersedes (*a*) those sections of the College and University Audit Guide that made depreciation optional and (*b*) SOP

78-10, which exempted certain long-lived tangible assets from depreciation (FAS-93, par. 3).

FAS-116 and FAS-117 provide for significant changes in the standards for accounting for contributions received and made by all entities, as well as for the format and content of financial statements of all not-for-profit organizations. Accordingly, these two Statements supersede all inconsistent portions of the above AICPA Audit Guides and SOP 78-10. FAS-124 establishes standards of financial accounting and reporting for equity investments with readily determinable fair values and for all investments in debt securities.

FINANCIAL STATEMENTS OF NOT-FOR-PROFIT ORGANIZATIONS

FAS-117 establishes standards for external financial statements of not-for-profit organizations. It requires not-for-profits to present a statement of financial position, a statement of activities, and a statement of cash flows. Operating cash flows of (*a*) unrestricted net assets, (*b*) temporarily restricted net assets, and (*c*) permanently restricted net assets must be disclosed separately in the statement of activities, and the statement of financial position must distinguish among these three classes of net assets. FAS-117 amends FAS-95 (Statement of Cash Flows), extending its provisions to not-for-profit entities (FAS-117, par. 1). Not-for-profit entities are also required to disclose expenses by functional classification. Voluntary Health and Welfare Organizations (VHWO) are required, and Other Not-for-Profit Organizations (ONPO) are encouraged, to disclose expenses by natural classification as well (FAS-117, par. 1).

Financial Statements Required

FAS-117 (*a*) specifies three financial statements that must be present in external financial reports and (*b*) standardizes the approach to the disclosure of operating cash flows from unrestricted, temporarily restricted, and permanently restricted net assets. FAS-117 reviews and discusses the fundamental concepts governing financial reporting; it emphasizes that general-purpose financial statements can be prepared to serve a wide range of user needs, including an assessment of management's stewardship responsibilities to safeguard entity assets and use them for authorized activities. FAS-117 further specifies that the user's primary informational needs include (FAS-117, par. 5):

- Information about assets and liabilities
- Inflows and outflows of resources

- Cash flows
- Service efforts of the organization

Three financial statements are necessary to provide this information (FAS-117, par. 6):

- Statement of financial position
- Statement of activities
- Statement of cash flows

FAS-117 also requires specific notes to the financial statements which complete the disclosures relevant to the information needs listed above.

FAS-117 also emphasizes that the disclosure requirements contained in all authoritative literature that do not specifically exempt not-for-profit entities remain in effect (FAS-117, par. 7). Another noteworthy aspect of FAS-117 is that the degree of disaggregated fund information is not limited. Preparers have flexibility regarding the amount of detail provided, the order of line items, and the grouping of assets, liabilities, revenues, expenses, and gains. However, it is expected that the exercise of this flexibility will be similar to that used by business enterprises (FAS-117, par. 8).

FAS-117 does not address issues related to measurement focus, basis of accounting, or measurement methods (FAS-117, par. 8).

Statement of Financial Position

According to FAS-117, the objective of the statement of financial position is to present information about assets, liabilities, and net assets to facilitate analysis of credit, liquidity, ability to meet obligations, and the need to obtain external financing (FAS-117, par. 9). In particular, FAS-117 emphasizes the need to distinguish between unrestricted assets and permanently or temporarily restricted assets. However, the focus of FAS-117 is on the organization as a whole, and therefore, the total amounts for assets, liabilities, and net assets must be reported (FAS-117, par. 10).

The statement of financial position must provide information about the entity's liquidity. This disclosure can be accomplished (*a*) by sequencing assets in the order of diminishing liquidity or by current/noncurrent classification or (*b*) by sequencing liabilities according to their nearness to maturity (FAS-117, par. 12).

Particular attention should be paid to disclosing which elements of the statement of financial position have donor-imposed restrictions on their use. Restrictions exist because assets cannot be used until a future period, because they may be used only for certain types of expenditures, or because only the investment income from the assets

may be used. Internally imposed restrictions made by the governing board of an entity must also be disclosed. Preparers are given flexibility about where to show disclosures about restrictions: on the face of the statements or in notes to the statements (FAS-117, pars. 14 and 15).

The principal difference between previous not-for-profit balance sheets and the format required by FAS-117 is in the net assets (equity) section. Instead of presenting a balance sheet with different columns for each fund, entities present a single, combined balance sheet with a net assets section distinguishing between classes of asset restrictions (FAS-117, par. 13):

Net assets:	
Unrestricted	$ xxx
Temporarily restricted	xxx
Permanently restricted	xxx
Total net assets	$ xxx
Total liabilities and net assets	$ xxx

While accounts may be maintained on a fund basis, the above example emphasizes that the reporting focuses on the nature of the restrictions and not on the particular fund in which an asset is carried.

☛ **PRACTICE POINTER:** FAS-117 makes no recommendations about whether the statement of financial position should show assets and liabilities by fund. Indeed, the terms fund and fund balance are not used in FAS-117. In its discussion of the statement of activities, FAS-117 explicitly states that reporting by fund groups is not precluded, but is not a necessary part of external reporting. Accordingly, it seems clear that entities may prepare a statement of financial position that includes disaggregated fund groups, as long as those groups aggregate with net asset classes. It is also important to note that the statement of activities change in net asset class must articulate with the net assets shown on the statement of financial position. FAS-117 emphasizes that information should be simplified, condensed, and aggregated into meaningful totals, and that the statements should not be obscured by unnecessary fund or line item details.

FAS-117 requires that either the statements or the notes thereto give information describing the amount and nature of the various types of restrictions that exist within the major categories of *temporarily restricted* or *permanently restricted* assets. For example, disclosures must be made to show the amount of assets temporarily restricted as to time of availability or as to type of use allowed. Within the category of permanently restricted assets, differentiation should be made regarding assets of an

endowment nature, which earn income, and assets that may be part of a collection (of art objects, historical treasures, etc.) (FAS-117, par. 14). Entities may disclose board designations on unrestricted assets either on the face of the statements or in notes (FAS-117, par. 16).

Statement of Activities

The statement of activities is the operating statement for a not-for-profit entity, analogous to an income statement for a business. This statement combines the revenues, expenses, gains, and losses with the changes in equities. The statement should use the term *changes in net assets* or *changes in equities* to describe equity (FAS-117, par. 18). As noted above, FAS-117 does not use the terms *fund balance* or *changes in fund balance*. Rather, FAS-117 sees net assets or equities as encompassing the whole of the net assets of the entity, while *fund balance* has historically been used to refer only to certain groups of assets. The statement of activities must report the changes in total net assets and the change in each net asset class (FAS-117, par. 19). Thus, an important dimension of reporting operations for not-for-profit entities by FAS-117 is the use of net asset classes instead of fund groups. The requirement is to report changes in unrestricted, temporarily restricted, and permanently restricted net assets in the statement of activities. Therefore, the statement will contain sections for changes in unrestricted net assets (which includes revenues and gains), changes in temporarily restricted net assets (both inflows and outflows), and a line for total changes in net assets.

Illustration of Format of Statement of Financial Position

NFP Organization #1
Statement of Financial Position
December 31, 20X4
(in thousands)

Assets:	
Cash and cash equivalents	$ 15
Accounts and interest receivable	425
Inventories and prepaid expenses	120
Contributions receivable	600
Short-term investments	300
Assets restricted to investment in land, buildings, and equipment	1,050
Land, buildings, and equipment	12,300
Long-term investments	43,600
Total assets	$58,410

Liabilities and net assets:	
Accounts payable	$ 500
Refundable advance	75
Grants payable	100
Notes payable	200
Annuity obligations	330
Long-term debt	900
Total liabilities	$ 2,105
Net assets:	
Unrestricted	$23,010
Temporarily restricted (Note B)	4,800
Permanently restricted (Note C)	28,495
Total net assets	56,305
Total liabilities and net assets	$58,410

Illustration of Format of the Statement of Activities

NFP Organization #2
Statement of Activities for Year Ending June 30, 20X5
(in thousands)

Changes in unrestricted net assets:	
Revenues and gains:	
Contributions	$ 900
Fees	450
Investment income	25
Other	10
Total unrestricted income	$ 1,385
Net assets released from restrictions:	
Program restrictions satisfied	$ 250
Equipment acquisition restrictions satisfied	200
Time restrictions expired	100
Total assets released from restrictions	550
Total support	1,935
Less: Expenses and losses:	
Program A	600
Program B	750
Management and administrative	400

Fund-raising expenses	100
Total expenses and losses	1,850
Increase in unrestricted net assets	85
Changes in temporarily restricted net assets:	
Contributions	650
Investment income	250
Net assets released from restrictions	(110)
Increase in temporarily restricted net assets	790
Changes in permanently restricted net assets:	
Contributions	310
Investment income	80
Net realized and unrealized losses on investments	(550)
Decrease in permanently restricted net assets	(160)
Increase in net assets	715
Net assets, beginning of the year	2,600
Net assets, end of the year	$ 3,315

FAS-117 states that the term *changes in net assets* or *change in equity* should be used in the statement (FAS-117, par. 18).

☛ **PRACTICE POINTER:** FAS-117 does not specifically state that the operating statement must be titled "Statement of Activities." The operating statement may be disaggregated into a "Statement of Unrestricted Revenues, Expenses, and Other Changes in Unrestricted Net Assets" (changes in unrestricted net assets in the previous illustration) together with a second statement, "Statement of Changes in Net Assets" (changes in temporarily and permanently restricted net assets in the previous illustration). FAS-117 unequivocally states, however, that the focus must be on net assets and the three major classes of restrictions: unrestricted, temporarily restricted, and permanently restricted.

Several provisions in FAS-117 simplify reporting requirements for restricted resources. When donor-restricted assets are received, they normally are reported as restricted revenues or gains. In cases in which the restrictions are met in the same period the resources are received, it is permissible to classify the receipts as unrestricted, provided the policy is disclosed and applied consistently (FAS-117, par. 21). In addition, gains and losses on investments are unrestricted, regardless of the nature of the restrictions on the investment assets, unless the governing board determines that the law requires that such gains and losses be restricted (FAS-117, par. 22). Finally, FAS-117

allows reporting of subtotals for operating and nonoperating items, expendable and nonexpendable items, or other terms as desired to provide additional detail within the three classes of net assets. This additional detail is not required, but preparers can make such distinctions as they deem necessary (FAS-117, par. 23).

FAS-117 allows the reporting of gains and losses as net amounts if they result from peripheral transactions, such as disposal of assets. In its basis for conclusion, the FASB clearly states that this approach should not be used for special events that are ongoing major activities (FAS-117, par. 25).

Service efforts One of the most important disclosures for not-for-profit organizations is information about service efforts. In health-care entities, colleges and universities, and ONPOs, this disclosure is accomplished by arranging the statement of activities along functional lines. For VHWOs, this information traditionally has been contained in the Statement of Functional Expenses. Functional expense disclosure involves informing the statement users of the different types of expenses (e.g., salaries, rent, professional fees) incurred for the major types of programs or functions the entity conducts.

FAS-117 requires all not-for-profits to report expenditures by functional classification and encourages ONPOs, health care providers, and colleges and universities to also provide disclosure of expenses by natural classification (FAS-117, par. 26).

Health care providers, colleges and universities, and ONPOs can comply with the functional expense disclosure standards by reporting expenses by function in the statement of activities. VHWOs are required to show expenses by both functional and natural classifications (FAS-117, par. 26). This must be done by showing, in a matrix-formatted statement, the amounts and types of expenses allocated to programs compared with the amounts spent on administration and fund-raising. The matrix format is accomplished by using multiple columns for each type of program or support expenditure while retaining line item expense categories in vertical format. This approach enables statement users to understand the basis of program expenditures and total expenditures and to compare the amounts of expenditures for programs with those for support.

> **OBSERVATION:** While an ONPO's disclosure of expenses in a functional-natural matrix is **not required** by FAS-117, any ONPO whose primary mission is to conduct public service, educational, research, or similar programs will have to disclose these data to fulfill the concept of full disclosure. FAS-117 has an expressed goal of describing the minimum disclosures necessary. Preparers are expected to exercise their professional judgment and go beyond the minimum disclosures as needed.

Proper classification of expenditures between program and support is a fundamental disclosure principle. FAS-117 provides detailed

guidance about the appropriate classification of items of a support nature. Supporting activities are divided into three categories: (1) management and general, (2) fund-raising, and (3) membership development (FAS-117, par. 28).

> **OBSERVATION:** FAS-117 specifies that membership development is an element of support activity and should be so reported.
>
> Also, it is important to emphasize that much information about service efforts may not be presentable in the body of the financial statements. Accordingly, preparers should ensure that notes provide full disclosure of information describing service accomplishments, including program descriptions, statistical data relevant to program inputs and outputs, and narratives about accomplishments.

Statement of Cash Flows

The requirement that the statement of cash flows be included in the reports of all not-for-profit entities removes a significant inconsistency in previous statements. FAS-117 amends several sections of FAS-95 to require that not-for-profit organizations now include a statement of cash flows in their financial statement package (FAS-117, par. 30). All these changes involve minor wording changes or additions to FAS-95 to clarify that FAS-95 is applicable to not-for-profit entities. As is the case for business entities, either the direct or indirect method may be used to present the cash flow information. The cash flow statement is best presented on an aggregated basis for the three classes of net assets; to do otherwise would result in a very detailed statement.

> ☛ **PRACTICE POINTER:** The statement of cash flows as required by FAS-117 is essentially the same as that required by FAS-95 for business enterprises. The only substantive difference is the substitution of "change in net assets" of the not-for-profit organization for "net income" of the business organization. For that reason, an illustration of the statement of cash flows is not presented here; see the 2003 *Miller GAAP Guide* chapter titled "Cash Flow Statement."

DEPRECIATION

FAS-93 requires that not-for-profit entities recognize the cost of using up the future economic benefits or service potential of long-lived tangible assets by reporting depreciation on those assets. In addition, disclosure of the following items is required for those assets (FAS-93, par. 5):

- Depreciation expense for the period
- Balances of major classes of depreciable assets by nature or function
- Accumulated depreciation by major class or in total
- A description of the methods of depreciation used

Depreciation is not required to be taken on works of art or historical treasures considered to have an indefinite service potential or an extraordinarily long useful life. Verifiable evidence should exist which indicates that (*a*) the historical treasures or works of art are of such value that they are worth preserving perpetually and (*b*) the entity has the capacity to preserve the undiminished service potential of the asset for an indefinite period, and is doing so (FAS-93, par. 6).

CONTRIBUTIONS RECEIVED AND MADE

FAS-116 eliminates inconsistencies in the method of accounting for contributions of cash and other assets, provides guidance for contributions received and contributions given, and promises to give cash or other assets, contributed services, collections of works of art, and gifts with donor-stipulated conditions. FAS-116 also specifies when to recognize the expirations of donor-imposed restrictions. (Prior to the issuance of FAS-116, accounting practices for contributions varied depending on the type of entity involved, the form of the contribution (whether cash, other assets, or services), and the purpose of the gift. To determine the correct practice for a particular financial reporting question, accountants were required to refer to the AICPA Audit Guide or SOP that specifically addressed the type of entity in question.) FAS-116 also eliminates inconsistencies in the terminology used to describe the contributions and in the timing of recognition of income for the contributions received and expense for contributions given.

> **OBSERVATION:** FAS-116 is consistent with the general trend in recent standards toward a full accrual approach to the recognition of revenue and expenses, as well as an emphasis on fair market value as a basis for measuring nonmonetary transactions.

FAS-116 applies to contributions of cash, nonmonetary assets, and services, and to promises to give the same. It applies to exchange transactions in which the value received is substantially different from the value given. It does *not* apply to (*a*) bargained arm's-length transactions without a gift element or (*b*) transactions in which the entity is an intermediary or is acting in some form of agency capacity (FAS-116, par. 4).

> **OBSERVATION:** Transfers of assets in which the reporting entity acts as an agent are not contributions. Accordingly, the guidance in AICPA Audit Guides for agency funds continues to be authoritative. However, FAS-116's basis for conclusion provides an analysis that differentiates between receipt of funds by an agent or intermediary and receipt of funds by an entity as a donee. This analysis indicates that the United Way organizations and other federated fund-raising entities are donees, not agents. In instances in which a donor uses an intermediary that acts as an agent to transfer assets to a third-party donee, neither the receipt nor the disbursement by the agent is a contribution received or made. Furthermore, a recipient of funds that makes disbursements in accordance with strict donor instructions (i.e., the recipient has discretion regarding the use made of those funds) is also an agent.

Also expressly excluded from the scope of FAS-116 are transactions that convey only contingent or indirect benefits, such as tax abatements. Transfers of assets from governments to businesses also are not covered by the Statement. The FASB concluded that these transactions pose specific complexities that may require further study, and so excluded them from the scope of the Statement (FAS-116, par. 4).

Contributions in FAS-116 include cash, assets, or services—or unconditional promises to give these in the future (FAS-116, par. 5). The Statement emphasizes the word *promise* and requires verifiable documentary evidence that a promise has been made (FAS-116, par. 6). It also distinguishes between donor-imposed *conditions* and donor-imposed *restrictions* to provide a basis for differentiating the way these items are reported (FAS-116, par. 7). Imposing restrictions on how a gift is to be used does not delay recognition of income or expense. However, recognition of conditional gifts is delayed until the conditions are substantially met.

Contributions Received

FAS-116 generally requires that all unconditional contributions—whether assets, services, or reductions of liabilities—be measured at fair market value on the date received and be recognized currently as revenue or gains (FAS-116, par. 8). FAS-116 takes the current recognition, fair value approach, which embraces the characteristics of relevance and reliability and the qualities of comparability and consistency that are discussed in FASB Concepts Statement 2 (Qualitative Characteristics of Accounting Information).

> **OBSERVATION:** The FASB Statements of Financial Accounting Concepts are intended to provide conceptual guidance in selecting the economic events recognized and reported in financial statements. Concepts Statement 2 examines the char-

acteristics of accounting information and is useful as a reference to understanding the importance attached to various concepts that are emphasized in the FASB Standards.

FAS-116 also provides new guidance in accounting for donated services. In particular, it holds that donated services must create or enhance nonfinancial assets, or must be of a specialized nature, must be provided by individuals possessing those skills, and typically need to be purchased, before they can be included as revenue or gains in the operating statement (FAS-116, par. 9). Thus, routine volunteer services requiring no particular expertise may not be reported as contribution revenue. Finally, FAS-116 requires explanatory footnotes that describe the programs or activities for which contributed services are used and other information that aids in assessing the success or viability of the entity (FAS-116, par. 10).

Assets to be included in a collection are recognized as revenue or gains if they are capitalized, but may not be included in revenue or gains if they are not capitalized (FAS-116, par. 13). To be part of a collection, the assets must be (FAS-116, par. 11):

- Held for public exhibition, education, or research rather than held for financial gain
- Protected, preserved, and not used as collateral or otherwise encumbered
- Subject to a policy that requires the proceeds of collection items sold to be reinvested in collections

Entities are encouraged by FAS-116 to capitalize collections retroactively or on a prospective basis; however, capitalization is *optional.* Capitalization of selected items is not permitted (FAS-116, par. 12). An entity that does not capitalize collections is required to disclose additional information as described later in this chapter.

Contribution Standards Applicable Only to Not-for-Profit Entities

FAS-116 requires that not-for-profit organizations distinguish the use of assets and support as *unrestricted, temporarily restricted,* or *permanently restricted* (FAS-116, par. 14). This separation could be accomplished through fund accounting by having a different fund for each of the three classes of net assets. Support that is restricted by donors as being available only in future accounting periods is reported as restricted support (FAS-116, par. 15).

Expiration of donor-imposed restrictions requires reclassification of net assets from restricted to unrestricted, or from a restricted to an

unrestricted fund. FAS-117 provides guidance on financial statement format. Since restricted contributions are reported as support in the temporarily restricted class of net assets when first received, they are reclassified in the operating statement when restrictions lapse. FAS-117 supersedes the requirement in SOP 78-10 that support or revenue restricted for certain operating purposes be deferred until the restrictions are met. The classification "capital additions" required by SOP 78-10 for contributions to be added to endowments or plant funds is also superseded. FAS-116 requires that contributions to acquire fixed assets or contributions of plant assets be reported as restricted support over the life of the asset if (*a*) the donor restricts the use and disposition of the asset or (*b*) the donee has a policy of imposing a time restriction that expires over the life of the donated assets or the life of assets acquired with donated money (FAS-116, par. 16).

When restrictions lapse, recognition is required in the statement of activities. In general, a restriction expires when the period of the restriction has lapsed or when an expenditure for an authorized purpose is made. If an expense is incurred for a purpose for which both unrestricted and temporarily restricted net assets are available, the donor-imposed restriction is met (FAS-116, par. 17).

Contributions Made

FAS-116 continues the emphasis on full accrual and fair market value in providing guidance for contributions made. The fair market value emphasis is particularly evident in the directions given for accounting for contributions of nonmonetary assets. Contributions of nonmonetary assets are recognized as expenses and decreases in assets (or increases in liabilities) in the period made. Donors should find the most objective way possible to determine the fair market value of nonmonetary assets (FAS-116, par. 18).

> **OBSERVATION:** Absence of a definite valuation does not justify use of historical cost as a basis for recording the transaction.

FAS-116 states that appraisals, present value of estimated cash flows, net realizable value, and quoted market prices are all acceptable ways of determining the fair market value of donated nonmonetary assets (FAS-116, par. 19). The difference between the book value and the fair market value of donated assets is a realized gain or loss on disposition in accordance with APB-29 (Accounting for Nonmonetary Transactions) (FAS-116, par. 18). When a promise is recorded as a liability, any interest accruals on the promise should be accounted for as contribution expense by the donor and as contribution revenue by the donee. No interest income or expense should be reported (FAS-116, par. 20).

Conditional Promises

Material gifts or promises subject to conditions present accounting problems regarding the appropriate time to recognize the gift revenue or expense. They may also create the need for additional note disclosures describing the nature of the conditions. FAS-116 requires that a promise to give be recognized when the conditions of the promise are substantially met (FAS-116, par. 22). Conditional promises are essentially contingent events. If the contingent event (condition) is remote, it may be ignored and the promise accounted for as an unconditional promise. Otherwise, the gift is not recognized until the conditions have been substantially met. Although FAS-116 requires note disclosure by recipients of conditional promises, there is no similar requirement for the promisor.

Recognition problems also occur for donees when ambiguous wording makes it difficult to determine if conditions for recognition exist. Conditional promises are essentially contingent revenue for the donee. FAS-5 (Accounting for Contingencies) prohibits recognition of contingent gains, and FAS-116 is consistent with FAS-5 in that regard (FAS-116, par. 23). The donee need only prepare a note to the financial statements describing the nature and conditions of the promise and the amounts promised (FAS-116, par. 25). Accrual of conditional promises is not permitted unless the probability that the condition will not lapse is remote. For unconditional promises, the notes to the financial statements should indicate the timing of the cash flows as well as amounts, and should disclose the balances in any allowances for uncollectibles (FAS-116, par. 24).

Additional Disclosures for Collections

As described previously, capitalization of collections by donees is optional. FAS-116 requires that the financial statements disclose the cash flows associated with collections *whether the collection is capitalized or not*. The choice of capitalization policy affects the way that these cash flows are disclosed. If collections are capitalized, the cash consequences of collection activities are a result of routine transactions recorded in the ledger, and would appear in the statement of activities (FAS-116, par. 26).

If collections are *not* capitalized, the cash consequences of collection activities appear in the statement of activities within a separate category called "changes in permanently restricted net assets." This category follows the revenue and expense categories. Substantial descriptive notes regarding the collections are required when collections are not capitalized. These disclosures must include the relative significance of the collection, along with the accounting and stewardship policies followed. In addition, the notes should indicate the

values of items sold, lost, or destroyed. A line in the financial statements must refer to the collections note (FAS-116, par. 27).

> **OBSERVATION:** The note disclosures required for uncapitalized collections are extensive. They emphasize that readers of the financial statements must be made aware of the details of all significant changes in the collection. In particular, statement users must be advised regarding casualty losses, insurance recoveries, accounting policies, and managerial controls in place. The concept of *full disclosure* is very much in evidence in this standard.

ACCOUNTING FOR INVESTMENTS

Definitions and Applicability

FAS-124 establishes standards for certain investments in debt and equity securities. The term *securities* is defined in FAS-124 as a share, participation, or other interest in property or in an enterprise of the issuer or an obligation of the issuer that has the following characteristics (FAS-124, par. 112):

- It is represented by an instrument issued in bearer or registered form, or it is registered in books maintained to record transfers by or on behalf of the issuer.
- It is of a type that is commonly dealt in on securities exchanges or markets or, when it is represented by an instrument, commonly recognized as a medium for investment in any area in which it is issued or dealt in.
- It is one of a class or series, or by its terms is divisible into a class or series of shares, participations, interests, or obligations.

Equity securities represent an ownership interest in an enterprise (e.g., common and preferred stock) or the right to acquire (e.g., warrants, rights, call options) or dispose of (e.g., put options) an ownership interest at fixed or determinable prices. Convertible debt and preferred stock that by their terms either must be redeemed by the issuing enterprise or are redeemable at the option of the investor are not considered equity securities (FAS-124, par. 112).

Debt securities represent a creditor relationship with an enterprise. Debt securities include U.S. Treasury securities, U.S. government agency securities, municipal securities, corporate bonds, convertible debt, commercial paper, securitized debt instruments and interest-only and principal-only strips. Preferred stock that must be redeemed by the issuing enterprise or that is redeemable at the option of the investor, as well as collateralized mortgage obligations that are issued in equity

form but are required to be accounted for as nonequity instruments regardless of how the instruments are classified, are considered debt securities. The term excludes option contracts, financial futures contracts, forward contracts, lease contracts, and swap contracts (FAS-124, par. 112).

> **OBSERVATION:** FAS-133 (Accounting for Derivative Instruments and Hedging Activities) indicates that FAS-124 does not apply to investments in derivative instruments that are subject to the requirements of FAS-133. If an investment would otherwise be in the scope of FAS-124 and has within it an embedded derivative subject to FAS-133, the host instrument remains within the scope of FAS-124.

A final term that is particularly important for understanding FAS-124 is *fair value*. *Fair value* is the amount at which an asset could be bought or sold in a current transaction between willing parties, other than in a forced or liquidation sale. If a quoted market price is available for a financial instrument, the fair value of an investment is the number of trading units multiplied by the market price per unit. If a quoted market price is not available, the estimate of fair value should be based on the best information available. It may be appropriate to consider prices of similar assets and valuation techniques (FAS-133, par. 535e).

> ☛ **PRACTICE POINTER:** The measurement standards of FAS-124 are applicable for investments in equity securities that have readily determinable fair values (with limited exceptions) and for all investments in debt securities. The exceptions for equity securities that have readily determinable fair values are investments that are accounted for by the equity method and investments in consolidated financial statements.

An equity security is deemed to have a readily determinable fair value if one of the following criteria is met:

1. Sales prices or bid-and-asked quotations for the security are available on a securities exchange registered with the Securities and Exchange Commission (SEC) or in the over-the-counter market. For over-the-counter market prices to qualify, they must be publicly reported by the National Association of Securities Dealers Automated Quotation (NASDAQ) system or by the National Quotation Bureau.

   > **OBSERVATION:** Restricted stock does not meet this criterion. The term *restricted stock* refers to equity securities for which sale is restricted at acquisition by governmental or contractual requirement, other than in connection with being pledged as

collateral, except if that requirement terminates within one year or if the holder has the power by contract or otherwise to cause the requirement to be met within one year. Any portion of the security that can be reasonably expected to qualify for sale within one year is not considered restricted.

2. For an equity security traded only in a foreign market, that market is of a breadth and scope comparable to a U.S. market referred to in (1) above.
3. For an investment in a mutual fund, the fair value per share or unit is determined and published and is the basis for current transactions.

Measurement and Recognition Standards

The most important measurement and recognition requirement is that qualifying investments in equity securities (i.e., investments that have readily determinable fair values and are not accounted for by the equity method or consolidation) and all investments in debt securities are to be accounted for at fair value in the statement of financial position (FAS-124, par. 7).

> **OBSERVATION:** FAS-115, which specifies requirements for debt and equity investments for business enterprises, includes a category of investments labeled "held to maturity," which includes only certain debt securities that are accounted for at amortized cost. While the requirements of FAS-115 for business organizations and FAS-124 for not-for-profit organizations are comparable in many respects, an important difference is that FAS-124 does not include a category of investment for debt securities that are **not** measured at fair value as FAS-115 does for business enterprises.

Building on the general reporting requirements of FAS-117 (Financial Statements of Not-for-Profit Organizations), FAS-124 provides the following guidance for the income effects of measuring investments at fair value (FAS-124, pars. 8–10):

- Gains and losses on investments resulting from their measurement at fair value are to be reported in the statement of activities as increases or decreases in unrestricted net assets, unless their use is temporarily or permanently restricted by donor stipulation or by law.
- Dividend, interest, and other investment income is to be reported in the period earned as increases in unrestricted net assets, unless the use of the assets received is limited by donor restrictions.

- Donor-restricted investment income is to be reported as an increase in temporarily restricted net assets or permanently restricted net assets, depending on the nature of the donor restriction.
- Gains and investment income that are limited to specific uses by donor restriction may be reported as increases in unrestricted net assets if the restrictions are met in the same reporting period as the gains and income are recognized (provided the organization has a similar policy for reporting contributions received, applies that policy consistently, and discloses that policy).

FAS-124 also deals with accounting for a *donor-restricted* endowment fund, which is an endowment fund created by a donor stipulating that the gift be invested in perpetuity or for a specified term. Gains and losses on investments in a donor-restricted endowment fund are classified as changes in unrestricted net assets, unless they are temporarily or permanently restricted by a donor's stipulation or by law that extends the donor's restriction to them (FAS-124, par. 11).

OBSERVATION: FAS-117 states that gains and losses on restricted net assets are unrestricted unless the donor stipulates otherwise. Thus, in a permanent endowment three possibilities exist:

1. Neither the donor nor law stipulates that the endowment restriction extends to gains and losses, in which case the gains and losses are unrestricted income.
2. The donor stipulates that gains and losses are to be used for some restricted purpose, often the same purpose for which the endowment income is restricted. In this case, the gains and losses are temporarily restricted income.
3. Either the donor or law stipulates that gains and losses become part of the endowment principal. In this case, the gains and losses are permanently restricted income. FAS-124 mentions the situation in which an endowment cannot be sold (i.e., must be held in perpetuity), in which case gains and losses on that security would be permanently restricted income.

As a general rule (i.e., unless otherwise restricted by donor stipulation or law), losses on investments in a donor-restricted endowment reduce temporarily restricted net assets to the extent that donor-imposed temporary restrictions on net appreciation of the fund have not been met before the loss occurs. Further losses reduce unrestricted net assets (FAS-124, par. 12). If losses reduce the assets of a donor-restricted endowment fund below the level required by donor stipulation or law, gains that restore the fair value of the assets to the required level are classified as increases in unrestricted net assets (FAS-124, par. 13).

Disclosure Standards

The FAS-124 disclosure requirements can be separated into three classifications.

First, the following information related to the statement of activities is required (FAS-124, par. 14):

1. Composition of investment return, including at least the following components:
   a. Investment income (e.g., dividends, interest)
   b. Net realized gains or losses on investments reported at other than fair value
   c. Net gains or losses on investments reported at fair value
2. A reconciliation of investment return to amounts reported in the statement of activities, if the investment is separated into operating and nonoperating amounts and an explanation of how the amount included in operations is computed, including any changes in policy, used to make that classification

Second, the following information related to the statement of financial position is required (FAS-124, par. 15):

1. Aggregate carrying amount of investments by major type
2. Basis for determining the carrying amount for investments other than equity securities with readily determinable fair values and all debt securities
3. The method(s) and significant assumptions used to determine fair values (related to the FAS-107 requirement)
4. The aggregate amount of the deficiencies for all donor-restricted endowment funds for which the fair value of the assets at the reporting date is less than the level required by donor stipulations or law

Third, for the most recent period for which a statement of financial position is presented, the nature of and carrying amount for each individual investment or group of investments that represents a significant concentration of market risk are required (FAS-124, par. 16).

ACCOUNTING FOR TRANSFERS OF ASSETS

FAS-116 (Accounting for Contributions Received and Contributions Made) includes the following statement (paragraph 4):

> This Statement does not apply to transfers of assets in which the reporting entity acts as an agent, trustee, or intermediary, rather than as a donor or donee.

FAS-136 (Transfer of Assets to a Not-for-Profit Organization or Charitable Trust That Raises or Holds Contributions for Others) amends FAS-114 by requiring a recipient organization to recognize at fair value an asset and liability instead of contribution revenue if the recipient organization accepts cash or other financial assets from a donor and agrees to use those assets, or disburse them and the return from investing the assets, or both, to a specified beneficiary (FAS-136, par. 11). The specified beneficiary reports its interest in the assets held by the recipient organization as an asset and as contribution revenue (FAS-136, par. 15). Exceptions to the above are situations in which the recipient organization is granted variance power (i.e., can redirect the use of funds) and in which the recipient and beneficiary organizations are interrelated (FAS-136, pars. 12–14).

FAS-136 also specifies criteria for determining when the recipient organization and the specified beneficiary are considered interrelated organizations. These criteria are typically met by a not-for-profit organization and a related foundation (FAS-136, pars. 13–14).

FIN-42 (Accounting for Transfers of Assets in Which a Not-for-Profit Organization Is Granted Variance Power) was a temporary solution to the issue covered by FAS-136 and was effective until FAS-136 was first applied, at which time FIN-42 was superseded.

RELATED 2003 *MILLER GAAP GUIDE* CHAPTERS

- Chapter 5, "Cash Flow Statement"
- Chapter 12, "Depreciable Assets and Depreciation"
- Chapter 28, "Investments in Debt and Equity Securities"
- Chapter 32, "Nonmonetary Transactions"