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**** ONLY ADMITTED IN OH

March 4, 2011

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

Via E-mail and Hand Delivery

Filed electronically in the Docket Office
3/4/2011

Attention: Sharla Dillon

Re: Consumer Advocate's Petition for a Declaratory Order that Berry's Chapel Utility, Inc., is a Public Utility under Tennessee Law and Should Be Regulated by the TRA
Docket 11-00005

Dear Chairman Freeman:

I have enclosed for filing an original and five copies of Berry's Chapel Utility, Inc.'s Initial Brief in this docket.

This Initial Brief and this cover letter are being filed electronically by electronic mail this same date. A copy has been served on Vance L. Broemel, Esq. and Mary Leigh White, Esq., with the Office of the Attorney General and Consumer Advocate. Please return the additional copy of the Initial Brief stamped filed to me.

Thank you for your assistance.

Sincerely yours,

Donald L. Scholes @

DONALD L. SCHOLES

c: Vance Broemel
Tyler Ring
Jim Ford

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

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

INITIAL BRIEF OF BERRY’S CHAPEL UTILITY, INC.

Introduction

Pursuant to the Hearing Officer’s Notice of February 11, 2011, Berry’s Chapel Utility, Inc. (Berry’s Chapel) submits this Initial Brief in support of its position that Berry’s Chapel is a nonutility under T.C.A. § 65-4-101(6)(E) and is not subject to regulation by the Tennessee Regulatory Authority (TRA). Berry’s Chapel agrees with the Hearing Officer that the issue raised in this docket by the Consumer Advocate involves strictly legal issues and requires no facts be presented to the TRA for it to act on the Consumer Advocate’s Petition.

In submitting this Initial Brief to address the three issues requested by the Hearing Officer, Berry’s Chapel is not consenting to the jurisdiction of the TRA and as set forth in this Initial Brief asserts that the TRA does not have primary jurisdiction to decide the legal issue raised in this matter. This Initial Brief will address the following three issues as requested by the Hearing Officer:

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.

Argument

1. **Under the doctrine of primary jurisdiction, the legal issue of whether Berry's Chapel Utility, Inc. is a nonprofit corporation under Tennessee law is solely an issue of statutory construction which does not require the TRA's expertise and should be decided in the initial instance by the courts of Tennessee.**

Berry's Chapel asserts that the sole issue raised by the Consumer Advocate in its Petition is whether Berry's Chapel Utility, Inc. is a nonprofit corporation under Tennessee law. If Berry's Chapel is a nonprofit corporation under Tennessee law, then it is a "nonutility" under the plain language of T.C.A. § 65-4-101(6)(E) which defines a nonutility to include "Any cooperative organization, association or corporation not organized or doing business for profit." If Berry's Chapel is not a nonprofit corporation under Tennessee law, then it is subject to regulation by the TRA as a public utility. The resolution of this legal issue is solely an issue of statutory construction which does not require the expertise of the TRA in public utility regulation to resolve.

The Consumer Advocate attempts to add to the plain language of this statute a strained construction which it claims requires that the word "cooperative" be interpreted as modifying the terms association and corporation. Berry's Chapel asserts the Consumer Advocate's position is contrary to proper statutory construction principles as set forth in this Initial Brief. The Consumer Advocate asserts that the legal issue to be resolved in this case is whether the term "cooperative" properly modifies "association" and "corporation" as well as "organization" in T.C.A. § 65-4-101(6)(E). Again, the resolution of the legal issue as framed by the Consumer

Advocate is still a matter of statutory construction which does not require the expertise of the TRA in public utility regulation to resolve.

In *Freels v. Northrup*, 678 S.W.2d 55, 57 (Tenn. 1984), the Tennessee Supreme Court recognized the primary jurisdiction doctrine which “generally requires that parties resort first to an administrative agency before they seek judicial action involving a question within the competence of that agency.” However, a court need not defer to an administrative agency to resolve a legal question unless such deferral will be conducive toward uniformity of decision between courts and the agency will utilize pertinent agency expertise. *Id.* The legal issue raised by the Consumer Advocate in the Petition is a Tennessee corporate law issue within the province of the Tennessee court system to make. The TRA has no expertise to decide Tennessee corporate law issues, including whether Berry’s Chapel is a Tennessee nonprofit corporation.

Likewise, the TRA has no expertise to decide whether the term “cooperative” modifies “corporation” in T.C.A. § 65-4-101(6)(E). Whether the term “cooperative” modifies “corporation” in T.C.A. § 65-4-101(6)(E) is strictly a statutory construction issue which requires no facts or expertise within the province of the TRA to decide. The TRA has no more special expertise to correctly interpret the language of T.C.A. § 65-4-101(6)(E) than it does to decide whether a corporation is a nonutility because it is “owned by any agency or instrumentality of the United States” under T.C.A. § 65-4-101(6)(A) or because it is “owned by any agency or instrumentality of the state” under T.C.A. § 65-4-101(6)(C).” Certainly the TRA does not believe it has the expertise to decide if a corporation is a governmental entity or not. For the same reasons, the TRA has no special expertise to decide whether a Tennessee nonprofit corporation is a nonutility under language of T.C.A. § 65-4-101(6)(E). Therefore, the issue of whether Berry’s Chapel is a nonutility under T.C.A. § 65-4-101(6)(E) should be decided by the courts not the TRA. Moreover, because the legal issue in this matter is not within the primary

jurisdiction of the TRA, it has no power to determine as to the validity or applicability of T.C.A. § 65-4-101(6)(E) pursuant to T.C.A. §§ 4-5-223 and 65-2-104. These sections only authorize the TRA to issue a declaratory order in a matter within which the TRA has primary jurisdiction. The TRA does not have primary jurisdiction to decide Tennessee corporate law issues or to interpret statutes which do not require the expertise of the TRA.

I have attached as Exhibit 1 to this Initial Brief a Complaint which has been filed with the Davidson County Chancery Court asking it to enter a declaratory judgment that Berry's Chapel is a nonutility under T.C.A. § 65-4-101(6)(E). Berry's Chapel requests that the TRA dismiss the Petition filed in this docket and permit the Davidson County Chancery Court to resolve the legal issue presented in the Petition.

2. Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company is not a public utility under Tennessee law and is not, therefore, subject to regulation by the TRA.

A. The plain and ordinary meaning of the language used in T.C.A. § 65-4-101(6)(E) includes Berry's Chapel as a nonutility.

Not all entities and organizations in Tennessee which provide traditional public utility services such as electric, gas, water and sewer services are regulated by the TRA. In fact, the vast majority of the citizens of Tennessee do not receive electric, gas, water and sewer services from investor-owned public utilities subject to regulation by the TRA. The vast majority of these traditional public utility services are provided by utilities which the legislature has specifically exempted from the jurisdiction of the TRA, cities, counties, utility districts, utility cooperatives and other nonprofit entities. The legislature has exempted from TRA regulation all entities and organizations which provide utility services in Tennessee except for investor-owned public utilities. The legislature fashioned this limited scope of the TRA's regulation of traditional public utility services by first defining "public utility" in T.C.A. § 65-4-101(6) to include

traditional public utilities and then specifically excluding from that definition several types of entities and organizations which it defined as “nonutilities.” These nonutilities are defined in the subsections of T.C.A. § 65-4-101(6), being subsections (A) – (I).

One of these subsections designates as nonutilities “[a]ny cooperative organization, association or corporation not organized or doing business for profit,” T.C.A. § 65-4-101(6)(E). Berry’s Chapel is a Tennessee nonprofit corporation; therefore, it is a nonutility under the language used in T.C.A. § 65-4-101(6) and is not subject to regulation by the TRA.

In an attempt to achieve the end result it desires, the Consumer Advocate argues a strained and artificial construction of the language of T.C.A. § 65-4-101(6) (E) by which the word “cooperative” should be interpreted to modify not only “organization” but also “association” and “corporation.” To support its interpretation the Consumer Advocate steps outside the language of T.C.A. § 65-4-101(6) (E). The Consumer Advocate suggests that a nonprofit corporation only comes within the language of subsection (6)(E) provided the nonprofit is exempt from paying federal income tax, has tax-exempt status from any agency or department of the State of Tennessee and makes other references to cooperatives in Tennessee law. The Consumer Advocate’s reading of T.C. A. § 65-4-101(6) (E) violates the primary rule of statutory construction which states that the legislative intent of a statute must be construed by the plain and ordinary meaning of the language used by the legislature within the four corners of the statute. *Austin v. Memphis Pub. Co.*, 655 S.W.2d 146, 148 (Tenn. 1983). “Where words of the statute are clear and plain and fully express the legislature's intent, there is no room to resort to auxiliary rules of construction, and [a court] need only enforce the statute as written.” *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998) (citing *Roberson v. University of Tennessee*, 912 S.W.2d 746, 747 (Tenn. Ct. App. 1995) and *In re Clayton*, 914 S.W.2d 84, 90 (Tenn. Ct. App. 1995)). See *Day v. North American Rayon Corp.*, 140 F. Supp. 490, 493 (E.D. Tenn. 1956) (“No

problem of construction arises where the language of a statute is understandable as to method and objective.”).

Berry’s Chapel contends that the operative language in T.C.A. § 65-4-101(6) (E) which connects all three types of organizations listed is “not organized or doing business for profit” not “cooperative.” The characteristic which all three types of entities listed in this subsection have in common which convinced the legislature to make them nonutilities is that they are “not organized or doing business for profit.” Because these entities are nonprofit organizations, the legislature concluded that regulation by the TRA was not required. Historically, the TRA and its predecessors have only regulated for-profit investor-owned utilities which clearly indicates that the common attribute which all of the entities in subsection (6)(E) have in common is that they are not organized or doing business for profit. To make “cooperative” an operative word to modify each type of organization listed in subsection (6)(E) required the Consumer Advocate to resort to strained interpretations of the language of subsection (6)(E) and to use secondary rules of statutory construction. No further inquiry needs to be made other than the plain language in the statute.

B. The drastic change in public utility regulation in Tennessee upon the enactment of Chapter 42 of the 1935 Tennessee Public Acts shows the legislature intended to include any Tennessee nonprofit corporation as a nonutility, including Berry’s Chapel.

“[L]egislative intent controls the construction of statutes.” *Anderson Fish & Oyster Co. v. Olds*, 277 S.W.2d 344, 345 (Tenn. 1955) (citing *Chicago & Southern Airlines, Inc., v. Evans*, 240 S.W.2d 249, 251 (Tenn. 1951)). Courts “must find legislative intent from the statute as a whole, having due regard for its overall purposes.” *Western Pipe Line Constructors, Inc. v. Dickinson*, 310 S.W.2d 455, 459 (Tenn. 1958). In arriving at the legislative intent, a court “must consider not merely the words or phrases used, but also the background, purpose and general

circumstances under which they were used.” *First Nat’l Bank v. McCanless*, 207 S.W.2d 1007, 1009 (Tenn. 1948).

The legislature first defined nonutilities for the purpose of regulation by the TRA by enacting Chapter 42 of the 1935 Tennessee Public Act (Chapter 42), a copy of which is attached as Exhibit 2. Section 1 of Chapter 42 sets forth seven different types of entities and organizations which are nonutilities which are presently codified in subsections (A)-(F) of T.C.A. § 65-4-101(6). The language used in these subsections has remained essentially unchanged since 1935, including the language which defines nonutilities to include “any cooperative organization, association or corporation not organized or doing business for profit.” Section 2 of Chapter 42 provides that any public utility may 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 nonutilities. The legislature’s intent in enacting Chapter 42 becomes clear when one sees how Chapter 42 amended the statute as it existed 1935.

Before Chapter 42 was passed, the language of T.C.A. § 65-4-101(6) was incorporated in Section 5448 of the Code of Tennessee of 1932, a copy of which is attached as Exhibit 3. At that time the definition of “public utility” was essentially the same as “public utility” is presently defined in T.C.A. § 65-4-101(6). Public utility was 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.”

Section 5448 did not include *any* exemptions from the regulation of public utilities by the Railroad and Public Utilities Commission (now the TRA). At that time the Railroad and Public Utilities Commission had the power to regulate all types of entities and organizations which provided public utility services including governmental entities, utility cooperatives, associations and nonprofit corporations. Therefore, Chapter 42 made a broad and sweeping change in public utility regulation in Tennessee.

This broad and sweeping change is evidenced by the language in the preamble and the operative sections of Chapter 42. The preamble to Chapter 42 makes it clear that the legislature intended to limit the authority and power of the Railroad and Public Utilities Commission to regulate public utility services in Tennessee. The preamble states: “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 nonutilities.” The Consumer Advocate argues that the language in the preamble which exempts “certain non-profit organizations” means the legislature intended to exempt some, but not all, non-profit organizations from regulation by the TRA. The Consumer Advocate ignores that similar language is used in the preamble as it relates to governmental entities. The preamble also provides that the exemption is for “*certain* Federal and State Corporations, Agencies, Instrumentalities, and other public bodies.” Does the Consumer Advocate believe there are federal, state or local governmental agencies which provide public utility service which are or could be subject to regulation by the TRA? The use of the word “certain” in the preamble does not have the meaning the Consumer Advocate ascribes to it.

The legislature not only exempted nonutilities from having to get a certificate to provide utility service and from having their rates set by the Railroad and Public Utilities Commission,

but the legislature also provided that a regulated public utility could sell, lease or dispose of its assets and property *without* obtaining the consent of the Railroad and Public Utilities Commission. Therefore, the TRA has no authority to approve or consent to the sale, lease or the disposal of a regulated public utility's assets and properties to a nonutility. In other words, the owners of a public utility have the right to dispose of their public utility assets as they see fit when such a transfer is to a nonutility.

Chapter 42 created exceptions to the pre-existing definition of public utility which were so broad that it only left investor-owned public utilities subject to regulation. Since 1935 the TRA has only regulated investor-owned public utilities which provide public utility services in Tennessee. To my knowledge neither the TRA nor its predecessors have attempted to regulate any governmental entity or any non-profit organization or corporation since that time.

C. The TRA's ability to disregard the corporate structure forms of the parent, subsidiaries and affiliated corporations of a regulated utility for ratemaking purposes does not give it the authority to find Berry's Chapel is not valid Tennessee nonprofit corporation.

The Consumer Advocate contends that the TRA has the power to ignore the separate identity of a corporation and asks the TRA to somehow use this power to find that Berry's Chapel is not a "nonprofit corporation" under Tennessee law. In support of its position, the Consumer Advocate cites two cases in which Tennessee courts have found that the TRA 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. These cases addressed the power of the TRA to ignore the non-utility subsidiaries and affiliates of a public utility the TRA was regulating. *Tennessee Public Service Com. v. Nashville Gas Co.*, 551 S.W.2d 315, 321 (Tenn. 1977) (holding that the TRA's predecessor, the Tennessee Public Service Commission, had jurisdiction in a rate-making case to consider the non-utility parent and

its public utility subsidiary as part of one operating system and take them both into account in determining the proper rate base and structure of the subsidiary); *Bellsouth Adver. & Publ. Corp. v. Tenn. Regulatory Auth.*, 79 S.W.3d 506, 515 (Tenn. 2002) (relying on *Nashville Gas Co.*, 551 S.W.2d 315, and concluding, based upon the particular facts and upon legal precedent governing public utilities and their non-utility subsidiaries and affiliates, that the TRA had jurisdiction over an affiliate of the public utility).

These cases cited by the Consumer Advocate do not address how the TRA somehow derives the authority to disregard the corporate status of the public utility itself. The TRA's power to disregard the corporate status of subsidiaries and affiliates of public utilities gives the TRA no power to question the validity of the creation and operation of Berry's Chapel as a Tennessee nonprofit corporation. As succinctly stated in *Nashville Gas Co.*, 551 S.W.2d at 319-320, "[c]onsiderations of 'piercing the veil', which are involved in cases involving tort, misconduct or fraud, are largely irrelevant in the regulatory and revenue fields." A corporation's identity should be disregarded "with great caution and not precipitately, since there is a presumption of corporate regularity." *Schlater v. Haynie*, 833 S.W.2d 919, 925 (Tenn. Ct. App. 1991) (cited with approval in *Oceanics Schs v. Barbour*, 112 S.W.3d 135, 140 (Tenn. Ct. App. 2003)). "The determination of whether to disregard the corporate fiction depends on the special circumstances of each case, and 'the matter is particularly within the province of the trial court.'" *Oceanics Schs*, 112 S.W.3d at 140 (quoting *Electric Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn. 1985)). The TRA has no statutory power to disregard the corporate identity of Berry's Chapel to achieve an end result not authorized by statute.

D. Whether a Tennessee nonprofit corporation without members should be a regulated public utility under T.C.A. § 65-4-101(6) is a decision for the legislature to make not the TRA.

The crux of the Consumer Advocate's position is that a Tennessee nonprofit corporation which does not have members cannot be a nonutility under T.C.A. § 65-4-101(6)(E). The Consumer Advocate takes this position because it believes a Tennessee nonprofit corporation which operates a traditional public utility service must either be regulated by the TRA or be a corporation with members which permits the members to elect the board of directors who run the utility. The Consumer Advocate believes its position is necessary to effectively protect Tennessee consumers from utilities operating in a monopolistic environment. Unfortunately, the language of T.C.A. § 65-4-101(6)(E) makes no distinction between nonprofit corporations with members and nonprofit corporations without members in defining nonprofit corporations as nonutilities.

While the Consumer Advocate's position could be good public policy, the decision of whether a Tennessee nonprofit corporation without members should be a public utility regulated by the TRA is a decision for the legislature not the TRA. In enacting T.C.A. § 65-4-101(6)(E), the legislature made it clear that it did not believe businesses and entities which were not organized or doing business for profit needed the regulatory protection of the TRA. Thus, historically the TRA has only regulated for-profit investor-owned utilities. If the legislature intended to treat Tennessee nonprofit corporations without members different from Tennessee nonprofit corporations with members, then the legislature could have so stated in T.C.A. § 65-4-101(6).

The Consumer Advocate makes several legal arguments in its Petition to achieve this goal which require strained interpretations of T.C.A. § 65-4-101(6)(E). The Consumer Advocate asserts that the word "cooperative" modifies not only "organization" but also "association" and

“corporation” claiming any other reading creates a result not intended by the legislature. However, if the legislature intended the TRA to only regulate for-profit investor-owned utilities, then the Consumer Advocate’s interpretation of T.C.A. § 65-4-101(6)(E) is based upon a nonexistent premise, regardless of how much merit such a nonexistent premise has. Berry’s Chapel asserts that the purpose of enacting Chapter 42 of the 1935 Tennessee Public Acts was to remove from regulation any public utility which was a nonprofit entity including governmental entities, utility cooperatives, nonprofit associations and nonprofit corporations. The Consumer Advocate expresses concern that Berry’s Chapel may somehow make distributions which would personally benefit the board of directors of Berry’s Chapel. This fear is unfounded. Berry’s Chapel is not authorized by the Tennessee Nonprofit Corporation Act to make *any* distributions to anyone. Under T.C.A. § 48-63-101, the legislature has provided that a Tennessee nonprofit corporation can only make distributions as authorized by T.C.A. § 48-63-102. Under T.C.A. § 48-63-102, the only distributions which can be made by a mutual benefit corporation is the purchase of its memberships. Because Berry’s Chapel has no members, it is not authorized by law to make any distributions of its assets to its board of directors or to anyone else. All revenues from the rates charged by Berry’s Chapel must be used to operate its sewer system.

If Berry’s Chapel should be a public utility rather than a nonutility, this decision is a decision for the legislature to make not the TRA. So far the legislature has not made this decision. Until the legislature enacts a statute which provides that Tennessee nonprofit corporations without members are excluded from the definition of nonutility currently in T.C.A. § 65-4-101(6)(E), then Berry’s Chapel is a nonutility and not subject to regulation by the TRA.

- 3. In the event the TRA finds that Berrys’ Chapel is a public utility under T.C.A. § 65-4-101, the TRA should not order a refund of the \$20.00 per month increase effective November 1, 2010 without conducting a hearing on whether the rate is just and reasonable.**

In the event the TRA finds that Berry's Chapel is a public utility in this docket, Berry's Chapel contends that it should not order an immediate refund of the rates put into place through the Rate Change Notice effective November 1, 2010 which includes the \$20.00 per month activity charge. If the TRA concludes Berry's Chapel is a public utility, Berry's Chapel would agree that the TRA would have the power to immediately suspend this new rate. If Berry's Chapel is found to be a public utility, it intends to file a rate case immediately after such an order is entered. In the alternative, the TRA could initiate a proceeding on its own or use this docket to hold a hearing as to determine whether the new rates implemented on November 1, 2010 were just and reasonable. If the TRA concludes some or all of the new rates are not just and reasonable after conducting an evidentiary hearing, the TRA has the power to order a full refund at that time. The cash requirement of an immediate refund may hamper the ability of Berry's Chapel to continue its day to day operations and to operate its sewer system in accordance with the terms and conditions of its NPDES permit.

Conclusion

Based upon the foregoing arguments, Berry's Chapel Utility, Inc. urges the TRA to find that it is a nonutility under T.C.A. § 65-4-101(6)(E) and to dismiss the Petition filed by the Consumer Advocate in this docket.

Respectfully submitted,



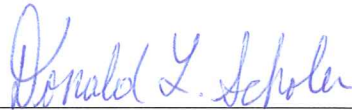
DONALD L. SCHOLES BPR # 10102
Branstetter, Stranch & Jennings, PLLC
227 Second Avenue North, Fourth Floor
Nashville, TN 37201-1631
(615) 254-8801
dscholes@branstetterlaw.com

Attorney for Respondent, Berry's Chapel Utility, Inc.

Certificate of Service

I hereby certify that a true and exact copy of the foregoing ^{Brief}~~Answer~~ has been mailed, postage prepaid, on this 4th day of March, 2011, to the following:

Vance L. Broemel, Esq.
Mary Leigh White, Esq.
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-8733



Donald L. Scholes

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
FOR THE 25TH JUDICIAL DISTRICT AT NASHVILLE

FILED
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BERRY'S CHAPEL UTILITY, INC.,)

Plaintiff,)

vs.)

CONSUMER ADVOCATE AND)
PROTECTION DIVISION OF THE)
OFFICE OF THE ATTORNEY)
GENERAL and TENNESSEE)
REGULATORY AUTHORITY)

Defendants.)

CLERK OF COURT
DAVIDSON COUNTY CHANCERY CT.

D.C. & M.

Docket No. 11-0298-IV

COMPLAINT

Comes now the Plaintiff Berry's Chapel Utility, Inc. and for its cause of action would respectfully show to the Court that:

1. Plaintiff Berry's Chapel Utility, Inc. is a Tennessee nonprofit corporation with its principal office being at 321 Billingsly Court, Suite 4, Franklin, Tennessee 37065.

2. Defendant Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General (the Consumer Advocate) was created by T.C.A. § 65-4-118 and has the power to participate in any matter or proceeding before the Tennessee Regulatory Authority or any other administrative, legislative or judicial body to represents in interests of the customers of public utilities defined in T.C.A. § 65-4-101 which are regulated by the Tennessee Regulatory Authority. The address of the Consumer Advocate is P.O. Box 20207, Nashville, Tennessee 37202-0207 and service upon the Consumer Advocate is made by service on the Attorney General for the State of Tennessee.

3. Defendant Tennessee Regulatory Authority (TRA) is an administrative agency of the State of Tennessee charged with regulating public utilities as defined in T.C.A. § 65-4-101(6) pursuant to the provisions of Title 65, Chapters 1-5 of Tennessee Code Annotated. The address of the TRA is 460 James Robertson Parkway, Nashville, TN 37243-0505 and service upon the TRA is made by service on the Attorney General for the State of Tennessee.

4. Plaintiff files this action pursuant to T.C.A. § 29-14-103 for a declaratory judgment that Berry's Chapel Utility, Inc. is a nonutility under T.C.A. § 65-4-101(6)(E) and is not subject to regulation as a public utility by the TRA.

5. Plaintiff provides sewer service to approximately 830 customers in Williamson County, Tennessee.

6. On September 1, 2010, Lynwood Utility Corporation merged into Plaintiff with Plaintiff being the surviving entity. Prior to this merger Lynwood Utility Corporation was a public utility as defined in T.C.A. § 65-4-101(6) and was subject to regulation by the TRA.

7. Upon the merger Plaintiff owned and began operating the sewer system formerly owned by Lynwood Utility Corporation. Plaintiff has an NPDES permit issued by the Tennessee Department of Environment and Conservation, Permit No. TN0029718, which authorizes Plaintiff to own and operate the sewer treatment and collection system which serves Plaintiff's customers in Williamson County.

7. Because Plaintiff is a Tennessee nonprofit corporation, Plaintiff is a nonutility under T.C.A. § 65-4-101(6)(E) and is not subject to the jurisdiction of the TRA. Pursuant to T.C.A. § 65-4-112(b), Lynwood Utility Corporation was not required to obtain the approval or consent of the TRA to transfer all of its assets to Plaintiff by a corporate merger because Plaintiff is a nonutility.

8. By letter dated September 17, 2010, to Mary W. Freeman, Chairman, Plaintiff notified the TRA of the merger of Lynwood Utility Corporation into the Plaintiff and notified the TRA that Plaintiff was a nonutility under T.C.A. § 65-4-101(6)(E). A copy of this letter is attached as Exhibit 1 to this Complaint. Neither Defendant questioned that Plaintiff was a nonutility until the Consumer Advocate filed a Petition for Declaratory Order with the TRA on January 10, 2011, seeking a declaratory order that Plaintiff is a public utility and does not fall within the definition of nonutility in T.C.A. § 65-4-101(6)(E). Attached as Exhibit 2 is a copy of the Consumer Advocate's Petition for Declaratory Order without the lengthy exhibits annexed to the Petition

9. In its Petition for Declaratory Order, the Consumer Advocate seeks an order from the TRA finding that the Plaintiff is a public utility under T.C.A. § 65-4-101(6)(E). Plaintiff filed an Answer to this Petition in which Plaintiff avers that it is not subject to the jurisdiction of the TRA because it is a nonutility under T.C.A. § 65-4-101(6)(E) as a Tennessee nonprofit corporation. A copy of this Answer is attached as Exhibit 3 to this Complaint. Under T.C.A. § 65-4-101(6)(E) a nonutility includes "Any cooperative organization, association or corporation not organized or doing business for profit." Plaintiff is a nonutility pursuant to T.C.A. § 65-4-101(6)(E).

10. Because Plaintiff is a nonutility, Plaintiff is not subject to the jurisdiction of the TRA, and the TRA has no power or authority to declare Plaintiff to be a public utility under T.C.A. § 65-4-101(6). Plaintiff avers that it has no legal duty to respond or abide by any decision or order of the TRA in which the TRA may find Plaintiff is a public utility.

11. Whether Plaintiff is a nonutility under T.C.A. § 65-4-101(6)(E), is a question of law requiring the proper interpretation of this statute as it applies to Plaintiff.

12. The resolution of this legal issue is a matter of statutory construction which does not require the expertise of the TRA in public utility regulation. Therefore, this court has primary jurisdiction over the resolution of this legal issue.

Wherefore, Premises Considered, Plaintiff Prays:

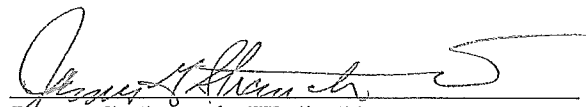
1. The Court enter a declaratory judgment finding that Plaintiff is a nonutility under T.C.A. § 65-4-101(6)(E) and is not subject to regulation by the TRA as public utility.

2. The Court exercise its primary jurisdiction over the question of law presented in this action and enter an order to stay the proceeding at the TRA initiated by the Consumer Advocate's filing of its Petition for Declaratory Order, Docket No. 11-00005 and to stay the enforcement of any order enter in that proceeding until a declaratory judgment is entered in this action.

3. The Court grant such further and other general relief to which Plaintiff may be entitled.

Dated this 4th day of March, 2011.

Respectfully submitted,



James G. Stranch, III, # 2542

Michael J. Wall, #24774

BRANSTETTER, STRANCH & JENNINGS, PLLC

227 Second Avenue North, Fourth Floor

Nashville, Tennessee 37201

(615) 254-8801

*Attorneys for Plaintiff Berry's Chapel
Utility, Inc.*

BRANSTETTER, STRANCH & JENNINGS, PLLC

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R. JAN JENNINGS *
JOE P. LENISKI, JR.
DONALD L. SCHOLES
JAMES G. STRANCH, III
J. GERARD STRANCH, IV
JANE B. STRANCH

*ALSO ADMITTED IN GA

ASSOCIATES:
B. DENARD MICKENS
STEVEN J. SIMERLEIN *
STACEY K. SKILLMAN **
MIKE STEWART
J. D. STUART
MICHAEL J. WALLOF COUNSEL:
ROBERT J. RICHARDSON, JR. ****ALSO ADMITTED IN CA
**ALSO ADMITTED IN KY
***ONLY ADMITTED IN OH

September 17, 2010

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

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

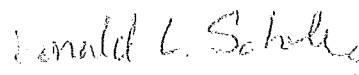

Dear Chairman Freeman:

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

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

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

Sincerely yours,


DONALD L. SCHOLES 

Enclosures

c: General Ryan McGehee
Tyler Ring
Jim Ford

FILED
STATE OF TENNESSEE

2010 JUL 16 PM 4:00

TRE HARGRETT
SECRETARY OF STATE

CHARTER
OF
BERRY'S CHAPEL UTILITY, INC.

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

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

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

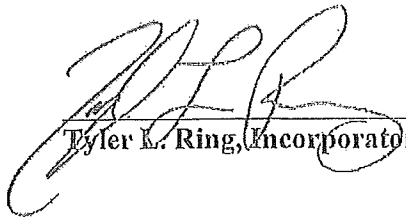
John Ring
321 Billingsly Court, Suite 4
Franklin, TN 37065

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

James B. Ford
9679 Aurora Court
Brentwood, TN 37027

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

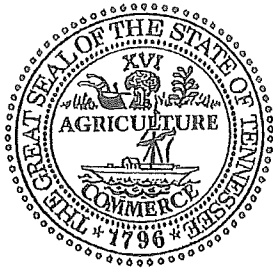
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CHARTER	
07/27/2010	11:22 AM
BATCH	184116
MTG TAX	0.00
TRN TAX	0.00
REC FEE	5.00
DP FEE	2.00
ARC FEE	0.00
TOTAL	7.00

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

Branstetter



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

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

July 16, 2010

Filing Acknowledgment

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

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

Document Receipt

Receipt # : 221470 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, Secretary of State
Business Services Division

Processed By: Cheryl Donnell

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

RECEIVED
SECRETARY OF STATE

2010 AUG 20 PM 3:13

RECEIVED
SECRETARY OF STATE

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

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.

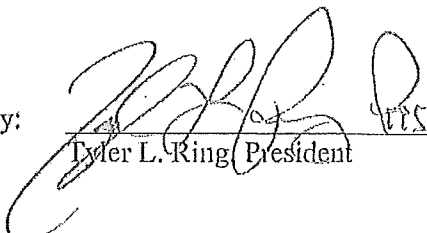
3. As to Berry's Chapel Utility, Inc., which is the surviving corporation of the merger, the Plan was duly approved by a unanimous vote of its board of directors. Berry's Chapel Utility, Inc. has no members; therefore, no vote by the corporation's members was required.

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.

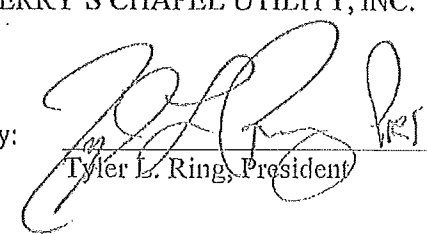
LYNWOOD UTILITY CORPORATION

By:


Tyler L. Ring, President

BERRY'S CHAPEL UTILITY, INC.

By:


Tyler L. Ring, President

filed electronically in docket office on 01/10/11

IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

EXHIBIT

2

IN RE:

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

)
)
) DOCKET NO. 11-00005
)
)
)

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

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to Tenn. Code Ann. § 65-4-118, respectfully petitions the Tennessee Regulatory Authority ("TRA") to convene a contested case, name Berry's Chapel Utility, Inc., as a party, and, pursuant to Tenn. Code Ann. § 4-5-223(a) and TRA Rule 1220-1-2-.05, issue a declaratory order that Berry's Chapel Utility, Inc. ("Berry's Chapel"), is a public utility under Tennessee law and, therefore, subject to regulation by the Tennessee Regulatory Authority ("TRA") pursuant to Tenn. Code Ann. § 65-4-101(6) and § 65-4-104.

INTRODUCTION

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."

As will be shown, however, 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.

In addition, 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.

For cause, Petitioner would show as follows:

1. The Consumer Advocate is authorized by Tenn. Code Ann. § 65-4-118 to represent the interests of Tennessee consumers of public utility services by initiating and intervening as a party in proceedings before the Authority in accordance with the Uniform Administrative Procedures Act and Authority rules.

2. Tenn. Code Ann. § 4-5-223(a) provides that "[a]ny affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency."

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

3. Tenn. Code Ann. § 65-4-104 provides that the TRA shall regulate all public utilities. The term "public utility" is defined in Tenn. Code Ann. § 65-4-101(6).

4. Berry's Chapel provides wastewater utility service to the residential development known as Cottonwood near Franklin, Tennessee. According to the charter of Berry's Chapel it is incorporated under the Tennessee Nonprofit Corporation Act, Tenn. Code Ann. § 48-61-104. Berry's Chapel maintains that it is a nonprofit corporation and, because nonprofit corporations are excluded from the definition of public utilities pursuant to Tenn. Code Ann. § 65-4-

101(6)(E), that it is not subject to TRA regulation. *See* the letter from Donald L. Scholes to Mary W. Freeman, Chairman of the TRA, September 17, 2010, attached as **Exhibit A** ("*Letter from Donald L. Scholes*").

5. In light of the assertion by Berry's Chapel that it is a nonprofit corporation, the Consumer Advocate is petitioning the TRA to issue a declaratory order that the public utility known as Berry's Chapel is in fact a public utility under Tennessee law and, therefore, subject to the regulation of the TRA, notwithstanding its incorporation under the Tennessee Nonprofit Corporation Act.

6. Lynwood Utility was a public utility regulated by the Authority. Lynwood Utility sold wastewater services to consumers in the State of Tennessee. Lynwood Utility's principal place of business in Tennessee was 321 Billingsly Court, Suite 4, Franklin, Tennessee. Effective September 1, 2010, the ownership of the sewer treatment and collection system of the Lynwood Utility became vested in Berry's Chapel. *See* the letter from Donald L. Scholes to Mary W. Freeman, Chairman of the TRA, September 17, 2010, attached as **Exhibit A** ("*Letter from Donald L. Scholes*"). The owners of Lynwood were John Ring and Tyler Ring. *See* the *TRA Order Approving Transfer of Authority*, Docket No. 04-00360, July 15, 2005, at page 3.

7. Berry's Chapel is a Tennessee corporation incorporated under the Tennessee Nonprofit Corporation Act as a "mutual benefit corporation." *See* the Charter of Berry's Chapel Utility, Inc., attached as **Exhibit B**. The purpose of Berry's Chapel is to own and operate a sanitary sewer collection and treatment system and to engage in any other lawful business. **Exhibit B** at ¶10. Furthermore, the ownership of the sewer treatment and collection system of Lynwood is now vested in Berry's Chapel. *See* the Letter from Donald L. Scholes, **Exhibit A**.

8. According to the Charter of Berry's Chapel Utility, Inc., attached as Exhibit B, the name and address of the incorporator of Berry's Chapel is:

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

This is the same address as that for the principal place of business of Lynwood. Again according to the Charter of Berry's Chapel Utility, Inc., the corporation's initial directors and their addresses are:

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

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

James B. Ford
9679 Aurora Court
Franklin, Tennessee 37065

9. John Ring and Tyler Ring are also referred to in the *Agreement and Plan of Merger of Berry's Chapel*, attached as Exhibit C. This document was filed with the Tennessee Secretary of State on August 20, 2010. To the best of Petitioner's knowledge this document has not been filed with the TRA. Paragraph 4 (Covenants) provides that "Berry's Chapel shall issue a promissory note to John Ring in the approximate amount of \$1,200,000 and a promissory note to Tyler L. Ring in the approximate amount of \$1,200,000, John Ring and Tyler Ring being the shareholders of Southern Utility Corporation, the sole shareholder of Lynwood, with such promissory notes to be secured by a second mortgage on the real property and a first lien on the personal property of Berry's Chapel." Paragraph 4(c) of the Agreement and Plan of Merger also states that "the Lynwood sewer treatment and collection system shall be transferred to the books

and records of Berry's Chapel at the fair market value on the effective date with an approximate value of \$5,580,000." In the last rate case before the TRA, Docket No. 09-00034, Lynwood set its total assets at \$2,020,694.15, with an approximate \$1.2 million in debt to a bank. See Exhibit D (TRA Docket No. 09-00034, *Response to First Discovery Request of the Consumer Advocate and Protection Division to Lynwood Utility Corporation*, Response No. 36: Schedule 36, Lynwood Utility Corporation, Balance Sheet Detail as of December 31, 2008, cover page and last five pages).

10. After the merger of Lynwood into Berry's Chapel, Berry's Chapel sought to change the name on permits issued to Lynwood by the Tennessee Department of Environment and Conservation ("TDEC") to the new name of Berry's Chapel Utility, Inc. A new permit has been issued in the name of Berry's Chapel but the new permit contains certain financial security obligations and requirements for plant upgrades and reserve capacity that Berry's Chapel does not agree with and it has appealed these provisions of the new permit. The *Petition for Review and Hearing and Request for Permit Amendment Regarding NPDES Permit TN0029718* is attached as Exhibit E. The appeal sets forth the grounds with some specificity. Paragraphs 1 and 2 on page 2 address the upgrade and reserve issues; paragraph 3 on page 3 sets forth the grounds for appealing the financial security provisions.

11. The letter from Donald L. Scholes announcing the merger of Lynwood into Berry's Chapel, attached as Exhibit A, states that Berry's Chapel is a "nonprofit corporation" and a "nonutility." The letter, however, provides no proof of Berry's Chapel's "nonprofit" status other than a Charter of Berry's Chapel Utility, Inc.

12. While tax exempt status with the State of Tennessee is not necessarily dispositive of nonprofit status, when Berry's Chapel notified the TRA of the merger of Lynwood into

Berry's Chapel in the letter of September 17, 2010, attached as Exhibit A, Berry's Chapel did not file with the TRA any record of tax exempt status granted or determined by any agency or department of the State of Tennessee, including the Department of Revenue and the State Tax Assessor's Office.

13. 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, when Berry's Chapel notified the TRA of the merger of Lynwood into Berry's Chapel in the letter of September 17, 2010, attached as Exhibit A, Berry's Chapel, an alleged nonprofit corporation, did not file with the TRA 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.

14. While 501(c)(3) of the federal Internal Revenue Code status is not necessarily dispositive of nonprofit status, when Berry's Chapel notified the TRA of the merger of Lynwood into Berry's Chapel in the letter of September 17, 2010, attached as Exhibit A, Berry's Chapel did not file with the TRA any record of 501(c)(3) status under the Internal Revenue Code, which provides for tax exempt status for nonprofits.

15. Although the letter from Donald L. Scholes dated September 17, 2010, attached as Exhibit A, calls for the TRA to cancel the Certificate of Convenience and Necessity of Lynwood, Berry's Chapel did not file with the TRA any statement recognizing that it no longer has an exclusive franchise for the territory formerly served by Lynwood, which territory is now presumably open to entry by any duly licensed and approved company. Furthermore, the Tennessee Deeds of Trust executed by Berry's Chapel for the use and benefit of John Ring and Tyler Ring continue to refer to a "25 foot public utility drainage and access easement located

between Lots Nos. 120 and 121” in the property description attached as Exhibit A (emphasis added) to the Deeds of Trust, without any reference to the current claim by Berry’s Chapel to the TRA that it is no longer a “public utility.” The Tennessee Deeds of Trust are attached as Exhibits F and G.

16. 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.

17. 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.

II. BERRY’S CHAPEL IS NOT A “COOPERATIVE” CORPORATION AS REQUIRED BY THE STATUTE EXCLUDING CERTAIN ENTITIES FROM THE DEFINITION OF PUBLIC UTILITIES

18. 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 A, 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 H for convenience of reference.

19. 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.

20. 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.

21. 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),

22. 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).

23. 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.

24. 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 I.

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)

25. 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).

26. 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 cooperative, 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 J).

27. 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 B, 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.

28. 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.

29. 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.

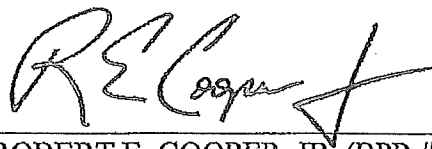
30. The Consumer Advocate is aware that in 2008 attorneys for the TRA wrote letters allowing a homeowners association which operated a wastewater system to avoid regulation by the TRA on the ground that it was a nonprofit corporation. A copy of these letters is attached as **Collective Exhibits K (K-1, K-2, K-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 K-1. Therefore, based on the analysis previously set forth in this Petition, the Consumer Advocate believes the position reflected in the letters is mistaken and requests that the TRA Directors give that position no precedential weight.

31. 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.

WHEREFORE, the Petitioner Consumer Advocate respectfully asks the Authority to convene a contested case proceeding, name Berry's Chapel Utility, Inc., as a party, and issue a declaratory order that Berry's Chapel Utility, Inc., is in fact a public utility under Tennessee law subject to regulation by the Tennessee Regulatory Authority, and to grant such other relief as may be proper, including, but not limited to, a refund of any increase in rates such as that set forth in the Rate Change Notice, which called for a \$20 per month increase effective November 1, 2010, attached as Exhibit L.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "RE Cooper", is written over a horizontal line.

ROBERT E. COOPER, JR. (BPR #10934)
Attorney General and Reporter
State of Tennessee

Vance L. Broemel

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: January 10, 2011.

IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

FILED - 9 11-11-07

TRA DOCKET ROOM

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

ANSWER OF BERRY'S CHAPEL UTILITY, INC. TO PETITION FOR
DECLARATORY ORDER

Comes now the Respondent, Berry's Chapel Utility, Inc., for its Answer to the Consumer Advocate's Petition in this docket and would state in response to the numbered paragraphs in the Petition as follows:

1. Respondent admits the allegations in paragraph 1 of the Petition.
2. Respondent admits the allegations in paragraph 2 of the Petition.
3. Respondent admits the allegations in paragraph 3 of the Petition.
4. Respondent admits the allegations in paragraph 4 of the Petition and avers that it provides sewer service to the River Landings Subdivision, Legends Ridge Subdivision, Walnut Grove Elementary School and Berry's Chapel Church of Christ as well as the Cottonwood Subdivision.
5. Paragraph 5 of the Petition contains no factual allegations but only presents legal argument which requires no response.

6. Respondent admits the allegations in paragraph 6 of the Petition except Respondent avers that the owner of Lynwood Utility Corporation was Southern Utility Corporation and that John Ring and Tyler Ring were the owners of Southern Utility Corporation.

7. Respondent admits the allegations in paragraph 7 of the Petition.

8. Respondent admits the allegations in paragraph 8 of the Petition.

9. Respondent admits the allegations in the first four sentences of paragraph 9 of the Petition. Respondent denies the allegations in the fifth and sixth sentences of paragraph 9 and avers that the total assets and debt to the bank set forth in *Response to First Discovery Request of the Consumer Advocate and Protection Division to Lynwood Utility Corporation*, Response No. 36, Schedule 36 in the Respondent's last rate case, TRA Docket No. 09-00034, was for ratemaking purposes only.

10. Respondent admits the allegations in paragraph 10 of the Petition.

11. Respondent admits the allegations in the first sentence of paragraph 11 of the Petition. Respondent denies the allegations in the second sentence of paragraph 11 of the Petition and avers that the Respondent is a nonprofit corporation under the Tennessee Nonprofit Corporation Act and that no further proof of its status as a nonprofit corporation is required under Tennessee law.

12. Respondent admits the allegations in paragraph 12 of the Petition.

13. Respondent admits the allegations in paragraph 13 of the Petition and avers that as a nonutility it had no obligation to file any document with the TRA under T.C.A. § 65-4-112(b).

14. Respondent admits the allegations in paragraph 14 of the Petition and avers that as a nonutility it had no obligation to file any document with the TRA under T.C.A. § 65-4-112(b).

15. Respondent admits the allegations in the first sentence of paragraph 15 of the Petition and avers that as a nonutility it had no obligation to file any document with the TRA under T.C.A. § 65-4-112(b). The allegations in the second sentence of paragraph 15 of the Petition require no response since this sentence simply quotes language in the referenced deeds of trust and presents legal argument.

16. Respondent avers that the first sentence of paragraph 16 of the Petition contains no factual allegations but only presents legal argument which requires no response. Respondent denies the allegations in the second sentence of paragraph 16 of the Petition.

17. Respondent avers that paragraph 17 of the Petition contains no factual allegations but only presents legal argument which requires no response.

18. Respondent denies the allegations in the first sentence of paragraph 18 of the Petition. Respondent avers that the remaining sentences in paragraph 18 of the Petition contain no factual allegations but only present legal argument which requires no response.

19. Respondent avers that paragraph 19 of the Petition contains no factual allegations but only presents legal argument which requires no response.

20. Respondent avers that paragraph 20 of the Petition contains no factual allegations but only presents legal argument which requires no response.

21. Respondent avers that paragraph 21 of the Petition contains no factual allegations but only presents legal argument which requires no response.

22. Respondent avers that paragraph 22 of the Petition contains no factual allegations but only presents legal argument which requires no response.

23. Respondent avers that paragraph 23 of the Petition contains no factual allegations but only presents legal argument which requires no response.

24. Respondent avers that paragraph 24 of the Petition contains no factual allegations but only presents legal argument which requires no response.

25. Respondent avers that paragraph 25 of the Petition contains no factual allegations but only presents legal argument which requires no response.

26. Respondent avers that paragraph 26 of the Petition contains no factual allegations but only presents legal argument which requires no response.

27. Respondent avers that the first two sentences of paragraph 27 of the Petition contains no factual allegations but only presents legal argument which requires no response. Respondent admits the allegations in the third sentence of paragraph 27. Respondent denies the allegations in the fourth sentence of paragraph 27. Respondent avers that the fifth and sixth sentences of paragraph 27 contain no factual allegations but only present legal argument which requires no response.

28. Respondent avers that paragraph 28 of the Petition contains no factual allegations but only presents legal argument which requires no response.

29. Respondent avers that paragraph 29 of the Petition contains no factual allegations but only presents legal argument which requires no response.

30. Respondent admits the allegations in the first four sentences of paragraph 30 of the Petition. Respondent denies the allegations in the fifth and sixth sentences of paragraph 30..

31. Respondent denies the allegations in paragraph 31 of the Petition..

AFFIRMATIVE DEFENSES

1. Respondent avers that the TRA lacks jurisdiction of the subject matter of whether the Respondent is nonprofit corporation under Tennessee law and therefore a nonutility under T.C.A. § 65-4-101(6) because the Respondent is a nonutility under T.C.A. § 65-4-101(6); therefore, the TRA has no power to issue a declaratory order requested by the Petitioner.

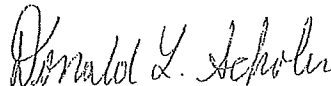
2. Respondent avers that the TRA has no power to issue a declaratory order in this matter because the legal issue in this case is whether the Respondent is a nonprofit corporation under Tennessee law and not a determination as to whether the Respondent is a nonutility under T.C.A. § 65-4-101(6). The determination of whether the Respondent is a nonprofit corporation under Tennessee law is a corporate law issue within the province of the Tennessee court system and is not the determination as to the validity or applicability of a statute, rule or order with the primary jurisdiction of the TRA which would give the TRA authority to issue a declaratory order under T.C.A. §§ 4-5-223 and 65-2-104.

Now having fully answered the Petition, Respondent requests that the TRA:

1. Dismiss the Petition with prejudice; and
2. Grant Respondent all other appropriate relief.

Dated this 9th day of February, 2011.

Respectfully submitted,

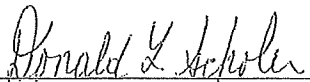


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(615) 254-8801
Attorney for Respondent, Berry's Chapel Utility, Inc.

Certificate of Service

I hereby certify that a true and exact copy of the foregoing Answer has been mailed, postage prepaid, on this 9th day of February, 2011, to the following:

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Mary Leigh White, Esq.
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202-0207
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JAMES G. STRANCH, III
J. GERARD STRANCH, IV
MICHAEL J. WALL

ASSOCIATE:
STACEY K. SKILLMAN ***

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

February 9, 2011

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

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

Via Hand Delivery

Attention: Sharla Dillon

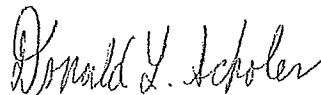
Re: Consumer Advocate's Petition for a Declaratory Order that Berry's Chapel Utility, Inc., is a Public Utility under Tennessee Law and Should Be Regulated by the TRA Docket 11-00005

Dear Chairman Freeman:

Please find enclosed an original and fourteen (14) copies of the Answer of Berry's Chapel Utility, Inc. to the Consumer Advocate's Petition for Declaratory Order in the above referenced matter. I would appreciate your returning to me stamped filed the extra copy of the Answer.

Thank you for your assistance in this matter.

Sincerely yours,



DONALD L. SCHOLLES

Enclosures

c: Tyler Ring
Jim Ford

CHAPTER 42

SENATE BILL NO. 124

(Moss, Carter, Maxwell, Boyd, Harris, Sprouse, Evins, Cate, Wright, Bramley, Draper, Fowler, Lowe, Abernathy, Atchley, Dodson, Hale, Trotter, Howell, 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 5608, 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, co-partnership, 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 subdivision (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

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PUBLIC ACTS, 1935 [Chapter 43]

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. F. 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, Cato, Wright, Hale, Howell, Trotter, Draper, Aher-nathy, Atchley, Howell, 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

THE
CODE OF TENNESSEE
1932

ENACTED BY
THE GENERAL ASSEMBLY OF 1931

PREPARED
BY
THE CODE COMMISSION

SAMUEL C. WILLIAMS, Chairman, Johnson City
ROBERT T. SHANNON, Nashville
GEORGE HARSH, Memphis

PUBLISHED BY AUTHORITY OF
THE LEGISLATURE

VOLUME TWO

KINGSPORT, TENN.
SOUTHERN PUBLISHERS, INC.
1931

report to the governor an abstract of the proceedings of any such conference or convention. (Ib., sec. 29.)

5443 3059a67. Law is operative only in this state.—The provisions of this chapter shall be construed to apply to and affect only the transportation of passengers, freight, cars and services to persons or between points within this state. (Ib., sec. 30, Modified.)

5444 3059a68. Annual reports to the governor; printed copies for the legislature.—The commission shall, annually, on the first day of January, make a report to the governor of all matters relating to their office for the preceding year, and such as will disclose the practical workings of companies under their jurisdiction in this state; and such suggestions in relation thereto as they may deem proper, together with an abstract of the minutes of all their meetings, and shall have printed and lay before each legislature five hundred copies of their reports for the two preceding years. (Ib., sec. 31.)

5445. Duty of commission and weight of findings.—The commission is to perform all duties imposed upon it by the provisions of this chapter, and see that such companies shall comply with all such regulations and orders as it may reasonably and lawfully make; and, in case any such company shall fail or refuse to comply with such reasonable and lawful regulations and orders, it shall be the duty of said commission to enforce the same; and power is given said commission to enforce the same by mandamus or mandatory injunction, or by other summary proceedings provided by law; and in all such proceedings the orders, regulations, rates and tariffs made and fixed by the commission pursuant to this chapter shall be taken and treated as *prima facie* reasonable and valid. It is made the duty of the courts having jurisdiction in such proceedings to hear and determine all such summary causes as speedily as practicable, giving preference or priority thereto as in revenue causes. (1921, ch. 70, sec. 2, Modified.)

5446 3059a83. Railroad rates to be fixed according to river competition.—Where any city or town in this state has competition existing in freight rates between railroads and rivers, it shall be the duty of the commission to regulate the freight rates of all railroads in cities and towns so situated, according to the rates fixed and charged by river transportation companies in competition with such railroads. (1897, ch. 10, sec. 34.)

5447. Commission's jurisdiction and control of public utilities.—The railroad and public utilities commission shall have general supervision and regulation of, 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 statute. (1919, ch. 49, sec. 3.)

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

POWERS OVER UTILITIES

1217

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.

5449. Railroads excluded.—However, none of the provisions of this statute following and none of the powers conferred upon the commission shall embrace, or apply to any railroad, whether operated by an incorporated company or individuals, which is operated in this state, and which is regulated and governed by the provisions of sections 5380-5447, and such railroads are expressly excluded from the definition of public utilities as set forth in the preceding section. (Ib., Modified.)

5450. Powers of commission.—The commission shall have power:

(a) To investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility as herein defined.

(b) From time to time to appraise and value the property of any public utility as herein defined, whenever in the judgment of said commission it shall be necessary so to do, for the purpose of carrying out any of the provisions of this law, and in making such valuation the commission may have access to and use any books, documents or records in the possession of any department or board of the state or any political subdivision thereof.

(c) Rates, etc., fixed.—After hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as herein defined, whenever the commission shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established.

(d) Schedules of classifications and rates.—To require every such public utility to file with it complete schedules of every classification employed and of every individual or joint rate, toll, fare, or charge made or exacted by it for any product supplied or service rendered within this state as specified in such requirement.

(e) Standards, classifications, etc.—After hearing, by order in writing, to fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility.

(f) Standards for measurements, etc.—After hearing, by order in writing, to ascertain and fix adequate and serviceable standards for the measurement of quantity, quality, pressure, voltage, or other condition, pertaining to the supply of the product or service rendered by