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March 11, 2011

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

Via E-mail and Hand Delivery

filed electronically in docket office on 03/11/11

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 the Reply Brief of Berry's Chapel Utility, Inc. in this docket.

This Reply 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 Reply 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		

REPLY BRIEF OF BERRY'S CHAPEL UTILITY, INC.

Comes now the Respondent, Berry's Chapel Utility, Inc. (Berry's Chapel) and files this Reply Brief in this docket:

1. **The proper interpretation of the effect of the enactment of T.C.A. § 65-4-101(7) demonstrates that including Berry's Chapel Utility, Inc. as a nonutility under T.C.A. § 65-4-101(6)(E) does not create a conflict within T.C.A. § 65-4-101 on the exempt status of a nonprofit entity from TRA Regulation.**

As discussed in the initial brief filed by Berry's Chapel, 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). Section 1 of Chapter 42 set forth seven different types of entities and organizations that are nonutilities, which are presently codified in subsections (A)-(F) of T.C.A. § 65-4-101(6).

In 1979, the legislature amended what is now T.C.A. § 65-4-101 to add Section (7). *See* Chapter 195 of the 1979 Public Acts (Chapter 195). The legislature set Section (7) apart from Section (6), which defines a "public utility." Not only did Chapter 195 amend T.C.A. § 65-4-101, but it also amended the Utility District Law of 1937 (then codified at Title 6, Chapter 26). The new section added to the Utility District Law of 1937 allowed a homeowners association as

described in this section to petition the county executive for exclusion from such utility district and for recognition and incorporation as a separate and distinct utility district. Therefore, the purpose of this statute was to permit an existing homeowners association to recreate themselves as a utility district by filing a petition with the county executive in the county in which the association was located and to provide that the board of directors of the association were to be the initial members of the new utility district created upon the exclusion of the owners of lots in the subdivision from local utility district by the county executive.

Section (7) provides a specific exclusion for nonprofit homeowners associations that meet all the conditions specified in T.C.A. § 65-4-101(7), including the conditions that the homeowners associations "own, construct, operate or maintain water, street light or park maintenance service systems for the exclusive use of that subdivision" and that the subdivision is unable to obtain such services from the local utility district. The exemption for homeowners associations set forth in T.C.A. § 65-4-101(7) limits the exemption to a subdivision which owns a water system and only serves the owners of residential lots in the subdivision. Does the Consumer Advocate believe that a homeowners association which provides sewer service is subject to TRA regulation because it does not fit within the exact language of T.C.A. § 65-4-101(7)? Does the Consumer Advocate believe that a homeowners association which owns a water system and serves commercial customers or residential customers who do not own lots in its subdivision is subject to TRA regulation because it does not fit within the exact language of T.C.A. § 65-4-101(7)? Berry's Chapel suggests that the answer to these two questions is no. Any such homeowner association is exempt from regulation as a nonutility under T.C.A. § 65-4-101(6)(E).

Such a scenario is precisely what the TRA General Counsel addressed in 2008 when presented with the issue about whether Fairfield Glade Community Club was exempt from TRA regulation. This issue arose when Fairfield Glade began serving commercial customers outside the development. While Fairfield Glade did not meet all the conditions in T.C.A. § 65-4-101(7), the TRA General Counsel concluded that it was still a nonutility under the exemption set forth in T.C.A. § 65-4-101(6)(E) because it was a not-for-profit corporation.

The enactment of T.C.A. § 65-4-101(7) in no way altered the scope of the exemption provided for nonprofit entities listed in T.C.A. § 65-4-101(6)(E). The opinion rendered by the TRA General Counsel on the Fairfield Glade inquiry facilitated a harmonious interpretation and operation of T.C.A. § 65-4-101 and is the correct one. The Consumer Advocate incorrectly used the rule of statutory construction that a statute should be construed in a way that avoids conflict and facilitates the harmonious operation of the law to achieve it wants and not the true legislative intent of T.C.A. § 65-4-101(7).

2. *Tiger Creek Bus Line v. Tiger Creek Transp. Ass'n, Inc.*, 216 S.W.2d 348 (Tenn. 1948) supports the plain meaning interpretation argued by Berry's Chapel.

The Consumer Advocate cites *Tiger Creek Bus Line v. Tiger Creek Transp. Ass'n, Inc.*, 216 S.W.2d 348 (Tenn. 1948), in support of its legal arguments. However, a careful reading of this case actually supports Berry's Chapel's argument that 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.

In *Tiger Creek Bus Line*, Tiger Creek Bus Line was a motor carrier that was organized as a nonprofit cooperative organization. *Id.* at 349. As a motor carrier, Tiger Creek Bus Line was subject to the jurisdiction of the Railroad and Public Utilities Commission under the Motor Carrier Act, Chapter 119 of the 1933 Public Acts as a common carrier, not as a public utility

under T.C.A. § 65-4-101. *Id.* at 349-350. Tiger Creek Bus Line argued that it was exempt from the jurisdiction of the Railroad and Utilities Commission under the exemption that is now codified at T.C.A. § 65-4-101(6)(E) because it was a nonprofit cooperative organization. The Tennessee Supreme Court held, however, that that exemption did not apply because Tiger Creek Bus Line was a motor carrier and the exemption related entirely to public utilities. *Id.* at 351. ("The statute law amended relates entirely to utilities and the powers of the Railroad and Public Utilities Commission. It does not apply to motor carriers for reasons heretofore pointed out.")

In holding that the exemption did not apply to Tiger Creek Bus Line, the court considered the language of the preamble to Chapter 42 and the specific entities and agencies that were exempt under Chapter 42, namely "certain Federal and State Corporations, Agencies, Instrumentalities, and other public bodies and certain non-profit organizations herein defined as nonutilities." *Id.* at 350 (quoting the preamble to Chapter 42). Relying on principles of statutory construction, the court held that the exemption now codified at T.C.A. § 65-4-101(6)(E) contained general language that should only be applied to things of the same kind or class as those indicated by the preceding special words in that particular statute. *Id.* at 351. Accordingly, the exemption did not apply to the Motor Carrier Act, under which Tiger Creek Bus Line was subject to regulation. Federal and state governmental agencies, municipalities and counties and utility districts were not in the common carrier transportation business. These entities were and continue to be in business of providing traditional public utility services. Therefore, as a nonprofit corporation providing sewer service, Berry's Chapel is in the same class and provide the same kind of service as the other exempt entities listed in T.C.A. § 65-4-101(6).

3. The manner in which the TRA has historically regulated public utilities subject to its jurisdiction supports a finding that Berry's Chapel is a nonutility.

In setting rates for a regulated utility, the TRA will examine the revenues and expenses of the regulated utility in providing utility services. When the TRA determines that an expense of a regulated utility is too high or unnecessary for the attrition year in a rate case, the TRA simply excludes such an expense from the regulated utility's attrition year for ratemaking purposes. In so doing the TRA shifts the burden of the "unreasonable" expense to the regulated utility's shareholders concluding that the utility's shareholders rather than its ratepayers should pay for such an expense. This method of treating expenses for ratemaking makes sense when the TRA is setting rates for an investor-owned public utility which is the only type of utility the TRA has historically regulated. This ratemaking principle makes no sense for a nonprofit entity whether it be a governmental entity, utility cooperative, association or corporation. Berry's Chapel has no shareholders; it has no owners. If the TRA determines an expense is too high or unnecessary in providing utility services, there are no shareholders to whom such an expense can be shifted. The only persons to bear the cost of such an expense are the utility's ratepayers. A nonprofit entity which provides a public utility service has no other source of revenue or funding other than the revenues received from the rates charged by the nonprofit utility.

A major issue in a regulated utility's rate case is the appropriate rate of return the investors of the regulated utility should earn on their investment in the utility. When a utility is operated by a nonprofit entity, there are no owners or investors in the utility which are looking for a return on their investment. Therefore, the regulatory oversight of the TRA is unnecessary to ensure that the utility's investors are not earning more than an adequate rate of return because a nonprofit utility cooperative, nonprofit association or nonprofit corporation has no investors.

The historical manner in which the TRA and its predecessors have regulated investor owned public utilities further supports Berry's Chapel's position that the legislature did not

intend for the TRA to regulate nonprofit corporations whether the corporations have or do not have members.

Conclusion

As stated in its initial brief, the decision about whether a nonprofit corporation which does not have members should be a "public utility" rather than a "nonutility" under T.C.A. § 65-4-101(6)(E) is a decision for the legislature to make not the TRA. As currently written Berry's Chapel comes within the express plain language of T.C.A. § 65-4-101(6)(E) because it is a nonprofit corporation created under Tennessee law.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and exact copy of the foregoing Reply Brief has been mailed, postage prepaid, on this 11th day of March, 2011, to the following:

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