

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 5, 2011

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**

ORDER DECLARING BERRY'S CHAPEL UTILITY, INC. TO BE A PUBLIC UTILITY

This matter came before Chairman Mary W. Freeman, Director Eddie Roberson and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on April 18, 2011 to consider the *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* ("Petition") filed by the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") on January 10, 2011. Based on the briefs filed and the oral arguments of the parties, the panel determined that the TRA has the authority to issue a declaratory order, as requested, and determined that Berry's Chapel Utility, Inc. ("Berry's Chapel") is a public utility under Tennessee law and subject to regulation by the TRA.

BACKGROUND

On September 17, 2010, the TRA received a letter from legal counsel for Berry's Chapel informing the TRA that the assets and liabilities of Lynwood Utility Corporation ("Lynwood"), a

public utility regulated by the TRA, had been assumed by Berry's Chapel.¹ According to the letter, on September 1, 2010, Lynwood merged into Berry's Chapel and "the ownership of the sewer treatment and collection system of Lynwood Utility Corporation became vested in Berry's Chapel Utility, Inc. . . ."² The letter described Berry's Chapel as a "Tennessee nonprofit corporation" and stated that under Tenn. Code Ann. § 65-4-101(6)(E), Berry's Chapel was a nonutility. The letter stated further that Authority approval of the merger was not required under Tenn. Code Ann. § 65-4-112(b) because Lynwood had merged with a nonutility. The letter closed by asking the TRA to cancel the certificate of public convenience and necessity issued to Lynwood.³

According to the Charter of Berry's Chapel provided with the September 17, 2010 letter, Berry's Chapel was incorporated under the Tennessee Nonprofit Corporation Act as a "mutual benefit corporation" without members. The Berry's Chapel Charter states that its purpose is "to own and operate a sanitary sewer collection and treatment system and to engage in any other lawful business."⁴

TRAVEL OF THE CASE

This docket was opened upon the Consumer Advocate filing its *Petition* on January 10, 2011. At a regularly scheduled Authority Conference held on January 24, 2011, Director Eddie Roberson was appointed as Hearing Officer in this matter for the purpose of determining whether

¹ Letter dated September 17, 2010 from Don Scholes, Esq., filed in TRA Docket No. 04-00360, *In re: Petition of Lynwood Utility Corporation for Approval of Transfer and Control Nunc Pro Tunc*.

² *Id.*

³ *Id.* Lynwood Utility Corporation is the provider of wastewater services to River Landings Subdivision, Legends Ridge Subdivision, Walnut Grove Elementary School, Berry's Chapel Church of Christ and the Cottonwood subdivision near Franklin, Tennessee. Lynwood was granted its original Certificate of Public Convenience and Necessity ("CCN") by the Tennessee Public Service Commission ("PSC") on June 14, 1976 and became subject to regulation by the Tennessee Regulatory Authority. By Order dated June 27, 1996 by the Tennessee PSC, Lynwood acquired the assets and operating authority of Lynwood Utility Company. The sole shareholder of Lynwood Utility Corporation was David Terry. On May 12, 1999, Mr. Terry transferred all of the outstanding stock of Lynwood to Southern Utility Corporation. In January 2003, Tyler Ring and John Ring became the sole owners of Southern Utility Corporation which owned the stock of Lynwood Utility Corporation.

⁴ Exhibit 1, Letter dated September 17, 2010 from Don Scholes, Esq., filed in TRA Docket No. 04-00360, *In re: Petition of Lynwood Utility Corporation for Approval of Transfer and Control Nunc Pro Tunc*.

a contested case should be convened in this docket and, if so, to rule on any preliminary matters and prepare the matter for hearing before the panel.⁵ Berry's Chapel filed its *Answer of Berry's Chapel Utility, Inc. to Petition for Declaratory Order* on February 9, 2011. The Consumer Advocate filed a *Reply to the Answer of Berry's Chapel to Petition for Declaratory Order* on February 11, 2011.

The Hearing Officer issued a *Notice of Briefing Schedule and Oral Argument* on February 11, 2011 ("*Notice*")⁶ which established dates for the filing of initial and reply briefs and for oral argument before the panel. The legal issues to be briefed and argued in this docket were identified in the *Notice* as follows:

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 by 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 refund of any increase in rates that was put into place through the Rate Change Notice, which called for a \$20 per month increase effective November 1, 2010.**

The Consumer Advocate filed its *Initial Brief* on February 25, 2011 in accordance with the schedule in the *Notice*. Due to a problem associated with sending the *Notice*, Berry's Chapel filed its *Initial Brief* on March 4, 2011.⁷ On March 11, 2011, both the Consumer Advocate and

⁵ *Order Appointing a Hearing Officer* (March 8, 2011).

⁶ Subsequently, an *Amended Notice of Briefing Schedule and Oral Argument* was issued on March 9, 2011 and a further *Amended Notice of Oral Argument* was issued on March 21, 2011, both of which reset dates at the request of the parties.

⁷ Also on March 4, 2011, Berry's Chapel initiated a Chancery Court action in the Chancery Court for the 25th Judicial District at Nashville against the Consumer Advocate and the TRA by filing a Complaint seeking a declaration from the Court that Berry's Chapel is a nonutility under Tenn. Code Ann. § 65-4-101(6)(E). Berry's Chapel's Complaint was docketed as Case No. 11-0298-IV. An Order of Voluntary Dismissal by Berry's Chapel was filed on June 7, 2011.

Berry's Chapel filed their reply briefs. After several postponements at the request of the parties, the Hearing Officer set the matter for oral argument before the panel on April 4, 2011.

On March 31, 2011, Berry's Chapel filed a *Motion to Continue Oral Argument and to Stay Proceeding* ("Motion"). In that *Motion*, Berry's Chapel asked for a continuance based on its filing of an amendment to its corporate charter to become a cooperative. On April 1, 2011, the Consumer Advocate filed its *Consumer Advocate's Response in Opposition to Berry's Chapel's Motion to Continue Oral Argument and to Stay Proceeding*. The Consumer Advocate also filed a *Notice of Pending Legislation*, which included a copy of proposed legislation being considered by the General Assembly that would amend the language in Tenn. Code Ann. § 65-4-101(6)(E).⁸ On April 4, 2011, the panel denied Berry's Chapel's *Motion* and proceeded to hear oral arguments from the parties. After hearing the oral arguments, the panel set deliberations on the issues set forth in the original *Notice* for April 18, 2011.

THE CONSUMER ADVOCATE'S PETITION

In support of its *Petition* seeking a declaratory order, the Consumer Advocate stated that Berry's Chapel had failed to provide to the TRA any "indicia of a nonprofit corporation other than a form submitted to the Tennessee Secretary of State."⁹ The Consumer Advocate stated further that Berry's Chapel was claiming to be exempt from TRA regulation under Tenn. Code Ann. § 65-4-101(6)(E), which is "inapplicable to a corporation such as Berry's Chapel" because Berry's Chapel "is not a 'cooperative' corporation not organized or doing business for profit[]" as required by this statute."¹⁰ The Consumer Advocate concluded that Berry's Chapel remains a public utility subject to TRA regulation on the grounds that Berry's Chapel "has not

⁸ *Notice of Pending Legislation* (April 1, 2011).

⁹ *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*, p. 2 (January 10, 2011).

¹⁰ *Id.*

demonstrated that it is the kind of nonprofit that is to be excluded from the definition of ‘public utility.’”¹¹

The Consumer Advocate asserted in its *Petition*,

... 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.¹²

The Consumer Advocate points out that in a monopoly situation where there is no market or alternative for consumers, “[g]overnmental regulation of utilities is supposed to serve as a proxy for regulation by the market place . . .”; however, that protection for consumers is removed under an interpretation of Tennessee law such as that fostered by Berry’s Chapel through its creation of a nonprofit association without members to own and operate the wastewater treatment system.¹³

¹¹ *Id.* at p. 18.

¹² *Id.* at pp. 2-3.

¹³ *Id.* at pp. 3-4.

BERRY'S CHAPEL'S ANSWER

Berry's Chapel filed its *Answer of Berry's Chapel to the CAD's Petition for Declaratory Order* ("Berry's Chapel's Answer") to the *Petition* on February 9, 2011. In addition to its denial of the substantive allegations in the *Petition*, Berry's Chapel asserted that the TRA did not have the authority to issue a declaratory order because the TRA does not have subject matter jurisdiction to determine whether Berry's Chapel is a nonprofit corporation under Tennessee law and, as such, could not determine whether Berry's Chapel is or is not a nonutility. Berry's Chapel asserted further that the question of whether Berry's Chapel was a nonprofit corporation was a legal issue governed by corporate law and within the exclusive providence of the Tennessee court system because it was "not the determination as to the validity or applicability of a statute, rule or order with[in] the primary jurisdiction of the TRA"¹⁴

POSITIONS OF THE PARTIES

Following the filings of the Consumer Advocate's *Petition* and *Berry's Chapel's Answer* thereto, the Hearing Officer issued the *Notice* that outlined the issues raised in those pleadings for resolution by the TRA. The determination of the essential issues raised in the *Petition* and *Berry's Chapel's Answer* required the Authority to interpret Tenn. Code Ann. § 65-4-101(6)(E). That subdivision provides that a nonutility, not subject to the jurisdiction of the TRA includes:

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

In deliberating the issues in this docket, the panel reviewed and considered the positions set forth by the parties in their briefs and oral arguments with respect to the three issues set forth in the *Notice* issued by the Hearing Officer on February 11, 2011. The issues and the respective positions of the parties as to each issue are summarized below.

¹⁴ *Answer of Berry's Chapel to the CAD's Petition for Declaratory Order*, p. 5 (February 9, 2011).

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 by Tenn. Code Ann. § 65-4-101(6).**

Consumer Advocate: The Consumer Advocate argued that Tenn. Code Ann. § 65-4-104 grants the TRA the power to regulate all public utilities and inherent in that power, the TRA has the authority to determine whether or not an entity is a "public utility." Further, the TRA possesses the requisite expertise to make such a determination through an interpretation of the statutory definition of a public utility. The Consumer Advocate stated that if the TRA lacks authority to interpret and apply the language contained within its own enabling statutes, any public utility could unilaterally declare itself to be some form of entity not subject to TRA regulation because the TRA would not have the authority to inquire into or make a determination whether that entity is a public utility.¹⁵

Berry's Chapel: Berry's Chapel argued that under the doctrine of primary jurisdiction the legal issue as to whether Berry's Chapel is a nonutility under Tennessee law is solely an issue of statutory construction which does not require the expertise of the TRA. Berry's Chapel further argued that the issue posed by the Consumer Advocate as to whether the word "cooperative" properly modifies "association," "corporation," and "organization" in Tenn. Code Ann. § 65-4-101(6)(E) is an issue of corporate law and an issue of statutory construction that is within the province of the Tennessee court system to determine. Because the special expertise of the TRA is not required, it is not within the TRA's jurisdiction to make the determination of whether Berry's Chapel is a nonprofit corporation or a public utility as defined by Tenn. Code Ann. § 65-4-101(6).¹⁶

¹⁵ *Consumer Advocate's Initial Brief That Berry's Chapel Utility, Inc., Is a Public Utility Under Tennessee Law and Should be Regulated by the TRA*, p. 3 (February 25, 2011).

¹⁶ *Initial Brief of Berry's Chapel Utility, Inc.* pp. 2-3 (March 4, 2011).

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.

Consumer Advocate: The Consumer Advocate asserted that the stated purpose of the original legislation that created the exclusion in subdivision (E) of Tenn. Code Ann. § 65-4-101(6) was to exempt certain non-profit organizations from the definition of public utility.¹⁷ Nevertheless, the new company formed by the alleged merger, Berry's Chapel, has not presented to the TRA any indicia of nonprofit corporation status other than a form submitted to the Tennessee Secretary of State. Therefore, the TRA should disregard the mere form of the nonprofit corporate status of Berry's Chapel and find that the substance of the corporation is a for-profit utility and subject to TRA regulation.¹⁸

Further, the Consumer Advocate argued that if subdivision (E) is interpreted in the manner suggested by Berry's Chapel, Tenn. Code Ann. § 65-4-101(7), which provides a specific exclusion for certain "nonprofit homeowners associations or organizations," would be superfluous. According to the Consumer Advocate, if the word "association" in subdivision (E) is a stand alone term and the word "cooperative" modifies only the word "organization," any non-profit homeowner's organization would already be a non-utility and not subject to the jurisdiction of the TRA. Thus, there would have been no reason for the legislature to add subdivision (7) to the statute.¹⁹

The Consumer Advocate also argued that another statute, Tenn. Code Ann. § 48-58-601(c),²⁰ is similarly drafted. The Consumer Advocate stated that the word "nonprofit" clearly

¹⁷ *Consumer Advocate's Initial Brief That Berry's Chapel Utility, Inc., Is a Public Utility Under Tennessee Law and Should be Regulated by the TRA*, pp. 17-18 (February 25, 2011).

¹⁸ *Id.* at p. 5.

¹⁹ *Id.* at p. 14.

²⁰ Tenn. Code Ann. § 48-58-601(c) states: "All directors, trustees or members of the governing bodies of nonprofit cooperatives, corporations, clubs, associations, and organizations"

modifies each of the terms following it – in the same manner the word “cooperative” does in the statute at issue.²¹

The Consumer Advocate relied on the legislative intent of Tenn. Code Ann. § 65-4-101 in making its construction argument. The Consumer Advocate asserted that this section was part of a 1935 act, the Preamble to which stated that it was “an Act that defined and limited 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[.]”²² The Consumer Advocate argued that the Preamble provides that “certain non-profit organizations” are to be excluded from the definition of “public utilities.”²³ The Consumer Advocate argued the words “certain non-profit organizations” indicate that the General Assembly intended to exempt some, but not all, non-profit organizations from regulation by the TRA because the word “certain” is also used before the words “federal and state corporations, agencies”²⁴

Regarding the definition of the term “cooperative,” the Consumer Advocate provided the following argument:

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.²⁵

In oral argument, the Consumer Advocate argued that the hallmark of a cooperative is having members.²⁶

²¹ *Consumer Advocate’s Initial Brief That Berry’s Chapel Utility, Inc., Is a Public Utility Under Tennessee Law and Should be Regulated by the TRA*, pp. 16-17 (February 25, 2011).

²² *Id.* at p. 17.

²³ *Id.* at p. 18.

²⁴ *Id.* at pp. 17-18.

²⁵ *Id.* at p. 19.

²⁶ Transcript of Proceedings, pp. 9-10, 24 (April 4, 2011).

Berry's Chapel: Berry's Chapel argued not all utilities in Tennessee are public utilities and subject to regulation by the TRA. According to Berry's Chapel, there are many utilities that the General Assembly has specifically exempted from the jurisdiction of the TRA, such as cities, counties, utility districts, utility cooperatives, and other nonprofit entities.²⁷

Berry's Chapel stated that the Consumer Advocate is resorting to a strained interpretation and using secondary rules of statutory construction when a plain reading of Tenn. Code Ann. § 65-4-101(6)(E) is sufficient.²⁸ According to Berry's Chapel, the Consumer Advocate violated the primary rule of statutory construction wherein 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. Berry's Chapel asserted that the operative language in Tenn. Code Ann. §65-4-101(6)(E) is "not organized or doing business for profit," not the word "cooperative." According to Berry's Chapel, the entities listed in that subdivision are nonprofit entities, and the General Assembly has determined that regulation by the TRA was not required. The common attribute of all the entities listed in subdivision (6)(E) is that those entities are not organized or doing business for profit.

Berry's Chapel provided a history of the legislation creating Tenn. Code Ann. §65-4-101(6)(E) and stated the legislative intent controls. According to Berry's Chapel, the General Assembly enacted Chapter 42 of the 1935 Tennessee Public Acts to include any Tennessee nonprofit corporation as a nonutility, such as Berry's Chapel. The General Assembly first defined nonutilities in 1935 and set forth seven different types of entities and organizations which are nonutilities as codified in subdivisions (A) – (F) in Tenn. Code Ann. §65-4-101(6). The language in subdivision (E) has remained unchanged since 1935. Section 2 of Chapter 42 states that any public utility may sell, lease, or otherwise dispose of any of its property,

²⁷ *Initial Brief of Berry's Chapel Utility, Inc.* pp. 4-5 (March 4, 2011).

²⁸ *Id.* at pp. 5-6.

including, but without limitation, franchises, rights, facilities, and other assets and its capital stock, to any of the foregoing nonutilities.²⁹

Before Chapter 42 was enacted, the language now in Tenn. Code Ann. § 65-4-101(6) was incorporated in Section 5448 of the Code of Tennessee of 1932, and the definition of “public utility” was essentially the same as presently defined. Section 5448 did not include any exemptions from the regulation of public utilities by the Railroad and Public Utilities Commission (now the TRA). At the time, the Railroad and Public Utilities Commission had the power to regulate all types of entities and organizations that provided public utility services, including governmental entities, utility cooperatives, associations, and nonprofit corporations. Chapter 42 made a broad and sweeping change in public utility regulation in Tennessee.³⁰

Additionally, the Preamble makes it clear that the General Assembly intended to limit the authority and power of the Railroad and Public Utilities Commission to regulate public utility services in Tennessee. The Preamble refers to the fact that certain Federal and State Corporations, Agencies, Instrumentalities and other public bodies and certain non-profit organizations herein are defined as nonutilities. According to Berry’s Chapel, the Consumer Advocate is incorrect in its argument that the words “certain non-profit organizations” means the legislature intended to exempt some, but not all non-profit organizations from regulation by the TRA.³¹

Berry’s Chapel also argued that the Consumer Advocate could not assert the TRA has the power to ignore the separate identity of a corporation and also ask the TRA to use this power to find that Berry’s Chapel is not a “nonprofit corporation” under Tennessee law. Although the case law cited by the Consumer Advocate addresses the power of the TRA to ignore non-utility

²⁹ *Id.* at pp. 6-7.

³⁰ *Id.* at pp. 7-8.

³¹ *Id.* at p. 8.

subsidiaries and affiliates of a public utility regulated by the TRA, the case does not address how the TRA can derive authority to disregard the corporate status of an entity. The case law does not address whether the TRA has the power to question the validity of the creation and operation of Berry's Chapel as a Tennessee nonprofit corporation.³²

Berry's Chapel also questioned the propriety of the Consumer Advocate's position that a Tennessee nonprofit corporation without members cannot be a nonutility because traditional public utility service must either be regulated by the TRA or be a corporation with members. Berry's Chapel argued that the language of the statute in defining a nonutility does not distinguish between nonprofit corporations with members and nonprofit corporations without members. According to Berry's Chapel, if the General Assembly intended to treat Tennessee nonprofit corporations without members different from Tennessee nonprofit corporations with members, the language in Tenn. Code Ann. § 65-4-106(6)(E) would have been explicit in that regard.³³ Berry's Chapel further stated that the Consumer Advocate's concern that the board of directors of Berry's Chapel will make distributions that will personally benefit themselves is unfounded because Berry's Chapel is not authorized under the Tennessee Nonprofit Corporation Act to make any distributions.³⁴

Berry's Chapel did not address the definition of "cooperative" in its briefs. When asked during oral argument for a definition, counsel for Berry's Chapel stated that Berry's Chapel maintained that the governing law regarding its status was the Nonprofit Corporation Act which provided that nonprofit corporations could be incorporated with or without members.³⁵

³² *Id.* at pp. 9-10.

³³ *Id.* at p. 11.

³⁴ *Id.* at p. 12.

³⁵ Transcript of Proceedings, pp. 30-33 (April 4, 2011).

3. Whether customers of Berry's Chapel Utility, Inc. f/k/a Lynwood Utility Company are entitled to 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.

Consumer Advocate: The Consumer Advocate argued that because Berry's Chapel is a public utility under Tennessee law and is subject to TRA regulation, any rate increase it sought to impose would require the approval of the TRA. Because Berry's Chapel did not obtain TRA approval prior to imposing a \$20/month rate increase on its customers based on its assertions that it was a nonutility and not subject to the jurisdiction of the TRA, Berry's Chapel must now provide a full refund to its customers of the \$20/month charges.³⁶

Berry's Chapel: Berry's Chapel asserted that if the TRA found Berry's Chapel to be a public utility, it should not be ordered to make an immediate refund of the rates it put into effect on November 1, 2010. Instead, the TRA would have the power to suspend the new rate. Also, Berry's Chapel stated that if the TRA made such a finding and suspended Berry's Chapel's rates, Berry's Chapel immediately would file a rate case with the TRA. In the alternative, Berry's Chapel suggested that the TRA initiate a proceeding on its own or through this docket and hold a hearing to determine whether the new rates implemented on November 1, 2010 are just and reasonable. According to Berry's Chapel, a directive from the TRA to make an immediate refund in full to customers would impair Berry's Chapel's ability to continue day-to-day operations and to operate its sewer system in accordance with the terms and conditions of its National Pollutant Discharge Elimination System permit.³⁷

³⁶ *Consumer Advocate's Initial Brief That Berry's Chapel Utility, Inc., Is a Public Utility Under Tennessee Law and Should be Regulated by the TRA*, p. 24 (February 25, 2011).

³⁷ *Initial Brief of Berry's Chapel Utility, Inc.* p. 13 (March 4, 2011).

FINDINGS AND CONCLUSIONS

At the Authority Conference on April 18, 2011, the panel considered the *Petition* filed by the Consumer Advocate. In so doing, the panel deliberated each issue and made the following findings and conclusions based upon the record and the filings of the parties.

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

In this case, the Consumer Advocate seeks a declaratory order that Berry's Chapel is a public utility and should be regulated by the TRA. The Authority's jurisdiction to issue a declaratory order is found in Tenn. Code Ann. § 4-5-223(a) which, in pertinent part, provides: "[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." (*emphasis added*).

The doctrine of primary jurisdiction provides that state regulatory agencies have primary jurisdiction over matters within their expertise and "generally requires that parties resort first to an administrative agency before they seek judicial action involving a question within the competency of that agency."³⁸ The Tennessee Supreme Court explained the doctrine of primary jurisdiction in *Freels v. Northrup*, 678 S.W.2d 55 (Tenn. 1984):

The doctrine, which has been recognized by the federal courts in Tennessee, *Terrell Oil Corp. v. Atlantic Richfield Co.*, 468 F. Supp. 860 (E.D.Tenn.1977), generally requires that parties resort first to an administrative agency before they seek judicial action involving a question within the competence of that agency. The doctrine applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. *Terrell Oil Corp. v. Atlantic Richfield Co.*, *supra*.

³⁸ *Freels v. Northrup*, 678 S.W.2d 55, 57 (Tenn. 1984).

The Court further stated that “[i]n deciding whether to defer to the administrative agency, courts generally make two inquiries: (1) will deferral be conducive toward uniformity of decision between courts and the agency, and (2) will deferral make possible the utilization of pertinent agency expertise.”³⁹

The panel noted that the predecessor agency to the TRA was created by the Tennessee General Assembly over 100 years ago. At that time, the General Assembly delegated to the agency broad regulatory powers over public utilities and to a much lesser extent powers over cooperatives. The TRA, the successor agency to the TPSC, was created by the General Assembly as Tennessee’s public utilities regulatory body. Tenn. Code Ann. §§ 65-4-104 and 106 and case law interpreting these sections provide the TRA with broad powers to exercise its jurisdiction over matters involving public utilities. Tenn. Code Ann. § 65-4-104 provides:

The [TRA] has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over the property, property rights, facilities, and franchisees, so far as may be necessary for the purpose of carrying out the provisions of this chapter.⁴⁰

Tenn. Code Ann. § 65-4-106 states that “any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3, and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.”⁴¹

The Tennessee Supreme Court has acknowledged these statutes and, in *Consumer Advocate Division v. Greer*, made the following observations:

The General Assembly, therefore, has “signaled its clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction.” *Tennessee Cable Television Ass’n v. Tennessee Public Service Comm’n*, 844 S.W.2d 151, 159 (Tenn. App. 1992). To enable the TRA to effectively accomplish its designated purpose—the governance and supervision of public utilities—the General Assembly has empowered the TRA to “adopt rules

³⁹ *Id.*

⁴⁰ Tenn. Code Ann. § 65-4-104 (2004).

⁴¹ Tenn. Code Ann. § 65-4-106 (2004).

governing the procedures prescribed or authorized,” including “rules of practice before the authority, together with forms and instructions,” and “rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers.” Tenn. Code Ann. § 65-2-102(1) & (2) (1997 Supp.).⁴²

Courts have also held that the Authority is an administrative agency exercising co-mingled legislative, executive, and judicial functions.⁴³ Utility regulation is a specialized, technical, and complex process. For this reason, the General Assembly has delegated to the TRA omnibus authority over public utilities.⁴⁴

Inherent and necessary in the power to adequately regulate public utilities is the long accepted ability of the TRA to interpret the statutory definition of a public utility and that of a non-utility as set out in Tenn. Code Ann. § 65-4-101(6)(E). The panel found that the Authority has specific expertise regarding the application of its enabling statutes and under the doctrine of primary jurisdiction is the correct forum to rule on the Consumer Advocate’s *Petition*. Based on this finding, the panel voted unanimously that it is within the Authority’s jurisdiction to make the determination as to whether Berry’s Chapel is a public utility.

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.

The panel noted that in its September 17, 2010 letter, Berry’s Chapel asserted that it is a nonprofit corporation. The panel found that the more relevant and appropriate question - and one that rests squarely on the shoulders of the TRA - is whether Berry’s Chapel is a utility or a nonutility under Tenn. Code Ann. § 65-4-101(6)(E). That subdivision states:

⁴² *Consumer Adv. Div. v. Greer*, 967 S.W.2d 759, 761-62 (Tenn. 1998).

⁴³ *Tennessee Cable Television Ass’n v. Tennessee Pub. Serv. Comm’n*, 844 S.W.2d 151, 158 (Tenn. Ct. App. 1992); see also, *Blue Ridge Transp. Co. v. Pentecost*, 343 S.W.2d 903, 904 (1961); *Louisville & Nashville R.R. v. Fowler*, 271 S.W.2d 188, 192 (1954); *GBM Communications, Inc. v. United Inter-Mountain Tel. Co.*, 112 (Tenn. Ct. App. 1986).

⁴⁴ See Tenn. Code Ann. § 65-4-104 (2004).

- (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.

Both parties relied on rules of statutory construction in making their respective arguments as to the interpretation of Tenn. Code Ann. § 65-4-101(6)(E). In a recent case, the Tennessee Supreme Court stated the following as applied to the task of statutory interpretation:

When dealing with statutory interpretation, well-defined precepts apply. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008). Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). When a statute is ambiguous, however, we may refer to the broader statutory scheme, the history of the legislation, or other sources to discern its meaning. *Colonial Pipeline*, 263 S.W.3d at 836. Courts must presume that a legislative body was aware of its prior enactments and knew the state of the law at the time it passed the legislation. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).⁴⁵

While both parties referred to the “plain language” of the statute in arguing their respective interpretations on the Authority, the panel found that the language was sufficiently ambiguous and therefore had to look outside the statutory language “to the broader statutory scheme” to determine its meaning.⁴⁶ The panel found as particularly persuasive the Consumer Advocate’s argument that there would have been no need for the General Assembly to amend Tenn. Code Ann. § 65-4-101 by adding paragraph (7) to exempt certain homeowners

⁴⁵ *Estate of French v. Stratford House et al.*, 333 S.W.3d 546, 554 (Tenn. 2011).

⁴⁶ *Id.* at 554. The legislature appears to have noticed this ambiguity and clarified the language in the statute. See 2011 Tenn. Pub. Acts 430.

associations or organizations⁴⁷ from the definition of public utility if such entities had already been included in the exemption set forth in (6)(E). Based on the presumption that “. . . a legislative body was aware of its prior enactments and knew the state of the law at the time it passed the legislation [internal citations omitted],”⁴⁸ the panel reasonably concluded that the General Assembly had interpreted the definitional statute in the same manner as the Consumer Advocate when the General Assembly determined it necessary to amend Tenn. Code Ann. § 65-4-101 to add a new section to that statute to provide an exception for certain homeowners associations or organizations.

Based on these findings, the panel voted unanimously that the proper construction of Tenn. Code Ann. § 65-4-101(6)(E) requires that the word “cooperative” modifies each of the terms “organization,” “association,” and “corporation” in that subdivision.

Next, the panel found that based on its interpretation of Tenn. Code Ann. § 65-4-101(6)(E), Berry’s Chapel would have to be a not-for-profit cooperative in order to be found to be a non-utility. The panel further found that the existence of a cooperative is contingent upon it having members and that a cooperative is an organization created by its members, for its members’ benefit and controlled by its members. The essence of a cooperative is the presence of member control rather than corporate control. The panel found, based on the record and argument of counsel, no such member structure has been established to date and that Berry’s Chapel currently does not have members.⁴⁹

⁴⁷ Tenn. Code Ann. § 65-4-101(7) states, “‘Public utility’ does not mean nonprofit homeowners associations or organizations. . . .”

⁴⁸ *Estate of French v. Stratford House et al.*, 333 S.W.3d 546, 554 (Tenn. 2011).

⁴⁹ On March 31, 2011, Berry’s Chapel filed a *Motion to Continue Oral Argument and to Stay Proceedings* stating it had amended its corporate charter to become a nonprofit corporation with members which will operate as a utility cooperative. Berry’s Chapel stated it filed an amendment to its charter with the Tennessee Secretary of State to become a nonprofit mutual benefit corporation with members.

Based on these findings, the panel voted unanimously that Berry's Chapel cannot be construed to be a "cooperative" nonprofit cooperation under Tenn. Code Ann. § 65-4-101(6)(E) and therefore it did not meet the statutory definition of a nonutility in Tenn. Code Ann. § 65-4-101(6)(E). The panel further voted unanimously that Berry's Chapel has been and is subject to the jurisdiction of the TRA as a public utility as prescribed by state law.

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

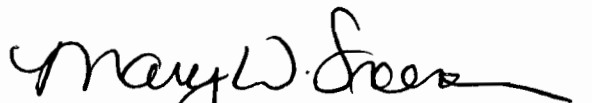
The panel found that because the status of Lynwood/Berry's Chapel as a public utility did not change, it was unauthorized to increase rates on November 1, 2010 without Authority approval. Because Berry's Chapel had no authority to increase rates, the panel voted unanimously to immediately suspend the \$20.00 per customer rate increase and directed Berry's Chapel to cease immediately charging or collecting such fees.

The panel also voted to open a new docket to address the ramifications from its declaration that Berry's Chapel is a public utility subject to TRA jurisdiction. Issues to be considered in the new docket will include:

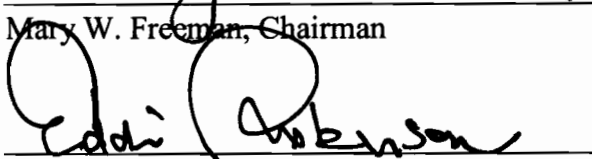
1. Whether Berry's Chapel is entitled to a hearing regarding the \$20 fee increase or whether it should be ordered to refund customers the amount collected since November 1, 2010?
2. What, if any, action should the Authority take against Berry's Chapel for violating statutes enforced by the TRA, including but not limited to:
 - (a) Operating without a CCN pursuant to Tenn. Code Ann. § 65-4-201 since September 1, 2010;
 - (b) Merging with Lynwood without Authority approval under Tenn. Code Ann. § 65-4-112; and
 - (c) Illegally increasing rates without Authority approval pursuant to Tenn. Code Ann. § 65-5-101.

IT IS THEREFORE ORDERED THAT:

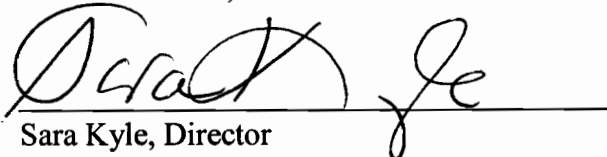
1. The *Petition for a Declaratory Order That Berry's Chapel Utility, Inc. is a Public Utility Under Tennessee Law and Should be Regulated by the TRA* is granted.
2. Berry's Chapel Utility, Inc. is a public utility subject to the regulatory jurisdiction and authority of the Tennessee Regulatory Authority.
3. Berry's Chapel Utility, Inc. is suspended from assessing the \$20.00 per customer rate increase instituted on November 1, 2010 and shall immediately cease charging or collecting such fees.
4. A new docket shall be opened to address the issues raised by the holdings of the Tennessee Regulatory Authority and as set forth in detail in this order.
5. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten days from the date of this Order.
6. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty days from the date of this Order.



Mary W. Freeman, Chairman



Eddie Roberson, Director



Sara Kyle, Director

Received
MARY W. FREEMAN

SEP 17 2010

TN Regulatory Authority

BRANSTETTER, STRANCH & JENNINGS, PLLC

ATTORNEYS AT LAW
227 SECOND AVENUE NORTH

FOURTH FLOOR

NASHVILLE, TENNESSEE 37201-1631

TELEPHONE (615) 254-8801

FACSIMILE (615) 250-3937

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

*ALSO ADMITTED IN GA

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

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

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

September 17, 2010

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

Via Hand Delivery

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

Dear Chairman Freeman:

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

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

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

RECEIVED

SEP 20 2010

TN REGULATORY AUTHORITY

Enclosures UTILITIES DIVISION

c: General Ryan McGehee
Tyler Ring
Jim Ford

Sincerely yours,

Donald L. Scholes
DONALD L. SCHOLES by (Pa)

Exhibit 1



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

FILED
RECEIVED
STATE OF TENNESSEE

2010 JUL 16 PM 4:08

TRE HARGETT
SECRETARY OF STATE

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

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

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

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

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

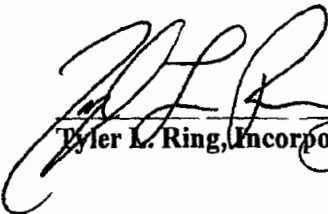
James B. Ford
9679 Aurora Court
Brentwood, TN 37027

6745-2519

0745.2528

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

Dated the 14th day of July, 2010.


Tyler L. Ring, Incorporator

BK/PG:5103/363-365

10024679

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

STATE OF TENNESSEE, WILLIAMSON COUNTY

SADIE WADE
REGISTER OF DEEDS

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

Branstetter
X



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

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

FILED
STATE OF TENNESSEE

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

2010 AUG 20 PM 3:13

THE COMPTROLLER
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

6759.0426