BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
INVESTIGATION AS TO WHETHER A SHOW CAUSE ORDER SHOULD BE ISSUED AGAINST BERRY'S CHAPEL UTILITY, INC., AND/OR LYNWOOD UTILITY CORPORATION FOR VIOLATION OF TRA RULE AND TENNESSEE STATUTES, INCLUDING BUT NOT IMITED TO, TENN. CODE ANN. §§65-4-112, 65-4-113, 65-4-201, AND 65-5-101	)	**DOCKET NO. 11-00065**

MOTION TO STRIKE THE CONSUMER ADVOCATE'S "STATEMENT OF POSITIONS AND CLAIMS" OR, IN THE ALTERNATIVE, TO TREAT IT AS THE "INITIAL BRIEF"

On July 1, 2013, the Hearing Officer entered an "Order Setting Procedural Schedule to Completion." The Order states that the Consumer Advocate may file an "Initial Brief" on or before July 24, 2013 and that the brief is limited to two issues: (1) the reasons why the Consumer Advocate opposes the Settlement Agreement between the Party Staff and Berry's Chapel Utility, Inc.; and (2) whether the Consumer Advocate's opposition precludes approval of the Agreement by the Authority.[1]

Two days after the Order was issued, the Consumer Advocate filed a six-page "Statement of Positions and Claims." This Statement explains why the Consumer Advocate opposes the Settlement Agreement and argues that the Authority may not approve the Agreement without the

[1] During the conference preceding the issuance of the procedural Order, Mr. Broemel asked that there be an initial round of briefs addressing only the issue of whether the Authority could approve the Settlement over the Advocate's objection and a second round on whether the settlement is in the public interest. The Hearing Officer overruled that request and instructed the parties to address both issues in one briefing round.

Advocate's Consent. In other words, the Statement addresses the same issues that the Consumer Advocate will discuss when filing his "Initial Brief" on July 24.

Berry's Chapel and the Party Staff ask that the Hearing Officer strike the Consumer Advocate's Statement. The Statement is clearly aimed at scuttling the Settlement Agreement and is therefore both (1) prejudicial to the other parties and (2) violative of the procedural Order.[2]

First, the filing is prejudicial because it erroneously states that the Settlement Agreement can only resolve potential violations of law which were expressly mentioned by the Directors when voting to open this investigation of Berry's Chapel. The Advocate ignores the language of the Authority's Order opening this docket. The relevant portion of the Order, which is quoted by the Hearing Officer in her own July 1, 2013 Order, explains that this docket encompasses any "action the Authority might take against Berry's Chapel for violating State statutes, including but not limited to. . . ." (emphasis added). Therefore, neither this docket nor the Settlement Agreement is limited to the potential violations mentioned by the Directors or listed in the Order. It includes them but is "not limited to" them. This language, which is even included in the caption of this docket, means that the docket is broad enough to encompass any potential violation of state law which could give rise to the issuance of a show cause order. For that reason, the parties to the Settlement Agreement have negotiated a global settlement resolving all potential violations of state law of which the parties are aware.

Second, the filing is prejudicial because the Consumer Advocate insists that his office has veto power over the Settlement and that the Authority cannot approve it without the Advocate's consent. This argument would make a little more sense if this proceeding were only a dispute among the parties. It is more than that. It is an enforcement docket opened by the agency

[2] In a similar situation, the Authority sua sponte struck a filing by the Consumer Advocate which was improperly filed and prejudicial to the opposing party. See Docket 13-00052, Order issued June 25, 2013.

pursuant to T.C.A. § 65-2-106; it is a "show cause" proceeding. The agency opens similar dockets in response to violations of the "do not call" statute and gas pipeline safety rules. Here, the agency opened a docket and designated members of its Staff (the Party Staff) to investigate and, if necessary, prosecute Berry's Chapel for violations of any applicable state laws under the agency's jurisdiction. Over the last several months, the Party Staff and Berry's Chapel have reached a comprehensive Settlement Agreement which has been submitted to the Authority, along with supporting testimony and exhibits, for approval. The Consumer Advocate is free to argue that the Agreement is not in the public interest, but the Authority is the final judge of its enforcement responsibilities and may approve the Settlement with or without the Advocate's consent. The Consumer Advocate can no more veto the proposed Agreement than he could veto a negotiated settlement between the TRA Staff and the offending party over a violation of the "do not call" statute.

The Advocate contends, nevertheless, that his office has several "claims" to make concerning Berry's Chapel and that the Authority cannot settle those claims without the Advocate's consent. This unusual argument is based entirely on a sentence in an Attorney General's opinion and the Advocate's misunderstanding of the word "claim."

Attorney General Opinion No. 11-06 (copy attached) holds that an administrative agency may approve a settlement between the agency and a regulated party even if an intervening party believes that the settlement is not in the public interest. In so holding, the Opinion notes that the agency cannot, by settling a proceeding, "dispose of the claims of the non-settling intervenor." Based on this, the Advocate argues that the TRA cannot dispose of the Advocate's "claims" against Berry's Chapel by approving the Agreement over the Advocate's objection.

The Advocate's argument arises entirely from counsel's misinterpretation of "claim." He conflates a common definition of claim, which is an assertion or a demand for something one believes is rightfully owed, with the legal meaning of a claim, which is a cause of action, usually asking for money, property, or an equitable remedy.[3] The Advocate has, of course, made claims, i.e. assertions, that Berry's Chapel should make larger refunds to the utility's customers. The Authority can and will address those arguments when it considers whether to approve the Agreement. But the Advocate is not a private attorney and does not represent individual customers who might (or might not) have a legal claim against the utility, i.e., a cause of action to recover money. Those are the kind of claims that cannot be resolved in a settlement without a party's consent. There are no claims of this type at stake in this docket. Moreover, if an intervenor could block a settlement simply by making claims, i.e., demands, for greater penalties, no case could ever be settled unless all parties agreed. The principal holding of the Attorney General's Opinion would be meaningless. The Advocate's interpretation makes no sense.

Finally, the Advocate's filing is prejudicial because it characterizes the Settlement Agreement as a "rate increase." Berry's Chapel has agreed to spend over $90,000 on refunds and the creation of an escrow account to benefit customers. The Advocate calls this a "rate increase" only because he thinks the amount of the refund should be larger.

The self-evident purpose of these poorly reasoned arguments is to persuade the Authority to reject the Settlement Agreement. Therefore, the Advocate's "Statement of Positions and Claims" violates the Hearing Officer's procedural Order which permits the Advocate to file one

[3] "In common parlance, the noun claim means an assertion" http://thelawdictionary.org/claim. A claim is "a demand for something as one's rightful due." American Heritage Dictionary Second College Edition (1985). In Black's Law Dictionary (8th Edition), a claim is "the aggregate of operative facts giving rise to a right enforceable by a court . . . (4) an interest or remedy recognized at law . . . cause of action."

initial brief, not two. The filing should be struck without delay and the Consumer Advocate admonished for disregarding – again – the Authority's procedural rules.[4]

If, in the alternative, the Hearing Officer concludes that striking the filing is insufficient to remedy the prejudice to the other parties and the patent violation of the procedural Order, the Hearing Officer should declare that the Consumer Advocate's Statement constitutes the "Initial Brief" described in the July 1, 2013 Order and not permit the filing of another brief on July 24, 2013. To the extent the Consumer Advocate wishes to amplify his arguments, he can do so in his "Reply Brief" on August 21, 2013.

In conclusion, Berry's Chapel and the Party Staff ask that the Consumer Advocate's filing of July 3, 2013 be struck and given no consideration in this docket or, in the alternative, that the filing be deemed the Consumer Advocate's "Initial Brief."

Respectfully submitted,

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BPR 22665

By: _____

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[4] This is the third time that Mr. Broemel has made an improper filing in this docket. *See* letter from Vance Broemel dated April 1, 2013, and letter from Vance Broemel dated June 12, 2013. Each letter is an argumentative statement critical of the negotiations between Berry's Chapel and the Party Staff. Both letters were filed before the Advocate became a party to the docket. Counsel for Berry's Chapel and the Party Staff elected not to reply publicly to either letter.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2013, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid.

BPR 22685

Henry Walker

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January 11, 2011

Opinion No. 11-06

Regulatory Board's Authority to Approve Settlement in Absence of Intervenor Approval

QUESTION

Under the Uniform Administrative Procedures Act, codified in Tenn. Code Ann. §§ 4-5-101 *et seq.*, may a board approve a settlement agreement or agreed order reached between an agency and the regulated party if an intervenor who is granted a petition to intervene under Tenn. Code Ann. § 4-5-310 refuses to agree?

OPINION

An intervenor in a contested case proceeding under the Uniform Administrative Procedures Act cannot block a settlement agreement between an agency and a regulated party merely by withholding its consent to the settlement agreement. A regulatory board may approve a settlement agreement between an agency and a regulated party over the objection of an intervenor if it determines that the settlement is reasonable and the public interest is protected. The settlement agreement cannot, however, dispose of the claims of the non-settling intervenor or impose obligations on the non-settling intervenor without the intervenor's consent.

ANALYSIS

Tenn. Code Ann. § 4-5-310 governs intervention in contested cases under Tennessee's Uniform Administrative Procedures Act ("UAPA"), Tenn. Code Ann. §§ 4-5-101 *et seq.* Tenn. Code Ann. § 4-5-310(a) provides that the administrative judge or hearing officer shall grant one or more petitions for intervention if three conditions are met:

> (1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;
> (2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and
> (3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

In addition to the administrative judge's authority to grant petitions for intervention under subsection (a), Tenn. Code Ann. § 4-5-310(b) allows the agency to grant one or more petitions for intervention "upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings." If a petitioner qualifies for intervention under Tenn. Code Ann. § 4-5-310(a) or (b), "the administrative judge or hearing officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time." Tenn. Code Ann. § 4-5-310(c). The conditions that may be imposed by the administrative judge include:

> (1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
> (2) Limiting the intervenor's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
> (3) Requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings.

Id. Tenn. Comp. R. & Regs. 1360-04-01-.12(2) provides that the following factors shall be considered in deciding whether to grant a petition for intervention:

> (a) Whether the petitioner claims an interest relating to the case and that he or she is so situated that the disposition of the case may as a practical matter impair or impede his ability to protect that interest;
> (b) Whether the petitioner's claim and the main case have a question of law or fact in common;
> (c) Whether prospective intervenor interests are adequately represented;
> (d) Whether admittance of a new party will render the hearing unmanageable or interfere with the interests of justice and the orderly and prompt conduct of the proceedings.

The UAPA defines "contested case" as follows:

> "Contested case" means a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing. Such proceeding may include rate making; price fixing; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; the granting or denial of licenses, permits or franchises where the licensing board is not required to

> grant the licenses, permits or franchises upon the payment of a fee or the finding of certain clearly defined criteria; and suspensions of, revocations of, and refusals to renew licenses. An agency may commence a contested case at any time with respect to a matter within the agency's jurisdiction[.]

Tenn. Code Ann. § 4-5-102(3). "'Party' means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party[.]" Tenn. Code Ann. § 4-5-102(8).

The intervention provisions of Tenn. Code Ann. § 4-5-310 are substantially similar to the intervention provisions contained in § 4-209 of the Uniform Law Commissioners' Model State Administrative Procedure Act of 1981 ("Model Act").[1] In the comment to § 4-209 of the Model Act, the Commissioners explain the distinction between subsections (a) and (b) as follows:

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[1] Section 4-209 of the Model Act provides as follows:

> (a) The presiding officer shall grant a petition for intervention if:
> (1) the petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing, at least [3] days before the hearing;
> (2) the petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as an intervener under any provision of law; and
> (3) the presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.
> (b) The presiding officer may grant a petition for intervention at any time, upon determining that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.
> (c) If a petitioner qualifies for intervention, the presiding officer may impose conditions upon the intervener's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:
> (1) limiting the intervener's participation to designated issues in which the intervener has a particular interest demonstrated by the petition;
> (2) limiting the intervener's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
> (3) requiring 2 or more interveners to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.
> (d) The presiding officer, at least [24 hours] before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification. The presiding officer shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

> The distinction between subsections (a) and (b) deserves emphasis. If a party satisfies the standards of subsection (a), the presiding officer *shall* grant the petition to intervene. In situations not qualifying under subsection (a), the presiding officer *may* grant the petition to intervene upon making the determination described in subsection (b).
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> Paragraph (a)(2) confers standing upon a petitioner to intervene, as of right, upon demonstrating that the petitioner's "legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding . . ." However, paragraph (a)(3) imposes the further limitation, that the presiding officer shall grant the petition for intervention only upon determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact of the proceedings upon the legal rights, etc. of the petitioner for intervention, paragraph (a)(2), against the interests of justice and the need for orderly and prompt proceedings, paragraph (a)(3).

Model Act § 4-209, Comment (emphasis in original).

The Tennessee Court of Appeals has explained that Tenn. Code Ann. § 4-5-310 and Tenn. Comp. R. & Regs. 1360-04-01-.12(2) "are designed to strike a balance between public participation in an administrative proceeding and the rights of the parties." *Wood v. Metropolitan Nashville & Davidson County Government*, 196 S.W.3d 152, 159 (Tenn. Ct. App. 2005). "The rights of the parties counterbalances the drive to let all interested persons participate." *Id.* (citing 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 5.20[3], at 45-46 (2d ed. 1997)). "Accordingly, intervention in administrative proceedings is not of right, and administrative agencies have substantial discretion to grant or deny intervention." *Id.* (citing *Tofias v. Energy Facilities Siting Bd.*, 435 Mass. 340, 757 N.E.2d 1104, 1109 (2001); *Cortland Glass Co. v. Angello*, 300 A.D.2d 891, 752 N.Y.S.2d 741, 743 (2002); *West Chester Area Sch. Dist. v. Collegium Charter Sch.*, 571 Pa. 503, 812 A.2d 1172, 1186 (2002)).

The question presented to us presupposes that a petition to intervene has been granted under Tenn. Code Ann. § 4-5-310(a) or (b). Once intervention has been granted, we are asked whether a regulatory board can approve a settlement agreement between an agency and a regulated party, even though the intervenor refuses to agree to the terms of the settlement agreement. We believe that the rule governing settlement of contested cases over the objection of an intervenor is correctly stated in *Halstead v. Dials*, 391 S.E.2d 385 (W.Va. 1990):

> [O]nce intervention has been granted in an administrative proceeding, the original parties may not stipulate away, by a consent order or otherwise, the rights of the intervenors. As a corollary to this rule, an administrative agency may approve

> settlement of a contested case or entry of a consent decree even though some of the parties, including intervenors, do not concur in the agreement. Where there are objections to the settlement or decree, the agency is required to make an independent assessment of the agreement on its merits. If the agency determines that the agreement is just and reasonable, with due consideration given to the public interest and to applicable legislative dictates, it may confirm the settlement or enter the consent order without the authorization of the dissenting parties.

391 S.E.2d at 389. *See also* 2 Am. Jur. 2d *Administrative Law* § 304 (2010) ("Although it is required to make an independent assessment of a proposed settlement agreement upon the objection to the agreement by intervenors, an administrative agency may approve the settlement of a contested case or an entry of a consent decree even though some parties, including intervenors, do not concur in the agreement.").

In the context of civil litigation, the United States Supreme Court has similarly stated:

> It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent. . . . Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.

Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 528-29 (1986) (internal citations omitted).

Based on the foregoing, we believe that a regulatory board can approve a settlement agreement between an agency and a regulated party in a contested case proceeding under the UAPA over an intervenor's objection. The board must make an independent assessment of the settlement agreement on its merits. If the board determines that the settlement agreement is reasonable and the public interest is protected, the board may approve the settlement agreement over the intervenor's objection. The board's approval of the settlement agreement cannot

dispose of the claims of the non-settling intervenor or impose obligations on the non-settling intervenor without the intervenor's consent.

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