

IN 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	)	DOCKET NO. 11-00065
UTILITY CORPORATION FOR	)	
VIOLATION OF TRA RULE AND	)	
TENNESSEE STATUTES, INCLUDING BUT	)	
NOT LIMITED TO, TENN. CODE ANN.	)	
§§ 65-4-112, 65-4-113, 65-4-201, AND 65-5-101	)	

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

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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"), submits for filing this Response to the Motion to Strike the Consumer Advocate's Statement of Positions and Claims or in the Alternative to Treat It as the Initial Brief.

The Consumer Advocate opposes the Motion to Strike the Consumer Advocate's Statement of Positions and Claims or in the Alternative to Treat It as the Initial Brief ("Motion"). The TRA Party Staff and Lynwood/Berry's Chapel ("Settling Parties") have cited no basis for such an extreme action. The Motion implies that the filing of the Statement of Positions and Claims ("Statement") violates the procedural schedule but there is no prohibition against such a filing in the order. The Settling Parties also assert that the Statement is "prejudicial." But it cannot be "prejudicial" to state your position. The idea that the Statement could "prejudice" the Hearing Officer of the TRA Directors is completely without merit.

The TRA Party Staff and Lynwood/Berry's Chapel also claim that the Hearing Officer should sanction the Consumer Advocate by treating the Statement as its Initial Brief. No authority is cited for this even more extreme action. The Statement contains none of the detailed factual or extensive legal analysis of a brief in such an important case as this. It merely sets forth the Consumer Advocate's positions in an affirmative manner so anyone involved with or following the case can see exactly where the Consumer Advocate stands. Indeed, most parties are grateful to have an understanding of the issues before the briefs. There is no "hide the ball" litigation here, which can lead to even more litigation costs.

However, in order to avoid delay and unnecessary litigation, if the Hearing Officer believes that the Consumer Advocate's Statement of Positions and Claims is not consistent with her understanding of the procedural schedule, the Consumer Advocate will agree to withdraw its Statement so long as it is allowed to file it or a similar document as part of or at the same time as its Initial Brief on July 24, 2013. Without such a Statement of Positions and Claims there is nothing in the record that indicates the Consumer Advocate's positions and claims in this case. Moreover, the absence of such a statement will make it more difficult for the public to follow the case, as it is likely to do, based on past cases with Lynwood/Berry's Chapel. The Consumer Advocate understands that the Settling Parties have taken the unprecedented position that the Consumer Advocate has no legal standing to assert any "claims" in this case because it is not a customer of the utility who has suffered monetary loss. But it is something altogether different for the Settling Parties to maintain that the Consumer Advocate cannot even put what it believes are its "claims" on a piece of paper and file it with the TRA.

Without a Statement of Positions and Claims the record is not as complete as a case with pleadings, petitions, complaints or other statements of positions and claims. Such a record could make review by an appellate court or chancery court more challenging in the event of an appeal or chancery court action by Lynwood/Berry's Chapel, a not unlikely possibility considering the fact that Lynwood/Berry's Chapel both appealed and went to chancery court in a recent case involving the Consumer Advocate.

This case is an extremely important one with unprecedented issues that go to the heart of consumers' rights and interests before the TRA. In particular, the TRA Party Staff and Lynwood/Berry's Chapel have placed squarely before the TRA the argument that only consumers who have a claim for monetary damages and can afford to hire a private attorney have the right to have their claims and interests go to hearing rather than be settled away by the TRA Party Staff and a regulated utility. The Consumer Advocate's Statement of Positions and Claims merely puts in written form for this particular docket what the Consumer Advocate said at the prehearing conference on June 26, 2013, in various dockets including prior rate cases, and in its Position of the Consumer Advocate filed in TRA Docket No. 13-00052 (transcripts of hearings are not available to the public, so a separate filing is necessary if the public is going to have an opportunity to follow the issues discussed at a conference). The Consumer Advocate believes that its Statement of Positions and Claims, as well as the arguments set forth in the TRA Party Staff's Motion to Strike, benefit all parties, the public, and the TRA Directors by setting forth the parties' respective positions in clear, concise terms. A full and open record permits everyone to understand the case and the issues it will address and avoids "hide the ball" litigation.

The Consumer Advocate is also concerned that unless it files a Statement of Positions and Claims the record in this case may be inadequate. Lynwood/Berry's Chapel is the same company that asserted the unprecedented claim to the TRA in TRA Docket No. 11-00005 that it should no longer be regulated because it had reorganized as a non-profit corporation. Lynwood/Berry's Chapel took that case at the TRA to a full hearing, as well as filing a suit in chancery court seeking to stop the TRA from making a decision in the matter. This suit was eventually withdrawn. Then Lynwood/Berry's Chapel appealed the TRA's decision to the Tennessee Court of Appeals, even though Lynwood/Berry's Chapel informed Director Hill in a letter dated November 4, 2011, in TRA Docket No. 08-00060, that "it has informed the CAPD and the Staff that the company does not intend to press its appeal of the TRA's ruling on August 5, 2011 that Berry's Chapel has been a regulated utility since September 1, 2010." It would be unwise of the Consumer Advocate not to be prepared for -- and therefore prepare the record for - - the same full-court litigation by Lynwood/Berry's Chapel.

Therefore, in the event this case is appealed by Lynwood/Berry's Chapel or ends up in the chancery court, it is imperative that the Consumer Advocate have on the record at least some statement of its claims and issues, particularly on matters such as the recovery from customers for charges for attorney's fees and odor control costs. This Show Cause Docket, No. 11-00065, was opened to "address the ramifications of the decision in 11-00005 [the docket in which Lynwood/Berry's Chapel asserted it was not subject to TRA regulation because it was a non-profit corporation];" in particular, this Show Cause Docket was intended to address the issue of whether customers should receive a refund of the unauthorized and illegal collection of a \$20 per

month rate increase. TRA Authority Conference, August 8, 2011, pp. 34-35. The Settlement Agreement, however, addresses numerous issues outside the scope of Docket No. 11-00005, such as attorney's fees, charges for odor control costs, and the resolution of violations of a settlement agreement between the Lynwood/Berry's Chapel and the Consumer Advocate, in addition to the refund of the illegal \$20 monthly charge. As it is now, the record is silent as to the reason the Settling Parties have expanded the docket from its original purpose.

In this Show Cause Docket there is nothing reported in the docket to indicate the parties' initial positions. This may be due to the unique nature of a show cause docket and the fact that the Consumer Advocate was not granted intervention until June 17, 2013, after the Settlement Agreement was filed. However, the result is that if any member of the public clicked on the TRA website and went to Docket 11-00065, whether that person be a ratepayer in Cottonwood (a neighborhood served by Lynwood/Berry's Chapel), a legislator who serves the legislative district in which Cottonwood is located, or the media, he or she would not be able to determine what the issues in this case are nor how the issues that were settled came to be in this docket. The Consumer Advocate has a public interest responsibility to represent ratepayers and that includes informing them of issues in a case that impacts them.

Lynwood/Berry's Chapel and the TRA Party Staff contend that the Consumer Advocate has no cognizable "claims" in this case. Thus, it is no exaggeration to say that the very meaning of the word "claims" is at issue in a way it has never been at the TRA. The Consumer Advocate, therefore, cannot discount the possibility that a court of law might not consider a brief on legal issues the same as a "claim," just as a brief on a motion for summary judgment in support of a

negligence claim in a court of law might not be viewed to be the same as actually asserting a “claim” of negligence.

The Consumer Advocate, therefore, opposes the Motion to Strike. The TRA Party Staff has cited no authority or basis for its Motion to Strike. The Statement was not untimely nor does it contain any offensive material. Moreover, the Consumer Advocate’s filing in no way violated any order of the Hearing Officer. There is no prohibition on making filings other than briefs in the Hearing Officer’s order. The Hearing Officer did order that briefs on legal issues be filed by July 24 and the Consumer Advocate intends to do that as it stated in its Statement of Positions and Claims. The TRA Party Staff apparently considers it “prejudicial” for the Consumer Advocate to state that it opposes the settlement of its claims without its consent; but that is simply the Consumer Advocate’s position and not a ground for striking. Indeed parties disagree in some respect in all litigation, but such disagreement is not prejudicial to the court when the parties state their position.

Furthermore, when the TRA Party Staff and Lynwood /Berry’s Chapel suggest, without citing any legal authority, that the Consumer Advocate’s Statement of Claims and Positions be somehow treated as a legal brief thereby depriving the Consumer Advocate of its right to set forth its legal positions and analysis, they are in effect depriving the Consumer Advocate of its due process right to be heard and its right to file documents for public view. It is extreme enough that the TRA Party Staff and Lynwood/Berry’s Chapel want to settle the Consumer Advocate’s claims without its consent. But it is even more remarkable that these parties want to deny the Consumer Advocate the right to be heard in its opposition to such a position.

By filing its Statement of Positions and Claims, the Consumer Advocate intended to get its own general position in this case on the record so the public could see what is at stake in this case and maintain a record for appeal. If, however, the Hearing Officer does not believe it is consistent with her procedural schedule for the Consumer Advocate to set forth its initial positions in this way at this time and so orders, the Consumer Advocate will withdraw the Statement so long as it is allowed to file it or a similar document as part of or at the same time as its Initial Brief.

The Consumer Advocate's Statement has already been helpful in bringing out issues in this case because in the Settling Parties' response to that pleading they made statements that raised new issues not raised during the previous conferences, but central to resolving this Docket. For example, after reading the Settling Parties' Motion to Strike, one may see the following new issues:

1. Do only consumers who hire a private attorney and have money damages have standing to withhold consent from the Settlement Agreement? (Page 4 of the Motion to Strike states that "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.").

2. Do the increased charges in the Settlement Agreement for attorney's fees and sludge removal, which are to be "recover[ed] from customers"

by Lynwood/Berry's Chapel and used as a set-off against refunds, constitute a rate increase? (Page 4 of the Motion to Strike states that "the Advocates' filing is prejudicial [sic] because it characterizes the Settlement Agreement as a "rate increase.""")

3. Is allowing Lynwood/Berry's Chapel to "recover" additional monies for attorney's fees and odor control in the Settlement Agreement the resolution of a "violation of state law?" (Page 2 of the Motion to Strike states that "the parties to the Settlement Agreement have negotiated a global settlement resolving all potential violations of state law of which the parties aware." Since the Settlement Agreement provides that increased amounts for attorney's fees and odor control are to be recovered by or awarded to or credited to Lynwood/Berry's Chapel, this must mean that the Settling Parties consider these items as "violations of state law.").

4. Can a docket opened to investigate violations of state law be procedurally used to resolve multiple dockets involving no violations of law?

In conclusion, this is a case with important issues of first impression. The Consumer Advocate believes it is helpful to all parties to have the Consumer Advocate set forth its general position as clearly as possible before filing a brief on July 24, 2013. If, however, the Hearing Officer disagrees and so orders, the Consumer Advocate will withdraw the Statement as previously described.



In no event should the Statement of Positions and Claims be considered as an Initial Brief since this would only mean that the TRA Directors would be deprived of the fullest possible analysis and treatment of important and unique legal issues.

RESPECTFULLY SUBMITTED,



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Dated: July 15, 2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail on July 15, 2013, upon:

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