

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 18, 2013

IN RE:	)	
	)	DOCKET NO.
INVESTIGATION AS TO WHETHER A SHOW CAUSE	)	11-00065
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 LIMITED TO, TENN. CODE. ANN.	)	
SECTIONS 65-4-112, 65-4-113, 65-4-201, AND 65-5-101	)	

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**ORDER ALLOWING WITHDRAWAL OF THE CONSUMER ADVOCATE'S  
STATEMENT OF POSITIONS AND CLAIMS, OR UPON A FAILURE TO SO WITHDRAW,  
GRANTING THE MOTION TO STRIKE**

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This matter is before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") upon 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 to Strike") filed by Berry's Chapel Utility, Inc. ("Berry's Chapel") and the Tennessee Regulatory Authority staff participating as a party ("Party Staff") (together, "Movants") on July 8, 2013. On July 15, 2013, the Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee ("Consumer Advocate") filed its response to the motion.

**Motion to Strike**

In the *Motion to Strike*, Berry's Chapel and Party Staff assert that the Consumer Advocate's *Statement of Positions and Claims*, which was filed in the docket file on July 3, 2013, is prejudicial and a patent violation of the Procedural Schedule rendered in the Hearing Officer's *Order Setting Procedural Schedule to Completion* ("Procedural Order") entered on

July 1, 2013. First, the Movants contend that prejudice arises when, in its *Statement of Positions and Claims*, the Consumer Advocate depicts the scope of the docket and issues for resolution as being restricted only to those matters expressly stated by the voting panel at the time that it initiated the docket.<sup>1</sup> As a result, Movants assert that the Consumer Advocate ignores the broad language used by the Directors in designating the matters for review in the docket.<sup>2</sup> Next, the Movants assert that the *Statement of Positions and Claims* is prejudicial because the Consumer Advocate contends, and the Movants disagree, that its interpretation of Attorney General Opinion No. 11-06 and construction of the term “claims” therein, is an accurate exposition of the law as it applies to the Consumer Advocate’s refusal to consent to or join in the Settlement Agreement in this docket.<sup>3</sup> In addition, the Movants assert that the Consumer Advocate’s filing is prejudicial because, therein, the Consumer Advocate characterizes the Settlement Agreement as a “rate increase.”<sup>4</sup>

Finally, Berry’s Chapel and Party Staff contend that the Consumer Advocate’s filing of its *Statement of Positions and Claims* is improper and violates the Procedural Schedule set forth in the *Procedural Order*. The Movants assert that in its *Statement of Positions and Claims*, the Consumer Advocate sets forth the reasons why it opposes the Settlement Agreement and its position as to the effect of its refusal to concur in the Settlement Agreement - both of the matters identified for resolution in the docket and specified in the Procedural Schedule for inclusion in

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<sup>1</sup> *Motion to Strike*, p. 2 (July 8, 2013).

<sup>2</sup> *Id.*; see also *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*, TRA Docket No. 11-00005, *Order Declaring Berry’s Chapel Utility, Inc. to be a Public Utility*, p. 19 (August 5, 2011), and Authority Conference Transcript, pp. 16-17 (April 18, 2011) (Initiating the show cause docket, the voting panel stated that the scope of the proceeding should address whether or not Berry’s Chapel is entitled to a hearing on the refund of its illegal rate increase and what, if any, action should be taken against Berry’s Chapel for violating state statutes enforced by the TRA, including but not limited to, Tenn. Code Ann. §§ 65-4-201, 65-4-112 or 113, and 65-5-101).

<sup>3</sup> *Motion to Strike*, p. 2-4.

<sup>4</sup> *Id.* at 4.

the Consumer Advocate's Initial Brief.<sup>5</sup> Yet, the Consumer Advocate states that its *Statement of Positions and Claims* constitutes a preliminary filing, made in advance of the brief it intends to file on July 24, 2013, in accordance with the Procedural Schedule. Hence, Movants complain that the Consumer Advocate expects and intends to file more than one substantive initial filing concerning its position on the issues despite the clear specifications of the Procedural Schedule.<sup>6</sup> Accordingly, Movants ask that the Hearing Officer strike the Consumer Advocate's *Statement of Positions and Claims* from the record, or alternatively, to deem such filing the Consumer Advocate's Initial Brief in accordance with the first filing deadline of the Procedural Schedule.

### **Response**

In the *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* ("Response"), the Consumer Advocate opposes the *Motion to Strike* and contends that the Movants have cited no authority nor provided any basis for either striking its *Statement of Positions and Claims* or sanctioning the Consumer Advocate by deeming such filing its Initial Brief.<sup>7</sup> First, the Consumer Advocate contends that its *Statement of Positions and Claims* was timely-filed and does not violate the *Procedural Order* because "there is no prohibition" specifically articulated in the *Procedural Order* against a party making additional filings.<sup>8</sup> Indeed, the Consumer Advocate asserts that inasmuch as the Hearing Officer has ordered that "briefs on legal issues be filed by July 24," it affirms that it has the freedom to make an additional filing and intends to do so.<sup>9</sup>

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<sup>5</sup> *Id.* at 4-5.

<sup>6</sup> *Id.* at 5-6.

<sup>7</sup> *Response*, pp. 1, 2 and 6 (July 15, 2013).

<sup>8</sup> *Id.* at 1 and 6.

<sup>9</sup> *Id.* at 6.

Second, the Consumer Advocate contends that its *Statement of Positions and Claims* is merely a recitation of its position on the issues and, thus, cannot be construed as prejudicial to the proceedings.<sup>10</sup> Further, that the Movants disagree with its position on the issues is not sufficient grounds for prejudice.<sup>11</sup> Third, the Consumer Advocate contends that its *Statement of Positions and Claims* is necessary for a complete and adequate record now and on appeal.<sup>12</sup> The Consumer Advocate asserts that its filing is appropriate, both as to timing and substance, due to the lack of a sufficient record in these proceedings:

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.<sup>13</sup>

In this Show Cause Docket there is nothing reported in the docket to indicate the parties' initial positions.<sup>14</sup>

Thus, the Consumer Advocate contends that its *Statement of Positions and Claims* is of paramount importance in order to preserve its positions on the variety of issues that have been included for resolution in the Settlement Agreement.<sup>15</sup> In addition, its filing is needed in order that the Consumer Advocate may effectuate its responsibility to represent ratepayers and inform them of the issues that impact them.<sup>16</sup>

In addition, the Consumer Advocate asserts that its *Statement of Positions and Claims* is beneficial to the public, parties, and Authority because it promotes a full and open record,<sup>17</sup> provides a convenient reference and ready access to information for both the public and appeals court,<sup>18</sup> and helps to clarify and increase understanding of the issues pending before the

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<sup>10</sup> *Id.* at 1 and 3.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* at 2, 3, 4, and 5.

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 3 and 4.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *Id.* at 2, 3, and 5.

<sup>18</sup> *Id.* at 2 and 5.

Authority.<sup>19</sup> Moreover, the Consumer Advocate asserts that its filing, and the *Motion to Strike* filed by the opposing parties in response, have raised or revealed new, unprecedented issues that are central to resolving the docket.<sup>20</sup>

Finally, giving its reason for filing the *Statement of Positions and Claims*, the Consumer Advocate states that it “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 [to] maintain a record for appeal.”<sup>21</sup> The Consumer Advocate further contends that in filing the *Motion to Strike*, and, in particular, by requesting that the *Statement of Positions and Claims* be deemed its Initial Brief, the Movants are attempting to deprive the Consumer Advocate of its due process right to be heard and to file documents for public view in the docket file.<sup>22</sup> Nevertheless, offering a compromise, the Consumer Advocate states, “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.”<sup>23</sup>

### **Findings and Conclusions**

In essence, the Movants contend that the Consumer Advocate’s *Statement of Positions and Claims* is prejudicial because it contains certain arguments that Movants assert are erroneous and mischaracterizes the terms and conditions of the Settlement Agreement.<sup>24</sup> While the Hearing

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<sup>19</sup> *Id.* at 3 and 8.

<sup>20</sup> *Id.* at 2, 3, 5 and 7-8.

<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.* at 7; see also p. 2 & 9.

<sup>24</sup> Black’s Law Dictionary defines prejudice:

1. Damage or detriment to one’s legal rights or claims. *Legal prejudice* – A condition that, if shown by a party, will usu[ally] defeat the opposing party’s action; esp., a condition that, if shown by the defendant, will defeat a plaintiff’s motion to dismiss a case without prejudice [dismissal]. *Undue prejudice* – The harm resulting from a fact-trier’s being exposed to evidence that is persuasive but inadmissible (such as evidence of prior criminal conduct) or that so arouses the emotions that calm and logical reasoning is abandoned.

Officer does not find the Consumer Advocate's *Statement of Positions and Claims* prejudicial insofar as the arguments therein might legally prejudice the Movants or unduly prejudice the trier-of-fact, i.e., the voting panel of Directors in this proceeding, the Hearing Officer agrees that the filing is improper and acknowledges that the Movants might view it as a preemptive maneuvering by the Consumer Advocate to gain an unfair advantage.

The Procedural Schedule, adopted by the Hearing Officer in the *Procedural Order*, was devised by the parties themselves and announced by the Consumer Advocate during the Pre-Hearing Conference held on June 26, 2013. The Procedural Schedule reflects the unaltered agreement of the parties as to the type and quantity of filings to be made and the associated deadlines for such filings to be entered in the docket file. Moreover, in adopting the parties' agreement, the Hearing Officer established the procedural steps to be followed in these proceedings, which included defining the specific rights and duties of the parties to file and present argument or proof in the record before the Authority.

The Procedural Schedule is clear in its delineation of the sequential filing of party briefs, commencing with the Consumer Advocate's Initial Brief. Contrary to the Consumer Advocate's assertions in its *Response*, there is no ambiguity in the Procedural Schedule as to what is permitted to be filed, when, or by which party, nor is there any provision for "*briefs on legal issues be filed by July 24 (emphasis added).*" Adopting the agreement of the parties, as articulated by the Consumer Advocate, the *Procedural Order* provides the Consumer Advocate sufficient opportunity to substantively expound, openly and preserved in the record, its positions on the issues under consideration in one initial filing and one reply filing. That the purpose of establishing a Procedural Schedule is to provide an orderly, even-handed manner in which to

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2. A preconceived judgment formed without a factual basis; a strong bias. *Black's Law Dictionary* 1218 (8<sup>th</sup> ed. 2004).

bring the proceedings to resolution is elementary. The Procedural Schedule established in the *Procedural Order* accomplishes this fundamental purpose.

Upon entry of the *Procedural Order*, should a party have good cause to deviate from the mandates of the Procedural Schedule, under the TRA Rules, that party is to file a motion setting forth the reasons why the schedule should be modified or amended.<sup>25</sup> The Consumer Advocate filed no such motion, nor did it make any attempt to obtain agreement of the other parties to alter or add to the Procedural Schedule.<sup>26</sup> The extemporaneous filing of the *Statement of Positions and Claims* by the Consumer Advocate, without the approval of the Hearing Officer, demonstrates disregard for the agreement reached between the parties themselves, the procedural practices and rules of the Authority, and the *Procedural Order* rendered by the Hearing Officer and entered in the docket.

Therefore, upon consideration, the Hearing Officer finds that the Consumer Advocate's filing of its *Statement of Positions and Claims* in the docket file on July 3, 2013, violates the *Procedural Order*. Further, the Hearing Officer finds that an appropriate remedy for such violation is to exclude the *Statement of Positions and Claims* from the record in this matter. Accordingly, the Hearing Officer will permit the Consumer Advocate to file a notice withdrawing its *Statement of Positions and Claims*. The Consumer Advocate, however, is not authorized and is otherwise prohibited to file its *Statement of Positions and Claims*, or any separate document similar to it, as part of or at the same time as its Initial Brief. Nevertheless, insofar as the sum and substance of its *Statement of Positions and Claims* constitute reasons for

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<sup>25</sup> See TRA Rule 1220-1-2-.06.

<sup>26</sup> Agreement between the parties of record, while not determinative, can serve to bolster a motion to alter or amend the procedural schedule filed according to the Rules. Of note and for purposes of illustration, on July 17, 2013, the parties in this docket, the Consumer Advocate, Party Staff, and Berry's Chapel, together, filed a *Joint Motion to Amend the Procedural Schedule* requesting to amend the Procedural Schedule to extend certain existing deadlines and permit additional filings in the docket file. The *Joint Motion to Amend the Procedural Schedule* will be addressed in a separate order.

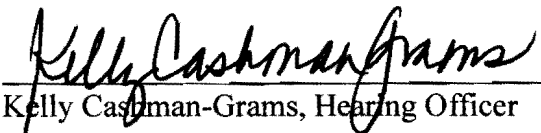
its opposition to the Settlement Agreement, and thereby, its opposition to the resolution of the docket, the Consumer Advocate is free to include the same within its Initial Brief, as established in the Procedural Schedule. In the event that the Consumer Advocate fails to file a notice withdrawing its *Statement of Positions and Claims* by 2:00 p.m. on July 23, 2013, the *Motion to Strike* filed by Berry's Chapel and Party Staff shall be granted.

**IT IS THEREFORE ORDERED THAT:**

1) The Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee is permitted to file a notice withdrawing its *Statement of Positions and Claims* by 2:00 p.m. on July 23, 2013.

2) In the event that the Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee fails to file a notice of withdrawal, as referenced in the above clause, the *Motion to Strike the Consumer Advocate's "Statement of Positions and Claims" or, in the Alternative, to Treat It as the "Initial Brief"* filed by Berry's Chapel Utility, Inc. and the Tennessee Regulatory Authority staff participating as a party on July 8, 2013, is GRANTED.

3) Upon entry of the notice to withdraw, or the failure to file such notice within the time designated above, the *Statement of Positions and Claims* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee on July 3, 2013, is hereby stricken from the record and excluded from consideration in these proceedings.

  
Kelly Cashman-Grams, Hearing Officer