

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)	

INITIAL BRIEF

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EXHIBITS ATTACHED

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Exhibit 2: Unofficial Transcript of Official Recording of Oral Argument, Berry’s Chapel Utility, Inc. v. Tennessee Regulatory Authority, 2012 WL 6697288 (Tenn. Ct. App., 2012) (M2011-02116-COA-R12-CV)

Exhibit 3: Schedules of Ms. Tiffany Underwood.^A

Exhibit 4: *Party Staff’s Responses [sic] to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065 (July 19, 2013)

Exhibit 5: Legal invoices discussed and submitted for recovery.^B

Exhibit 6: *Order Granting in Part and Denying in Part Consumer Advocate’s Renewed Motion to Summarily Deny Motion to Approve Settlement Agreement and Alternatively*

^A Schedules 1 and 1A are available online filed with *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065 (May 31, 2013). Schedules 1B-1F were inadvertently not filed. Schedule 1B is redacted to protect consumer information.

^B Invoice Nos. 780543, 785766, and 795169 were filed in Tab D with *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065 (May 31, 2013). Invoice No. 790885 was filed *Supplementary Exhibit 1 To The Testimony Of Tiffany Underwood*, Docket No. 11-00198, pg. 3 (July 15, 2013)

to Treat the Motion as a Motion for Summary Judgment *and denying* Motion to Approve Settlement Agreement, Docket No. 01-00704 (Aug. 12, 2004)

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INITIAL BRIEF

Robert E. Cooper, Jr., the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division (“Consumer Advocate”), respectfully submits this Initial Brief in Tennessee Regulatory Authority (“TRA” or “the Authority”) Docket No. 11-00065.

I. INTRODUCTION

Berry’s Chapel Utility, Inc. (“Berry’s Chapel” or “Company”) and the TRA Party Staff (also called “Settling Parties”) have submitted a Settlement Agreement (“Settlement”) dated on May 31, 2013. If the Settlement is approved by the Directors as the final decision in this case, the TRA will bless a series of illegal rate increases. Berry’s Chapel is neither penalized with fines nor ordered to pay interest for its wrongful collection of monies from ratepayers. And the Settlement leaves consumers less than whole after paying illegal fees for two years. In the process, a series of ratemaking and fundamental principles designed to foster fairness were ignored. Of the \$146,120.67 in illegal charges owed to the approximately 800 harmed consumers calculated for the Settlement,¹ only \$74,214.68 will be refunded to the harmed

¹ It is unclear whether any testing was performed on amount of illegal charges to verify their accuracy. The Consumer Advocate reserves the right to challenge the total amount of refunds, but such recalculation was not considered necessary for the limited issues of challenging the Settlement in this brief.

ratepayers under this Settlement. Meaning, the Company will not have to refund \$71,905.99 in illegal charges.² Not only will the Company get to keep almost 50% of the illegal charges, it will also not incur any penalties for its illegal activity.³ And, even though the customers have waited as long as three years to get the money they paid as a result of illegal charges (“refunds”)—and they will have to wait another 18 months before the installments of refunds in the settlement are completed—they will receive no interest. So, instead of penalizing Berry’s Chapel for its illegal behavior, the Settlement actually benefits Berry’s Chapel for breaking the law. The Company has basically used funds that are not its money to begin with to continue to pay its operating expenses, which are already recovered through rates. This would be similar to a lawyer using trust fund proceeds of a client to pay his secretary, FedEx bill, and the like.

Knowing the history of Berry’s Chapel is important to understanding the background of this Settlement. Berry’s Chapel is a non-profit wastewater utility serving customers in Williamson County, Tennessee. It was created on July 16, 2010,⁴ and it formerly operated as the for-profit Lynwood Utility Corporation (“Lynwood”).

In 2010, Lynwood attempted to evade or “get out from under” TRA regulation⁵ and started charging illegal fees to customers that total over \$145,000.⁶ On September 17, 2010, Lynwood sent a letter to the TRA stating that it had merged with Berry’s Chapel, and the non-profit organization was the surviving entity after the merger.⁷ In the same letter, Lynwood/Berry’s Chapel informed the TRA that it did not believe it was under TRA jurisdiction

² See discussion *infra* Part II, nn. 20-21 and accompanying text.

³ It is the position of the Consumer Advocate that the illegal charges should be treated as restitution and should be treated as separate funds, and not funds that can be intermingled with funds received through authorized rates. These funds are like deposits or an attorney retainer that should be held in a separate trust fund like accounts and returns. They should not for policy and accounting reasons be considered monies available for resolving other issues.

⁴ See *Copy Of Letter From The CAD To Don Scholes, Counsel For Lynwood Utility Corp.*, Docket No. 11-0005, page 6 (Jan. 18, 2010) (showing the Secretary of State filing).

⁵ Exhibit 1, Official Recording of Oral Argument, at 33:37-38; Exhibit 2, Unofficial Transcript of Official Recording of Oral Argument at 12, *Berry’s Chapel Utility, Inc. v. Tennessee Regulatory Authority*, 2012 WL 6697288 (Tenn. Ct. App., 2012) (M2011-02116-COA-R12-CV).

⁶ Exhibit 3; *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065, Schedule 1 (May 31, 2013).

⁷ See *id.* pg. 3.

after the merger because, it contended, Berry's Chapel's non-profit status made it a "nonutility."⁸ Shortly thereafter, in spite of ratepayer and Consumer Advocate protests, Berry's Chapel unilaterally and illegally increased its monthly rates by \$20 and charged illegal late fees.⁹ Berry's Chapel also knowingly and unlawfully continued a surcharge for two full years longer than the year authorized.¹⁰

Over the next two years, Berry's Chapel continued its litigious march to attempt to evade TRA jurisdiction, pocketing illegal customer fees in the meantime. The Consumer Advocate started receiving numerous complaints from customers for the illegal charges and filed a petition on January 10, 2011 requesting the TRA issue a declaratory order that Berry's Chapel was a utility subject to TRA jurisdiction, which led to the creation of Docket No. 11-00005. In another effort to evade TRA jurisdiction, Berry's Chapel filed a complaint on March 4, 2011 in Chancery Court seeking a declaratory order, finding that Berry's Chapel was a non-utility under Tenn. Code Ann. § 65-4-101(6)(E), and staying the proceeding at the TRA.¹¹ The Chancery Court action was eventually dismissed by Berry's Chapel.

Meanwhile, in Docket No. 11-00005, the Consumer Advocate and Berry's Chapel filed briefs and made oral arguments, and the TRA issued a declaratory order that Berry's Chapel was a public utility subject to TRA jurisdiction on April 18, 2011.¹² At the time of giving the oral order, Director Roberson declared that Berry's Chapel had "no authority to increase rates" and explained "[n]ow I do not contend to know whether Berry's Chapel is in need of a rate increase in the magnitude of \$20 per customer, but this I do know, it took the wrong approach when it

⁸ See *Copy Of Letter From The CAD To Don Scholes, Counsel For Lynwood Utility Corp.*, Docket No. 11-0005, pg. 3 (Jan. 18, 2010). It should be noted that some of these customers lost their homes in the flood.

⁹ See *id.* at 1; see also *Berry's Chapel Utility, Inc. v. Tennessee Regulatory Authority*, 2012 WL 6697288, at *1 (Tenn. Ct. App., 2012).

¹⁰ See *Order Approving Settlement Agreement*, Docket No. 08-00060 (Apr. 29, 2009). Lynwood, Berry's Chapel's predecessor began the surcharge on April 30, 2009. See *Letter to Henry Walker from the CAD*, Docket No. 08-00060, pg. 2 (June 20, 2011).

¹¹ *Complaint*, *Berry's Chapel Utility, Inc. v. Consumer Advocate and Protection Division of the Office of the Attorney General and Tennessee Regulatory Authority*, Docket No. 11-0298-IV, at 4 (25th Dist. Chanc. Ct., Mar. 4, 2011).

¹² See *Order Declaring Berry's Chapel Utility, Inc. To Be A Public Utility*, Docket No. 11-00005 (orally issued on Apr. 18, 2011; written order issued on Aug. 5, 2011).

increased such fees under the erroneous and dubious shelter of being a nonutility.”¹³ The order contained specific issues to be considered in a new docket to address the ramifications that Berry’s Chapel is subject to TRA regulation:

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. § 65-5-101.¹⁴

The new docket created by the order was this Show Cause Docket, Docket No. 11-00065.

This Show Cause Docket was stayed while Berry’s Chapel appealed the declaratory order in Docket No. 11-00005 and continued to keep ratepayers’ monies. On June 6, 2011, the legislature amended Tenn. Code Ann. § 65-4-101(6)(E) to clarify that non-profit utilities like and including Berry’s Chapel were unquestionably under TRA jurisdiction.¹⁵ Berry’s Chapel filed an appeal challenging the declaratory order and asserted that it was not subject to TRA jurisdiction during the period between July 2010 (when it reorganized as a non-profit) and June 2011 (when the legislation was amended).¹⁶ In an usually rapid decision, the Court of Appeals issued its opinion affirming the TRA’s declaratory order that Berry’s Chapel was a utility just one week after the oral arguments.¹⁷

Although it has taken nearly three years, after the defeat of Berry’s Chapel’s attempts to evade the law by the TRA, the Chancery Court, the Court of Appeals, and the legislature, it

¹³ *Transcript of Authority Conference*, April 18, 2011, pg. 16.

¹⁴ *Order Declaring Berry’s Chapel Utility, Inc. to be a Public Utility*, Docket No. 11-00005, pg. 19 (Aug. 5, 2011).

¹⁵ *See Berry’s Chapel Utility, Inc. v. Tennessee Regulatory Authority*, 2012 WL 6697288, at *1, n.2 (Tenn. Ct. App., 2012).

¹⁶ *Berry’s Chapel Utility, Inc. v. Tennessee Regulatory Authority*, 2012 WL 6697288, at *1 (Tenn. Ct. App., 2012).

¹⁷ *Id.* (showing session was on Dec. 23, 2012 and opinion was issued on Dec. 21, 2012).

should be finally time to address the customer fees illegally charged and received by Berry's Chapel.

Unfortunately, the Settlement Agreement filed in Docket No. 11-00065 on May 31, 2013 ("Settlement") between the TRA Party Staff and the Company takes a most unprecedented and unusual approach that threatens to prevent making the customers whole while simultaneously violating many long-standing fundamental ratemaking principles.¹⁸

In addition to the substantive problems with this Settlement of refunding only half of the illegal charges owed, the procedural aspects of this case may violate due process requirements, but at minimum, significantly impair the transparency of the case for the public. In most cases, after discovery and intervention of interested parties, the parties file their positions in the form of testimony, briefs, or other reports, and then a settlement follows. Here, there are no reports indicating the parameters of the investigation and resulting findings nor is there any testimony of either the TRA Party Staff or the Company that is independent of the Settlement. Importantly, the two issues that the panel authorized in Docket No. 11-00005 for this Show Cause Docket are not discussed or answered independently of the Settlement. The only calculations made were created to support the Settlement, and it should be noted that a large amount of the refunds calculated are the Company's computations, rather than the TRA's independent calculations.¹⁹ Moreover, the Settlement Parties attempt to settle away refunds owed to injured customers without their approval. There has been no investigation report by the TRA Party Staff. There has been no public filing of the parties' positions.

The Consumer Advocate recommends the Directors deny this Settlement. In Part II, the Consumer Advocate points out and explains the problems with the Settlement itself, including how it violates fundamental ratemaking principles and is against public policy. In Part III, the Consumer Advocate makes clear how this Settlement does not settle or otherwise discharge the Consumer Advocate's claims. Part IV provides the Consumer Advocate's conclusion.

¹⁸ See discussion in Part II of this brief.

¹⁹ See Exhibit 3, *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065, Schedule 1A, Note A (May 31, 2013).

II. THE CONSUMER ADVOCATE RECOMMENDS THE DIRECTORS DENY THIS SETTLEMENT BECAUSE IT VIOLATES THE LAW AND FUNDAMENTAL RATEMAKING PRINCIPLES, AND IT IS AGAINST PUBLIC POLICY.

In summary, the Consumer Advocate disagrees with the Settlement because it does not provide 100% reimbursement of the unlawfully taken \$146,120.67²⁰ back to the injured consumers and, instead of providing a future deterrent of the Company's improper conduct by assessing penalties and interest, the Settlement allows Berry's Chapel to walk away with nearly 50%²¹ of the consumers monies so it can recover alleged costs outside of the usual ratemaking process.²² The costs specifically at issue are the \$19,781.25 in legal fees allegedly associated with flood damage and \$40,074.92 in odor expenses.²³ The remaining \$12,049.82 reduction to refunds would go to fund the Company's bond requirements,²⁴ but this should be funded by the Company rather than funded by the consumers.²⁵ Although the flood occurred in May 2010, the legal invoices submitted as the basis for recovery in this Settlement are from *July 2011 to January 2013*.²⁶ And most of the legal fees occurred during the rate case in Docket No. 11-00198 for which the entire rate case expense requested have already been allowed and recovered in rates.²⁷ As for odor expenses, the Company's request for odor expenses in this Settlement are over and above the \$36,691 consumers already pay in rates annually for sludge removal, which uses the same operational process of Waste Management removing sludge to control odor.²⁸

²⁰ Exhibit 3; *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065, Schedules 1 (May 31, 2013) (showing \$146,120.67 as the total of illegal charges adopted by Ms. Underwood).

²¹ The amount of illegal charges to be refunded under this Settlement is calculated as follows: \$146,120.67 minus \$74,218.68 equals \$71,905.99. *Settlement Agreement*, Docket No. 11-00065, ¶¶ 21-22 (May 31, 2013) (showing refunds of \$73,680 and \$534.68, or a total of \$74,218.68). The exact percentage of the reduction to refunds of illegal charges is 49.2% (\$71,905.99/\$146,120.67).

²² Because this Settlement and the calculations supporting it did not adhere to the statutory procedures required for changes to rates set forth in Tenn. Code Ann. § 65-5-103 and the correlating TRA rules, the Settlement appears to rely on the Company's numbers. If the statutory procedures were followed, these numbers may differ.

²³ *Settlement Agreement*, Docket No. 11-00065, ¶¶ 11-12 (May 31, 2013); *see also* Exhibit 3, *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065, Schedules 1E and 1F (May 31, 2013).

²⁴ *Settlement Agreement*, Docket No. 11-00065, ¶ 23 (May 31, 2013).

²⁵ *See Direct Testimony of William H. Novak*, Docket No. 11-00065, pg. 8 (July 29, 2013).

²⁶ *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065, Tab D (May 31, 2013) (citing TRA Rule 1220-4-13-.07(1)).

²⁷ *Final Order*, Docket No. 11-00198, pgs. 11-12 (Aug. 21, 2012) (showing authorized rate increase related to regulatory expense); *Rebuttal Testimony of James B. Ford, Secretary-Treasurer to Berry's Chapel Utility, Inc.*, Docket No. 11-00198, pg. 10 (May 22, 2012) (showing the breakdown of costs in regulatory expenses).

²⁸ *See Final Order*, Docket No. 11-00198, pg. 8 (Aug. 21, 2012).

This Settlement essentially rewards the Company for making illegal charges to the consumers and, therefore, the Consumer Advocate recommends it be denied.

The Settlement has many aspects that are against public policy and, if approved, would violate numerous fundamental ratemaking principles and laws. As discussed further in the following sections, there are many problems with the approval of cost recovery in this Settlement. First the TRA Party Staff has no authority to settle cost recovery to the Company because: (a) this Settlement is outside the scope authorized by the Directors for this Docket; (b) the TRA as an entity does not have statutory authority to be a party to settlements providing cost recovery to utilities; and (c) even if the TRA asserts it can be a party to settlements providing cost recovery to utilities, the procedures followed for this Settlement do not follow the process required by Tennessee's Administrative Procedures Act. Second, previous panels of the TRA have considered and ordered the treatment of odor control costs and legal fees related to the flood damage. Thus, cost recovery of these costs as they are in this Settlement is barred by *res judicata* and collateral estoppel. Third, the approval of this Settlement would result in violating the filed rate doctrine and retroactive ratemaking, which is prohibited under Tennessee law. Fourth, approval of this Settlement abandons fundamental ratemaking principles requiring critical analysis of costs before authorization of recovery and therefore violates requisite due process to ensure "just and reasonable" rates. Fifth, the approval of this Settlement would force consumers to abide by the previous settlement approved in Docket No. 08-00060 while allowing Berry's Chapel to breach it, which is unfair and can deter parties from future settlements. Sixth, this Settlement is against the public policy and not in the public interest of Berry's Chapel's customers or Tennessee consumers generally.

A. The TRA Party Staff does not have the authority to approve this Settlement.

As a threshold matter, the TRA Party Staff does not have the authority to approve this Settlement. The Settlement goes beyond the original purpose ordered by the Directors for this Docket and there does not appear to be statutory authority for the TRA to be a party (as opposed to an adjudicator or rulemaker) in rate-change proceedings.

1. This Settlement is outside the scope of this Docket.

This Docket was created based on the order in Docket No. 11-00005:

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. § 65-5-101.²⁹

The TRA Party Staff's authority in a docket is limited to what is conferred to it by the Directors. The intended purpose of this Docket is to (1) determine if Berry's Chapel is entitled to a hearing regarding refunds of the illegal charges to customers; and (2) what actions should be taken against Berry's Chapel for its multiple violations of law. Nothing has been filed in this Docket to address these two questions. Instead of an investigative report of findings and recommendations whether a hearing is required and whether enforcement action should be taken against Berry's Chapel for its illegal actions, there is the Settlement, which is silent as to both questions.

²⁹ *Order Declaring Berry's Chapel Utility, Inc. to be a Public Utility*, Docket No. 11-00005, pg. 19 (Aug. 5, 2011).

2. TRA does not have statutory authority to advocate as a party in proceedings that increase or modify rates.

The enabling statutes are clear on the TRA's authority. The TRA has the authority to:

- (a) investigate any matter related to a public utility;³⁰
- (b) assess penalties for violations of judgments and orders;³¹
- (c) order a public hearing with due notice to all interested parties and issue or refuse a certificate of public necessity and convenience, or to qualify or withdraw the same as provided in the statutes;³²
- (d) charge and collect fees from utilities;³³
- (e) use enforcement authority, including assessing penalties, investigation, notice and hearing, and generally initiating proceedings relative to a violation of unauthorized telephone solicitations³⁴ and unsolicited facsimile advertisements;³⁵ and
- (f) fix just and reasonable rates after hearing and upon notice.³⁶

Undoubtedly, the TRA has the authority to fix rates in its adjudicative capacity as an impartial, objective board balancing the interests of consumers and the interests of the utilities.

Determining whether a utility recovers its costs and to what extent have always been ratemaking functions. A high level of ratemaking procedures are as follows:

- (1) utility applies for an overall rate increase (*i.e.*, rate cases) or a rate increase for a specific cost (*e.g.*, surcharge);³⁷
- (2) utility undertakes a ratemaking hearing on the merits of whether the utility should get the ratemaking treatment requested;
- (3) the TRA, in its adjudicative role, authorizes a rate including recovery of authorized costs; and
- (4) utility charges the consumers the authorized rate to recovery the authorized costs.

The only reason this situation differs from the normal ratemaking process is because the utility illegally charged its customers first and pocketed the monies and is now asking for "approval" to keep that money for cost recovery. Even though the order of the steps differ in this case from the typical rate case, the fundamental ratemaking effect of a utility receiving money

³⁰ Tenn. Code Ann. § 65-4-117.

³¹ § 65-4-120.

³² § 65-4-204.

³³ § 65-4-301, *et seq.*

³⁴ § 65-4-405(f).

³⁵ § 65-4-504.

³⁶ § 65-5-101.

³⁷ *See, e.g.*, Docket No. 12-00049 (rate case); Docket No. 12-00051 (surcharge).

and that money coming from customers is still occurring. The difference here is any costs allowed for recovery in this Settlement did not go through a proper hearing to determine whether the costs are just and reasonable. Indeed, that is the first question posed by the panel in Docket No. 11-00005, but remains unanswered in this Settlement.

This Settlement is different from the exercise of the TRA's adjudicative function in ratemaking. In this Settlement, the TRA Party Staff is operating as a party; meaning, the Party Staff is an advocate for a certain position.³⁸ As a party, the TRA Party Staff cannot act in a role of balancing the interests of the other parties. Rather, its only role is to advocate for the TRA as an entity. The TRA as an entity has an interest in investigating violations of the law as well as enforcing the law, including but not limited to ensuring utilities abide by authorized rates.

None of the Tennessee statutes give the TRA authority, as a party, to "give and take" a utility's costs in a settlement, or even allow the TRA to act as a party-advocate (rather than adjudicator/decision-maker) in a proceeding determining whether a utility should or should not recover costs. Cost recovery is a component of fixing just and reasonable rates, which the TRA does in its adjudicative function as an impartial, objective, and independent board by hearing and upon notice. To argue that the TRA Party Staff has any rights or interest in the utility's cost to give it the ability to "give and take" such costs in a settlement agreement would contradict the TRA's objectivity and impartiality that stems from it *not* having any rights or interests in any part of the utility (its costs or otherwise).

Courts have long held that an agency can serve the adjudicative function as a decision-making board and have members serving the investigative functions as a party in the same case so long as due process is served. The U.S. Supreme Court has articulated: "Clearly, if the initial

³⁸ The position that the TRA Party Staff is advocating for is unclear and uncertain since there are no filings independent of the Settlement indicating what the TRA Party Staff's position was before the Settlement, and the Settlement is silent as to what position or claims the TRA Party Staff advocated for.

view of the facts based on the evidence derived from nonadversarial processes [e.g., investigations] as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.”³⁹ This Settlement, however, goes well beyond the investigative or enforcement function. Indeed, this Settlement is giving away refunds owed to consumers, but the TRA Party Staff has no rights or interests in the utility’s costs authorized by statute. Nor is the TRA Party Staff representing consumers.⁴⁰

3. Even if the TRA is convinced it has the authority to be party-advocate in ratemaking proceedings, it has not followed the proper procedures required by the statutes.

This Settlement attempts to increase rates. The process of fixing rates is considered a contested case.⁴¹ In contested cases, Tennessee requires that agencies give parties adequate notice, proper discovery, and the opportunity for a hearing.⁴² This Settlement has not afforded the consumers a chance for a proper evidentiary hearing after discovery. Therefore, even if the TRA believes it has the authority to be a party-advocate in a ratemaking proceeding, it is not authorized to do so in the method used in this Settlement.

Thus, this Settlement threatens the fundamental fairness of consumers’ due process by allowing the TRA Party Staff to negotiate and settle the appropriate level of a utility’s costs as a party—at the consumers’ expense but without their approval and participation—and then the TRA authorizes such settlement and forgoes an evidentiary hearing on the change to past rates.

B. Previous panels of the TRA have considered the legal fees associated with flood damage and odor control costs and provided clear orders regarding their treatment, which bars the settlement of these costs in this Docket.

³⁹ *Withrow v. Larkin*, 421 U.S. 35, 58 (1975).

⁴⁰ See discussion *infra* Part III.A.

⁴¹ Tenn. Code Ann. § 65-2-101(2) (“Contested case” means all proceedings before the authority in which the legal rights, duties, or privileges of specific parties are determined after a hearing before the authority; provided, that the fixing of rates shall be deemed a contested case rather than a rule-making proceeding; . . .”).

⁴² Tenn. Code Ann. § 4-5-301, *et seq.*

The doctrines of *res judicata* and collateral estoppel prevent the recovery of the costs in this Settlement because prior panels have final orders regarding these costs.

1. The Tennessee law on the doctrines of *res judicata* and collateral estoppel bars re-litigating claims and issues from former suits.

The doctrines of *res judicata* and collateral estoppel have many similarities. Both doctrines are questions of law reviewed *de novo* on appeal.⁴³ And both doctrines apply to the TRA orders issuing rate increases because, as the Tennessee Supreme Court has declared, such orders are adjudicative and final and conclusive.⁴⁴ And, therefore, TRA orders allowing rate increases, like the orders in Docket Nos. 11-00198 and 08-00060, are subject to the effects of *res judicata* and collateral estoppel.⁴⁵ Both doctrines promote finality, conserve judicial resources, and prevent inconsistent decisions.⁴⁶ Doctrines protecting prior decisions are “not based upon any presumption that the final judgment was right or just. Rather, it is justifiable on the broad grounds of public policy which requires an eventual end to litigation.”⁴⁷ Indeed, it has long been held in Tennessee that “public policy dictates that litigation should be determined with reasonable expedition, and not protracted through inattention and lack of diligence on the part of litigants or their counsel.”⁴⁸

Although *res judicata* and collateral estoppel share the same public policy reasons, they have different effects. One major difference between the two doctrines is that *res judicata* applies to all claims that existed at the time of the former suit, regardless if they were actually litigated or “*could have been litigated in the former suit*,”⁴⁹ while collateral estoppel only applies

⁴³ *Estate of Deola Miller v. Rice*, 2012 WL 3655244 (Tenn. Ct. App. 2012).

⁴⁴ *United Cities Gas Co. v. Tennessee Public Serv. Comm’n*, 789 S.W.2d 256, 258-59 (Tenn. 1990). In Tennessee, the provisions of a tariff are binding upon the utility and its customers and have the effect of law. *GBM Communications, Inc. v. United Mountain*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986) (cert. denied).

⁴⁵ *See id.*

⁴⁶ *See, e.g., Hooker v. Haslam*, 393 S.W.3d 156, 165, n.6 (Tenn. 2012) (*res judicata*); *Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009) (collateral estoppel).

⁴⁷ *Hooker v. Haslam*, 393 S.W.3d 156, 165, n.6 (Tenn. 2012) (quoting *Moulton v. Ford Motor Co.*, 533 S.W.2d, 295, 296 (Tenn. 1976).

⁴⁸ *Jordan v. Johns*, 79 S.W.2d 798, 802 (Tenn. 1935).

⁴⁹ *Hooker v. Haslam*, 393 S.W.3d 156, 165, n.6 (Tenn. 2012) (citing *Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987).

to issues that were actually litigated, decided, and necessary to the judgment in a former suit.⁵⁰

While the effect of *res judicata* is on claims known at the time of the former suit, collateral estoppel has the effect of making issue determinations conclusive in subsequent proceedings.⁵¹

In addition to different effects, the doctrines have different elements. The Tennessee Supreme Court has recently articulated the elements of both *res judicata* and collateral estoppel.⁵² The Supreme Court declared that *res judicata* applies if the following elements are met:

- (1) a court of competent jurisdiction rendered a prior judgment;
- (2) the prior judgment was final and on the merits;
- (3) both proceedings involved the same parties or their privies; and
- (4) both proceedings involved the same cause of action.⁵³

For collateral estoppel, however, the Court stated the following elements must be met to prevail with a collateral estoppel claim:

- (1) that the issue to be precluded is identical to an issue decided in an earlier proceeding,
- (2) that the issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding,
- (3) that the judgment in the earlier proceeding has become final,
- (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and
- (5) that the party against whom collateral estoppel is asserted has a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded.⁵⁴

The party invoking either doctrine has the burden of proof.⁵⁵

2. The Authority has already decided in prior dockets the treatment of the costs submitted for recovery in this Settlement.

It is the utility's responsibility to ask for its recurring expenses during a rate case.

Whether a utility does so is entirely up to the utility. If the utility failed to make accurate

⁵⁰ *Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009).

⁵¹ *Id.*

⁵² *Hooker v. Haslam*, 393 S.W.3d 156, 165, n.6 (Tenn. 2012) (*res judicata*); *Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009) (collateral estoppel).

⁵³ *Hooker v. Haslam*, 393 S.W.3d 156, 165, n.6 (Tenn. 2012) (citation omitted).

⁵⁴ *Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009).

⁵⁵ *See id.*

forecasts of its recurring sludge removal, accounting, and legal expenses, the consumers should not be left on the hook for such costs. Nor should Berry's Chapel be able to use illegally obtained consumer funds to cover recurring expenses. Berry's Chapel had its bite at the apple in each of the rate cases. Fundamental fairness and justice prevent giving any utility getting two bites at the apple for its failure to present its case for rate increases in the past two rate cases.

As set forth in the following subsections, prior panels of the Authority have decided the treatment of the costs included in recovery in this Settlement in Docket Nos. 08-00060, 09-00034, and/or 11-00198.

- a. The TRA considered cost recovery for flood damage, including legal fees in Docket No. 11-00198, and ordered their exclusion as "inappropriate and unreasonable."

Docket No. 11-00198 was the most recent rate case by the Company and included the consideration and decision determining the recovery for flood damage. Originally, Berry's Chapel had filed two separate dockets for the rate case and flood damage (Docket No. 11-00180), but the Authority consolidated the dockets "[f]or the sake of efficiency."⁵⁶

The Consumer Advocate expert witness, Dave Peters, filed direct testimony, and specifically discussed the flood damage costs requested by the Company, including overhead costs, interest expense, future repairs, professional fees (including legal fees), and fuel and meals.⁵⁷ In regards to legal fees, Mr. Peters specifically stated:

I deducted \$1,437.50 in legal fees from the professional services expense claimed by Berry's Chapel, leaving \$742.00 in engineering expenses as recoverable. In my opinion, legal expenses is [sic] not appropriate to include in the recovery of flood damage expenses covering the cost of repairs. A generous amount of legal expense for a small utility was already built into the Company's last rate case.⁵⁸

⁵⁶ *Order Consolidating Dockets & Amending Procedural Schedule*, Docket No. 11-00198, pg. 2 (May 7, 2012).

⁵⁷ *See generally Direct Testimony of Dave Peters*, Docket No. 11-00198, pg. 19 (Apr. 23, 2012).

⁵⁸ *Id.*

In the Company's pre-filed rebuttal testimony, Mr. Ford, Secretary-Treasurer of Berry's Chapel, discussed Mr. Peters' testimony on flood damage for the overhead, interest, and future repairs.⁵⁹ With respect to legal fees, Mr. Ford stated:

Legal services . . . were obtained related to notice requirements to TRA and TDEC and actions to be taken to debt holders and local county and federal officials related to damages and status of plant operations and amounted to about 5 hours legal work (\$1,437.50) which would not have been incurred if not for the flood disaster.⁶⁰

The Final Order agreed with the Consumer Advocate on legal fees associated with flood damage:

Specifically, the Consumer Advocate eliminated . . . (5) Legal fees of \$1,437.50. . . . The Consumer Advocate also maintains that it is not appropriate to include legal expense in the recovery of flood damage expenses ***The panel finds that it is proper to exclude the costs recommended by the Consumer Advocate because they are inappropriate and unreasonable.***⁶¹

Although the TRA disallowed the flood damage legal fees, it did increase rates for other legal fees. The TRA increased the annual legal fees recoverable in rates to \$12,695.⁶² The TRA also allowed 100% of the Company's request for regulatory expenses related to rate case (\$64,000 amortized over two years for \$32,000 per year) and "ongoing" regulatory expenses (\$19,937, which includes \$6,000 for "other misc filing requirements by TRA (Financial Security filings, Surcharge Tracking filings)").⁶³ Thus, the total amount in rates each year for legal and regulatory expenses is \$64,632.

- b. The recovery of the costs sought for recovery as "odor control" in the Settlement were already considered and decided by the TRA in Docket Nos. 08-00060, 09-00034, and 11-00198.

⁵⁹ *Rebuttal Testimony of James B. Ford, Secretary-Treasurer to Berry's Chapel Utility, Inc.*, Docket No. 11-00198, pg. 12 (May 22, 2012).

⁶⁰ *Id.* at 12.

⁶¹ *Final Order*, Docket No. 11-00198, pgs. 15-16 (Aug. 21, 2012) (emphasis added).

⁶² *Id.* at 8.

⁶³ *Final Order*, Docket No. 11-00198, pgs. 11-12 (Aug. 21, 2012) (showing authorized rate increase related to regulatory expense); *Rebuttal Testimony of James B. Ford, Secretary-Treasurer to Berry's Chapel Utility, Inc.*, Docket No. 11-00198, pg. 10 (May 22, 2012) (showing the breakdown of costs in regulatory expenses).

This Settlement allows the Company to keep \$40,074.92 in illegally obtained consumer monies under the false premise that these are unrecovered odor control costs. The \$40,074.92 consists of the following charges and amounts:

- ***Legal fees from 2009 and 2011-2012:*** \$11,068.25;
- ***Accounting (“consulting”) fees to James Ford through his consulting company, Visions, Inc.:*** \$3,490; and
- ***Waste Management fees from July 2009 to August 2010:*** \$25,516.67.⁶⁴

As previously mentioned, the operational process resulting in odor control costs is the same as that operational process that results in sludge removal expense. Meaning, Waste Management removes sludge, and that removal is what controls the odor. Sludge removal is a recurring cost already provided for in rates. This Settlement has an increased risk of double recovery because the same service provided from Waste Management service qualifies as both the recurring sludge removal and the sludge removal services called “odor control” allowed in Docket No. 08-00060.

The reason there was a separate odor control docket at all is because the TRA learned that the sludge removal process (and, therefore, the underlying expenses) used to develop the 2007 rate case was inadequate to control odor, but it did not learn that a problem existed until late in the rate case.⁶⁵ The TRA ordered the Staff to prepare a report on odor control measures, which was filed on August 31, 2007 in Docket No. 07-00007. A settlement for the rate increase was filed in Docket No. 07-00007 and approved by the TRA on September 10, 2007. At that time, the TRA instructed the Company to file a petition in a separate docket if it wanted to recover

⁶⁴ Exhibit 3, *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065, Schedule 1E and supporting documents (May 31, 2013).

⁶⁵ See Docket No. 07-00007.

odor elimination costs.⁶⁶ The Company filed a petition for odor control that resulted in the creation of Docket No. 08-00060.

The Consumer Advocate and Berry's Chapel entered into a settlement agreement for Docket No. 08-00060, which was approved by the TRA.⁶⁷ This settlement agreement allowed Berry's Chapel to recover \$30,973.02 in odor elimination costs through a 12-month volumetric surcharge.⁶⁸ At the end of the 12 months, Berry's Chapel was supposed to file reports indicating the revenue from the surcharge so any over or under collection of the \$30,973.02 could be calculated and refunded to the customers (if over collected) or recovered by the Company (if under collected). The surcharge began in July 2009.⁶⁹

Although it should have terminated the surcharge in June 2010, Berry's Chapel continued the surcharge for a total of three years until July 2012—resulting in consumers paying unauthorized, illegal charges for two whole years.⁷⁰ Berry's Chapel attempted to justify these illegal charges by stating that it did not believe it was a utility regulated by the TRA during some of this period and alleged that its costs exceeded the illegal proceeds.⁷¹ When it alleged its costs exceeded its revenue, however, Berry's Chapel conveniently excluded the revenue it received for sludge removal, legal, accounting, and regulatory expenses during that same period.⁷²

This Settlement treats the odor control costs as a rider. But nothing in any docket suggests the TRA or the Consumer Advocate as a party to the settlement intended or authorized for the odor control surcharge to be continuous and ongoing or otherwise to be treated as a rider.

⁶⁶ *Order Approving Settlement Agreement*, Docket No. 08-00060, pgs. 1-2 (Apr. 29, 2009).

⁶⁷ *Id.* at 3.

⁶⁸ *Id.* at 3 & Ex. 1 pgs. 4-6.

⁶⁹ Exhibit 3, *Testimony and Exhibits of Tiffany Underwood*, TRA, Docket No. 11-00065, Schedule 1C (May 31, 2013).

⁷⁰ See Exhibit 3, *Testimony and Exhibits of Tiffany Underwood*, TRA, Docket No. 11-00065, Schedule 1C (May 31, 2013).

⁷¹ See *Company's Update on Steps Taken to Address Certain Problems*, Docket No. 08-00060, pg. 2 (Nov. 4, 2011).

⁷² See *id.*

Any belief by the Company that it had the authorization to continue deferring odor control costs is simply not supported by any Order.

The settlement in Docket No. 08-00060 allowed the recovery of a maximum of \$30,973.02 in odor control costs and included unambiguous, specific instructions for the Company's attempt to recover any additional costs: "Prior to incurring any additional costs associated with odor control measures Lynwood will file a petition and obtain approval from the TRA."⁷³ The Company has not filed any petition in any docket requesting authorization from the TRA Directors for any additional costs for odor control, and it certainly did not do so *prior to incurring* any additional costs.

The Company has, however, sought and been awarded recovery of Waste Management expenses through the sludge removal expense account, as well as awarded the recovery of legal fees, accounting, and regulatory expenses in Docket Nos. 09-00034 and 11-00198. The amounts authorized in the rate cases are as follows:

- Docket No. 09-00034
 - **Sludge Removal Expense (including Waste Management costs):** \$34,617.⁷⁴ The TRA authorized the full amount of the Company's request.
 - **Annual Legal Expense:** \$8,899.⁷⁵ The TRA authorized the full amount of the Company's request.
 - **Accounting Fees (Bookkeeping & Other):** \$29,684 (excludes Tax Accounting expenses).⁷⁶ The TRA authorized the full amount of the Company's request.

⁷³ *Order Approving Settlement Agreement*, Docket No. 08-00060, Ex. 1, pg. 6 (Apr. 29, 2009).

⁷⁴ *Final Order*, Docket No. 09-00034, pg. 5 (Nov. 3, 2009).

⁷⁵ *Petition*, Docket No. 09-00034, Schedule E-3 to Ford's Testimony (Mar. 05, 2009); *Direct Testimony of Dave Peters*, Docket No. 09-00034, Schedule 2, line 20 (June 19, 2009). The Order in Docket No. 09-00034 only went into detail about the contested issues in the case. See *Final Order*, Docket No. 09-00034, pg. 4-13. Because the Company and the Consumer Advocate agreed on this amount, the Order for Docket No. 09-00034 does not discuss the legal expenses. See *id.*

⁷⁶ *Petition*, Docket No. 09-00034, Schedule E-3 to Ford's Testimony (Mar. 05, 2009); *Direct Testimony of Dave Peters*, Docket No. 09-00034, Schedule 2, lines 17 & 19 (June 19, 2009). The Order in Docket No. 09-00034 only went into detail about the contested issues in the case. See *Final Order*, Docket No. 09-00034, pg. 4-13. Because

- **Regulatory Expenses:** \$21,524 (excludes the amortization of the \$36,000 in rate case expense).⁷⁷ The TRA authorized the full amount of the Company's request.
- Docket No. 11-00198
 - **Sludge Removal Expense (including Waste Management costs):** \$39,691.⁷⁸
 - **Annual Legal Expense:** \$12,695.⁷⁹
 - **Accounting Fees (Bookkeeping & Other):** \$24,944 (excludes Tax Accounting expenses).⁸⁰
 - **Regulatory Expenses:** \$19,937 (excludes amortization of \$64,000 rate case expense). This amount includes \$6,000 in fees associated with filings for TRA Dockets: "other misc filing Requirements by TRA (Financial Security filings, Surcharge Tracking filings) \$6,000 along with other miscellaneous items."⁸¹ The TRA authorized the full amount of the Company's request. The TRA authorized the full amount of the Company's request.

Even the TRA Party Staff's witness, Ms. Underwood, shows that the Waste Management invoices from September 2010 to June 2011 were already addressed as part of Docket No. 11-00198.⁸² It is unclear why Ms. Underwood did not assume that the accounting and legal expenses had been also included or otherwise addressed in the rates under Docket No. 11-00198, particularly since the regulatory expenses includes \$6,000 for "misc filings" including "Surcharge Tracking filings."

Moreover, it is unclear why Ms. Underwood did not assume the Waste Management sludge removal, accounting, and legal expenses were already included in the rate case in Docket

the Company and the Consumer Advocate agreed on this amount, the Order for Docket No. 09-00034 does not discuss the accounting expenses. *See id.*

⁷⁷ The Final Order authorized an annual amount of \$33,524 in regulatory expense. *Final Order*, Docket No. 09-00034, pg. 7 (Nov. 3, 2009). This amount included \$12,000 in the amortization of rate case expense, *id.*; and \$4,153 in "Utility Regulatory Assessment Fee", *Petition*, Docket No. 09-00034, Schedule E-5 to Ford's Testimony (Mar. 05, 2009). The Consumer Advocate removed these amounts from the regulatory expense to show what annual amount remained for ongoing expenses.

⁷⁸ *Final Order*, Docket No. 11-00198, pg. 8 (Aug. 21, 2012).

⁷⁹ *Id.*

⁸⁰ *Id.* (showing \$16,274 for Accounting & Bookkeeping and \$8,670 for Accounting – Other).

⁸¹ *Rebuttal Testimony of James B. Ford, Secretary-Treasurer to Berry's Chapel Utility, Inc.*, Docket No. 11-00198, pg. 10 (May 22, 2012).

⁸² Exhibit 3, *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065, Schedule 1E, tickmark C/ (May 31, 2013).

No. 09-00034. The Company had the same opportunity to recover the same types of recurring sludge removal, accounting, and legal/regulatory expenses in Docket No. 09-00034 as it did in Docket No. 11-00198. Indeed, the Consumer Advocate even encouraged the Company to do so in its pre-filed direct testimony in Docket No. 09-00034, stating that the rate case is the appropriate instance to request necessary expenses to control odor and save in regulatory expenses from bringing unnecessary dockets.⁸³

3. The Tennessee law on the doctrines of *res judicata* and collateral estoppel clearly bars recovery of legal fees for flood damage and odor control costs in this Settlement.

As shown in the following sub-sections, both doctrines apply to both legal fees for flood damage and odor control costs and, therefore, the costs are barred from recovery in this Settlement.

a. *Res judicata* bars recovery of the legal fees for flood damage.

As mentioned in Part II.A.1, the legal fees allegedly for flood damage were considered and determined in the most recent rate case, Docket No. 11-00198. The application of the elements of *res judicata* to Docket No. 11-00198 is as follows:

- i. ***A court of competent jurisdiction rendered a prior judgment:*** The TRA, acting in its adjudicative function and as a court of competent jurisdiction, rendered a prior judgment regarding legal fees for flood damage in Docket No. 11-00198. The order agreed with the Consumer Advocate's proposed excluded costs, including legal fees, stating that "they are inappropriate and unreasonable."⁸⁴
- ii. ***The prior judgment was final and on the merits:*** The judgment in Docket No. 11-00198 was final and on the merits. No motions to reconsider or appeals were filed.
- iii. ***Both proceedings involved the same parties or their privies:*** Both the Consumer Advocate and Berry's Chapel were parties in Docket No. 11-00198 as well as in this Show Cause Docket. In Docket No. 11-00198, the TRA acted solely in its adjudicative role and not as a party, as is proper during cases involving rate increases.⁸⁵

⁸³ *Direct Testimony of Dave Peters*, Docket No. 09-00034, pgs. 5-6 (June 19, 2009).

⁸⁴ *Final Order*, Docket No. 11-0198, pg. 16 (Aug. 21, 2012).

⁸⁵ See discussion in Part II.A.

- iv. ***Both proceedings involved the same cause of action:*** As a threshold matter, this Docket has no claims or causes of action on the record, which the Consumer Advocate believes is an issue and one of the problems with this Settlement.⁸⁶ Nevertheless, even though the Company has made no formal petition or official claim for legal fees associated with the flood damage in this Docket outside of the Settlement, it is reasonable to interpret the Settlement as including an implicit claim by the Company for such legal fees since the Settlement includes \$19,781.25 in recovery of legal fees for flood damage.⁸⁷ Indeed, if the claim is not implicitly read into the Settlement, then parties could always circumvent *res judicata* by failing to make claims but including remedies for such silent claims in settlements. Thus, this Docket contains a claim for legal fees associated with flood damage. Docket No. 11-00198 certainly involved a claim for legal fees associated with flood damage (in addition to legal fees for other matters).

It should be pointed out that the only “flood expenses” invoices submitted for this Settlement are for legal fees.

It should also be noted that Berry’s Chapel submitted only \$1,437.50 in legal fees associated with flood damage for Docket No. 11-00198 but submitted over \$20,000 in legal invoices allegedly associated with flood damage for the Settlement in this Docket. Of the \$20,000 in legal invoices submitted for the Settlement, \$16,970 of the fees were incurred from ***July 2011 through June 2012***, and are therefore inarguably claims that existed at the time of the former action and, thus, certainly covered by *res judicata*.⁸⁸ Since the common practice at the TRA is for utilities to provide forecasts of total costs of legal fees, even when such fees have not yet been incurred, the \$2,811.25 in legal fees incurred after the hearing should have been asserted in Docket No. 11-00198.

⁸⁶ See *infra* Part I & Part II.A (discussing the procedural problems with this Docket); see also CAPD’s Response to Motion to Strike, Docket No. 11-00065 (July 15, 2013).

⁸⁷ Settlement Agreement, Docket No. 11-00065, ¶¶ 11-12 (May 31, 2013); see also Exhibit 3, Testimony and Exhibits of Tiffany Underwood, TRA, Docket No. 11-00065, Schedule 1F and underlying supporting invoices in App. D (May 31, 2013).

⁸⁸ See Exhibit 3, Testimony and Exhibits of Tiffany Underwood, TRA, Docket No. 11-00065, Schedule 1F and underlying supporting invoices in App. D (May 31, 2013). The service periods for each invoice are as follows: Invoice No. 738044 – July 2011; Invoice no. 775411 – Feb. 2012; Invoice No. 780543 – Mar. 2012; Invoice No. 785766 – Apr. 2012; Invoice No. 790885 – May 2012; Invoice No. 795169 – June 2012 (month of hearing); Invoice No. 801590 – June & July 2012; Invoice No. 807363 – Aug. 2012; Invoice No. 813125 – Sept. 2012; Invoice No. 835463 – Jan. 2013.

Thus, it is reasonable to state that the Company had existing claims in Docket No. 11-00198 for all the legal fees that it has submitted for recovery in this Settlement. If the Company failed to assert those claims, that has no effect on the application of *res judicata*. As previously mentioned, Tennessee “public policy dictates that litigation should be determined with reasonable expedition, and not protracted through inattention and lack of diligence on the part of litigants or their counsel.”⁸⁹

b. Collateral estoppel bars recovery of the legal fees for flood damage.

i. The issue to be precluded is identical to an issue decided in an earlier proceeding: The issue is whether legal fees associated with the flood damage are recoverable, and it was determined in a previous docket. The previous docket considering this exact issue was Docket No. 11-00198.⁹⁰ Because the Settlement in this Docket authorizes the recovery of the legal fees associated with the flood damage that were previously unauthorized, the Settlement necessarily includes the issue of whether legal fees associated with the flood damage are recoverable.

ii. The issue to be precluded was actually raised, litigated, and decided on the merits in the earlier proceeding: The issue was raised by Berry’s Chapel when it sought recovery for legal expenses associated with flood damage in Docket No. 11-00180, which was later consolidated with Docket No. 11-00198 (the rate case). Mr. Peters argued that several of the flood damage expenses were inappropriate for recovery in his pre-filed direct testimony, including the legal fees.⁹¹ Mr. Ford discussed Mr. Peters’ exclusion of flood damage expenses, including the legal fees in his pre-filed rebuttal.⁹² The TRA necessarily had to determine the issue of whether to include legal fees associated with flood damage in order to determine the amount of flood damage expenses to authorize. The TRA determined that the flood damage costs excluded by the Consumer Advocate, including the legal fees excluded, were “inappropriate and unreasonable” and were therefore not recoverable.⁹³

iii. The judgment in the earlier proceeding has become final: Docket No. 11-00198 is a final order. There are no pending appeals or motions to reconsider.

iv. The party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding: Berry’s Chapel was a party in Docket No. 11-00198.

⁸⁹ *Jordan v. Johns*, 79 S.W.2d 798, 802 (Tenn. 1935).

⁹⁰ *Final Order*, Docket No. 11-0198, pg. 16 (Aug. 21, 2012).

⁹¹ *See generally Direct Testimony of Dave Peters*, Docket No. 11-00198, pg. 19 (Apr. 23, 2012).

⁹² *Rebuttal Testimony of James B. Ford, Secretary-Treasurer to Berry’s Chapel Utility, Inc.*, Docket No. 11-00198, pg. 12 (May 22, 2012).

⁹³ *Final Order*, Docket No. 11-0198, pg. 16 (Aug. 21, 2012).

v. ***The party against whom collateral estoppel is asserted has a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded:*** Berry's Chapel had a full and fair opportunity in Docket No. 11-00198 to challenge the issue of whether legal fees associated with flood damage are recoverable.

Berry's Chapel litigated and lost the issue of whether legal fees associated with flood damage are recoverable. Collateral estoppel bars the Authority from allowing any of the flood damage legal fees submitted for recovery in this Settlement and going against the prior decision to disallow legal fees associated with flood damage as "inappropriate and unreasonable" in Docket No. 11-00198.

c. *Res judicata* bars recovery of the odor control costs.

Like the legal expenses associated with flood damage are barred by *res judicata*, the odor control costs included in this Settlement were covered under previous orders that bar their recovery in this method. As previously mentioned, it is important to keep in mind that the main process for controlling odor is the same as sludge removal for which the Company recovers in rates. The other expenses of accounting and legal fees are also covered in the rate cases as accounting and legal expenses or regulatory expense.

- i. ***A court of competent jurisdiction rendered a prior judgment:*** The TRA, acting in its adjudicative function and as a court of competent jurisdiction, rendered a prior judgment regarding odor control in Docket No. 08-00060, as well as judgments regarding sludge removal, accounting, legal, and regulatory expenses in both Docket Nos. 09-00034 and 11-00198. The rates from Docket No. 09-00034 were effective October 1, 2009, while the rates from Docket No. 11-00198 became effective for the bills in July 2012. Any sludge removal, accounting, or legal expenses associated with controlling odor incurred prior to the Docket No. 09-00034 were considered or should have been raised for consideration in Docket No. 08-00060. In Docket No. 08-00060, the order allowed the recovery of a maximum of \$30,973.02 in odor control costs. It did not contain any indication that the surcharge was a rider to be continued as long as the Company had costs. Instead, the order specifically states: "Prior to incurring any additional costs associated with odor control measures Lynwood will file a petition and obtain approval from the TRA."⁹⁴ The Company has not filed any petition in any docket requesting authorization from the TRA Directors for any

⁹⁴ *Order Approving Settlement Agreement*, Docket No. 08-00060, Ex. 1, pg. 6 (Apr. 29, 2009).

additional costs for odor control, and it certainly did not do so *prior to incurring* any additional costs. Moreover, this Settlement allows 100% of the costs submitted by Berry's Chapel, while the order in Docket No. 08-00060 allowed only prudently incurred costs, which resulted in excluding much of the expenses for services from affiliated parties. Additionally, the Authority decided what costs were reasonable, necessary, and prudent for controlling odor in Docket Nos. 08-00060 (considering prior to the Docket to determine recovery), 09-00034 (in the form of recovery of ongoing and future expenses for sludge removal and general legal, accounting and regulatory expenses), and 11-00198 (same form as in Docket No. 11-00198).

- ii. ***The prior judgment was final and on the merits:*** The judgments in Docket Nos. 08-00060, 09-00035, and 11-00198 are final and on the merits. No motions to reconsider or appeals were filed for any of the dockets.
- iii. ***Both proceedings involved the same parties or their privies:*** Both the Consumer Advocate and Berry's Chapel were parties in Docket Nos. 08-00060, 09-00035, and 11-00198, as well as in this Show Cause Docket. In Docket Nos. 08-00060, 09-00035, and 11-00198, the TRA acted solely in its adjudicative role and not as a party, as is proper during cases involving rate increases.⁹⁵
- iv. ***Both proceedings involved the same cause of action:*** As a threshold matter, this Docket has no claims or causes of action explicitly stated for the record, which the Consumer Advocate believes is an issue and one of the problems with this Settlement.⁹⁶ Nevertheless, even though the Company has made no formal petition or official claim for odor control costs in this Docket outside of the Settlement, the Settlement could be read to include an implicit claim by the Company for such fees since the Settlement includes \$40,074.92 in recovery of odor control costs.⁹⁷ Indeed, if the claim is not implicitly read into the Settlement, then parties could always circumvent *res judicata* by failing to make claims but including remedies for such silent claims in settlements. Thus, this Docket contains a claim for odor control costs consisting of charges for sludge removal, accounting, and legal fees. Docket Nos. 08-00060, 09-00034, and 11-00198 certainly involved claims for sludge removal, accounting, and legal expenses.

The Company has already made claims for these costs in Docket Nos. 08-00060, 09-00034, and/or 11-00198, or should have made claims in these dockets. Therefore, any claims to recover the costs for Waste Management, accounting, and legal bills in this Settlement violates the doctrine of *res judicata*.

⁹⁵ See discussion in Part II.A.

⁹⁶ See *infra* Part I (discussing the procedural problems with this Docket); see also CAPD's Response to Motion to Strike, Docket No. 11-00065 (July 15, 2013).

⁹⁷ Settlement Agreement, Docket No. 11-00065, ¶¶ 11-12 (May 31, 2013); see also Exhibit 3, Testimony and Exhibits of Tiffany Underwood, TRA, Docket No. 11-00065, Schedule 1E and underlying supporting invoices (May 31, 2013).

Based on the above discussion and the facts set forth in Part II.B.2, the Consumer Advocate has satisfied its burden of proof that the doctrine of *res judicata* bars the odor control costs and the legal fees associated with flood damage included in this Settlement because such costs were either considered, or existing and should have been considered, in Docket Nos. 08-00060, 09-00034, and 11-00198; and collateral estoppel bars the recovery of legal fees associated with flood damage because the panel in Docket No. 11-00198 necessarily decided this issue. Regardless if this panel agrees with the justness of the orders in the prior dockets, the doctrines of *res judicata* and collateral estoppel, as well as the underlying principles of the doctrines, compels the TRA to stand by those orders and deny settlements—like this one—that try to contravene or otherwise disturb those orders.

C. This Settlement provides for a rate increase that is prohibited because it violates the prohibition against retroactive ratemaking and the filed rate doctrine.

This Settlement permits a rate increase for historical rates and is prohibited because it violates prohibition against retroactive ratemaking and the filed rate doctrine.

1. This Settlement authorizes a rate increase.

There is no way to get around the fact that any reduction in the return of illegally obtained consumer monies is unquestionably a rate increase for consumers. For example, assume Berry's Chapel was authorized to charge Jane Doe \$70 by tariff in 2010 but actually charged \$100. Jane Doe paid \$30 in illegal charges. Instead of getting \$30 now in a customer refund, however, this Settlement would allow the Company to reduce that \$30. This Settlement permits a rate increase by the amount of the reduction to customer refunds since, instead of Jane Doe paying the then-authorized \$70 for service, she would have paid \$70 plus the amount the consumer refund is reduced. Meaning, if this Settlement reduces Jane Doe's refund by, say for

example \$10, Jane Doe's effective rate for 2010 after this Settlement would have been \$80, even though the tariff allowed Berry's Chapel to charge her only \$70 at the time of her service.

2. Tennessee law does not permit retroactive ratemaking or violations against the filed rate doctrine.

The TRA does not have statutory authority to approve rates that violate the prohibition against retroactive ratemaking or contradict the filed rate doctrine. The Tennessee Court of Appeals has stated the statutes do not confer authority to the TRA to permit retroactive ratemaking:

The Commission has no authority other than that which is specifically granted by statute. T.C.A. § 65-5-201 empowers the Commission to order rates which shall be followed "thereafter." The legislature has not conferred upon the PSC the power of retroactive ratemaking.⁹⁸

As for the filed rate doctrine, a "tariff" is the terms and conditions of service the TRA has approved for a public utility. In Tennessee, the provisions of a tariff are binding upon the utility and its customers and have the effect of law. *GBM Communications, Inc. v. United Mountain*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986) (cert. denied). Thus, the tariff is the law, and any charges that vary from the tariff is against the law.

The statutory interpretation used by the Tennessee Court of Appeals for prohibiting retroactive ratemaking applies to the filed rate doctrine. Under Tenn. Code Ann. § 65-5-103, the TRA only has authority to change "existing" rates—not future or historical rates. Additionally, while the Tennessee Court of Appeals has not considered the filed rate doctrine in the context of utility ratemaking, it has recently considered it in the regulated services arena:

Under the filed rate doctrine, a regulated entity is forbidden "to charge rates for its services other than those [rates] properly filed with the appropriate federal regulatory authority." This "century-old" doctrine originated in decisions of the United States Supreme Court "Although the doctrine has been applied primarily in the context of federal regulation, it applies equally where state law

⁹⁸ *Security Alarms & Servs., Inc. v. Tennessee Public Service Comm'n*, 1984 Tenn. App. LEXIS 3426, at *1, *7 (Sept. 13, 1984).

creates a state agency and a statutory scheme pursuant to which the state agency determines reasonable rates.”⁹⁹

Thus, the statutes of Tennessee do not permit this Settlement.

3. To authorize a rate increase by reducing consumer refunds of unauthorized charges violates the filed rate doctrine and the prohibition against retroactive ratemaking.

Allowing the Company to recover any expenses of sludge removal, accounting, and legal fees that allegedly exceeded the applicable authorized rates in tariffs filed in accordance with final orders in Docket Nos. 07-00007,¹⁰⁰ 08-00060,¹⁰¹ 09-00034,¹⁰² and 11-00198¹⁰³ would violate the prohibition against retroactive ratemaking. The doctrine of retroactive ratemaking precludes either the customer or utility from using hindsight review to “true up” rates. “The doctrine of retroactive ratemaking precludes a company from collecting revenues to compensate for past under-recoveries of expenses incurred in providing service in past periods”¹⁰⁴ Just as the TRA regrettably cannot issue refunds to customers when utilities’ earnings exceed their authorized rate of return, the TRA cannot increase rates to customers for a utility’s past losses.

Similarly, reduction to illegally obtained consumer monies in this Settlement violates the filed rate doctrine. The TRA approved a rate in Docket Nos. 07-00007, 09-00034, and 11-00198 and a limited and temporary surcharge in Docket No. 08-00060. The reduction of any consumer refunds would necessarily change the rates authorized in prior dockets and, therefore, violates the filed rate doctrine.

⁹⁹ *Blackburn & McCune, PLLC v. Pre-Paid Legal Services, Inc.*, 398 S.W.3d 630, 662 (2010) (internal citations omitted).

¹⁰⁰ *Revised Tariff of Lynwood Utility Corporation*, Docket No. 07-00007 (Sept. 10, 2007).

¹⁰¹ *Revised Page No. 9 of Lynwood’s Tariff*, Docket No. 08-00060 (Mar. 31, 2009) (effective for 1 year from start date).

¹⁰² *Revised Tariff*, Docket No. 09-00034 (filed Sept. 29, 2009) (effective Oct. 1, 2009).

¹⁰³ *Updated Tariff*, Docket No. 11-00198 (filed June 11, 2012) (effective for July 2012 bills).

¹⁰⁴ *In the Matter of Application by Water Resources, Inc. for a Certificate of Convenience and Necessity for Water Utility Service in River Walk Subdivision, in Mecklenburg County, North Carolina and for Approval of Rates*, 2013 WL 3776459 (N.C.U.C., July 15, 2013).

The Consumer Advocate recommends the TRA reject this Settlement because this Settlement would violate the prohibition against retroactive ratemaking and the filed rate doctrine, and the TRA does not have statutory authority to authorize rates retroactively or any rates other than existing rates.

D. Approval of the rate increase in this Settlement abandons fundamental ratemaking principles, which require critically analyzing costs before authorizing recovery and violates requisite due process to ensure “just and reasonable” rates.

As the TRA Party Staff states, these costs were not analyzed under the “rate making mindset.”¹⁰⁵ The TRA Party Staff defines “rate making mindset” as requiring “an analysis of all revenues, expenses, and rate base to determine whether an adjustment to base rates was necessary.”¹⁰⁶ When asked how Ms. Underwood’s analysis and testimony would have differed if she had used a “rate making mindset,” the TRA Party Staff refused to answer claiming that it is “irrelevant.”¹⁰⁷ In the only discovery issued by any party, the TRA Party Staff refused to answer how the analysis would be different utilizing a ratemaking mindset, it can be reasonably interpreted from the TRA Party Staff’s definition of a “rate making mindset” that it believes a full rate case is necessary for costs to be analyzed under a just and reasonable standard. It appears that the disagreement here is what kind of analysis, discovery, and review should be conducted for costs recovered from customers.

1. Tennessee law requires costs be reasonable and prudent costs necessary to provide utility service prior to recovery.

The Settlement and the testimony supporting it repeatedly conclude without support or investigation¹⁰⁸ that the customers benefitted from the costs allegedly incurred by the

¹⁰⁵ *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065, pg. 3, lines 9-10 (May 31, 2013).

¹⁰⁶ Exhibit 4, *Party Staff’s Repsonses [sic] to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065, pg. 8, DR # 10 (July 19, 2013).

¹⁰⁷ *Id.* DR# 11.

¹⁰⁸ The Consumer Advocate asked the TRA Party Staff for information about which customers were contacted to determine whether the odor problem still existed; the TRA Party Staff refused to answer and said that any such

Company.¹⁰⁹ But merely “benefiting” the customers (either through the utility stating the customers benefitted or the customers actually benefitting from the cost) is not the standard applied to determine whether costs should be recovered under Tennessee law.

Tennessee courts have interpreted that rates are “just and reasonable” in accordance with Tenn. Code Ann. § 65-5-103 when the rates include a rate of return and only those operating expenses that are reasonable and prudent costs necessary to provide utility service.¹¹⁰ Simply because costs are authorized outside of a rate case does not mean a utility can recover costs that are unreasonable, imprudent, or otherwise unnecessary to provide utility service.¹¹¹ Indeed, if costs outweigh the correlating benefits of a process, certainly the reasonableness, prudence and necessity of these costs would be questioned and analyzed before authorization for recovery from consumers. Encouraging efficient management through denial of costs resulting from inefficiencies is not only authorized, but it is specifically stated as a factor that *shall* be considered when the TRA determines rates.¹¹² The consumers are helpless to protect themselves against unnecessary, unreasonable, or imprudent costs and rely on the TRA to act as their gatekeeper when determining management efficiency as it affects costs sought for recovery.

answer is “irrelevant.” Exhibit 4, *Party Staff’s Responses [sic] to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065, pg. 8, DR # 10 (July 19, 2013).

¹⁰⁹ See, e.g., *Testimony and Exhibits of Tiffany Underwood, TRA*, Docket No. 11-00065, pg. 3, line 4 (May 31, 2013); *Settlement Agreement*, Docket No. 11-00065, ¶13 (May 31, 2013).

¹¹⁰ *Tennessee American Water Co. v. Tennessee Regulatory Authority*, 2011 WL 334678, *1, *26. (“[T]he United States Supreme Court held that a public utility cannot include negligent or wasteful losses among its operating charges in a rate proceeding and only property and necessary expenses should be recovered.”).

¹¹¹ See *Consumer Advocate & Protection Division of the Office of the Attorney General of Tennessee v. Tennessee Regulatory Authority*, 2012 WL 1964593. *1, *20 (Tenn. Ct. App., 2012) (“The statutory grant of authority suggests that, while the TRA’s plenary power to supervise and regulate utilities *includes* the setting of base rates, its power is not *limited* to setting base rates. The statute indicates that the TRA has authority over all rates charged to customers, and that the TRA must be able to take any actions necessary in those proceedings to effectuate its decisions.”).

¹¹² Tenn. Code Ann. § 65-5-103(a) (“In determining whether such increase, change or alteration is just and reasonable, the authority *shall* take into account the safety, adequacy and *efficiency or lack thereof* of the service or services furnished by the public utility.”) (emphasis added).

2. The costs recovered in this Settlement have not been reviewed to determine whether they are reasonable and prudent costs necessary to provide utility service.

Neither the Settlement nor its supporting testimony shows the performance of a review of the prudence, reasonableness, and necessity of the costs.

The only time reasonableness is mentioned at all is in the TRA Party Staff's discovery responses with respect to the law firm's usage of a 50/50 allocation of attorney's fees for Docket No. 11-00198 that are allegedly related to flood damage, but this is without support.¹¹³ The TRA Party Staff states that it determined the reasonableness of the 50/50 allocation of legal bills by reviewing their narrative description and a sample of the daily timesheets. How the sample was selected, however, is not discussed anywhere. It would be one thing if the TRA Party Staff randomly selected a statistically valid number of days to review the daily timesheet and obtained a certain percentage of the days and amounts to ensure the sample reviewed was representative of all the fees. It would be quite another if the law firm just provided whatever timesheets it wanted the TRA Party Staff to see.

- a. The legal invoices have nothing to do with flood damage repairs.

The TRA Party Staff's analysis appears to ignore the invoices themselves, which show that the Company's attorney's time was spent on recovering legal fees and had nothing to do with flood damage. Some examples are provided in Exhibit 5 and discussed in the following:¹¹⁴

- **Invoice No. 780543:** For March 1, 2012, 1.25 hours were billed for attending the pre-hearing conference, which were for both the flood damage docket and the rate case. The entry for flood damage legal expenses also includes charges for reviewing TRA data requests issued in the show cause docket and discussions of responses. The show cause docket data requests did not request information on flood damages. In a separate entry for the same day, 1 hour was billed for the same conference and discussions following for the "rate case." The status conference itself lasted 30 minutes. Thus, a conservative reduction is necessary from 1.25 hours to 0.50 attributable to flood damage expenses.

¹¹³ Exhibit 4, *Party Staff's Responses* [sic] to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff, Docket No. 11-00065, pg. 8, DR # 2 (July 19, 2013).

¹¹⁴ This list of examples is not intended to be an exhaustive list of all charges unrelated to flood damage.

Ms. Underwood's schedules indicate a removal of only .25 hour as "should have been allocated to regulatory." The time excluded is not attributed to any specific invoice line item.

- **Invoice No. 785766:** Invoice No. 785766 covers the period of legal services rendered to Berry's Chapel in the month of April, 2012, and billing \$4,357.50.
 - For April 4, 2012, 2.5 hours was billed for meeting with TRA Staff to discuss various proceedings at the TRA and follow-up with TRA attorney on motion to hold in abeyance to file with the Tennessee Court of Appeals.¹¹⁵
 - For April 11, 2012, 1.25 hours billed for discussion with Consumer Advocate about discovery from the rate case (no discovery was filed in the flood damage docket) and discussion with Chairman Hill about the regulation of waste water utilities and impact of new legislation.

Ms. Underwood's schedules indicate a removal of only 2 hours as "should have been allocated to regulatory." The time excluded is not attributed to any specific invoice line item.

- **Invoice No. 790885:** Invoice No. 790885 covers the period of legal services rendered to Berry's Chapel in the month of May, 2012, and billing \$7,366.25. Due to a previously scheduled trip, the Company's accounting witness was not available to testify at the rate case hearing in June. A hearing to allow Mr. Ford's testimony to be heard and subject to cross-examination was conducted on May 31, 2012.
 - The invoice includes 3.5 hours of charges on May 8 and 21-22, 2012, for discussions of rebuttal testimony filed in the rate case.
 - Billed 1.5 hours to attending meeting with the Consumer Advocate and TRA Staff to discuss the rate case, show cause and flood issues on May 9, 2012.
 - 0.75 hours for conference calls with TRA Show Cause Staff on rate issues, call with Mr. Ford about meeting with TRA Show Cause Staff and to go over accounting issues; read Hearing Officer's Notice of Hearing.
 - Billed 1.25 hours for the preparation of testimony of Jim Ford on May 30, 2012.
 - Billed 3.0 hours for the rate case hearing on May 31, 2012. As discussed earlier, the hearing was focused on the rate case.

Ms. Underwood's schedules indicate a removal of only .5 hour as "should have been allocated to regulatory." The time excluded is not attributed to any specific invoice line item.

- **Invoice No. 795169:** Invoice No. 795169 covers the period of legal services rendered to Berry's Chapel in the month of June, 2012, and billing \$4,565.00. Billing entries for June

¹¹⁵ The entry references "a motion" to be filed in "court." A joint motion was filed by the TRA and Berry's Chapel with the Court of Appeals on April 10, 2012.

1, 4-8, and the 11-12 are all related to the rate case hearing and various issues unrelated to flood damage as well as discussion with TRA Staff. The claimed flood damage bills also include discussions with TRA Staff for Berry's Chapel to hire Terry Buckner or Darlene Stanley as consultants. Again, none of these issues are related to flood damage.

In instances in which the description of legal services for Invoice No. 795169 included a reference to flood damage, there is no segregation from rate case expenses or unrelated matters. Nor can faith be placed in billing description referencing "flood damage" as reflecting an actual legal cost attributed to the flood of May, 2010. Invoice No. 795169 includes 1.5 hours billed for the June 7 rate case hearing, although the billing description designates the rate case hearing on that date as the hearing on "flood issues." The rate case hearing on June 7, 2012 lasted two hours.

When asked in a discovery request what specific time was reallocated to regulatory, the TRA Party Staff could not provide a specific answer but merely repeated the notes on Ms. Underwood's schedules.¹¹⁶ Given these troublesome examples and the TRA Party Staff response, it is unclear whether the TRA Party Staff investigated what costs were removed and/or reviewed the remaining charges as to whether they had anything to do with flood damage.

Also, it should be noted that any legal fees associated with the show cause docket should not be recovered from ratepayers under any type of expense—flood damage, rate case, or regulatory expense. The show cause docket is a direct result of Berry's Chapel's violation of the law. Violating the law is not necessary to provide utility service. To burden ratepayers with legal bills to defend such illegal activity is extremely unfair and inappropriate.

b. The allocations of attorney time between the rate case and the flood damage are not supported by the evidence.

In addition to ignoring the subject matter of the charges, the TRA Party Staff's analysis appears to ignore the fact that there is other strong evidence that undermines the reasonableness of a 50/50 allocation.¹¹⁷ One fact that appears ignored in determining the reasonableness of the 50/50 allocation is a review of the actual transcript of the proceedings. For example, the

¹¹⁶ See Exhibit 4, *Party Staff's Responses* [sic] to *First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065, DR # 3 (July 19, 2013).

¹¹⁷ This paragraph includes a few of the examples of evidence that suggests the 50/50 allocation is unreasonable, and it is not intended to be an exhaustive list.

Company seeks recovery in this Settlement for the five hours the law firm allocated as flood damage for the hearing;¹¹⁸ but the entire hearing over two days was a total of five hours.¹¹⁹ Moreover, of the 208 pages of the transcript related to testimony, only 47 pages even mention or otherwise reference the flood damage (22.5%).¹²⁰ Thus, instead of the 50/50 allocation purportedly used to allocate time between the rate case and the flood damage, evidence suggests that 100% of the hearing time was charged to flood damage even though the flood was referenced less than 25% of the time of the hearing. These facts make the 50/50 allocation appear inconsistently and not reasonable as applied and indicate that it does not really have a basis in the actual division of time. More importantly, appellate courts that review legal fees for recovery in other matters have held that only actual time spent can be recovered.¹²¹ Therefore, the actual time spent is the appropriate standard for recovering legal fees.

3. The recovery of costs in this Settlement creates a high risk Berry's Chapel will recover the same cost twice.

Additionally, neither party has provided any evidence to support Ms. Underwood's testimony that panels in previous dockets have not reviewed odor control costs and legal fees allegedly related to flood damage, and these costs could therefore be recovered twice if authorized in this Settlement.¹²² For example, Ms. Underwood's testimony does not show she has verified that the legal invoices submitted for recovery in this Settlement have not been already recovered under the \$65,000 rate case expense authorized in Docket No. 11-00198

¹¹⁸ *Supplementary Exhibit 1 To The Testimony Of Tiffany Underwood*, Docket No. 11-00198, pg. 3 (July 15, 2013) (Invoice No. 790885, billing entry of 3 hours for May 31, 2012); *Testimony and Exhibits of Tiffany Underwood*, TRA, Docket No. 11-00065, Tab D, pg. 37 (May 31, 2013) (Invoice No. 795169, billing entry of 1.5 hours for June 7, 2012).

¹¹⁹ *Transcript*, Docket No. 11-00198, pgs. 5 (10:04 a.m. start time) and 13 (12:52 p.m. end time) (May 31, 2012); *Transcript*, Docket No. 11-00198, pgs. 4 (9:00 a.m. start time) and 84 (11:09 a.m. end time) (June 7, 2012).

¹²⁰ A total of 47-pages of transcript at least mention the flood. *Transcript*, Docket No. 11-00198, pgs. 10-15, 97-108, 120, 126, 130 (May 31, 2012) (19 pages); *Transcript*, Docket No. 11-00198, pgs. 12-17, 20, 22-23, 25-26, 28-33, 37, 69-72, 74, 76-80, 83 (9:00 a.m. start time) and 84 (11:09 a.m. end time) (June 7, 2012) (28 pages).

¹²¹ See, e.g., *Binta v. Gordon*, 710 F.3d 608, 627-28 (6th Cir. 2013).

¹²² This paragraph includes a few of the examples of evidence of the high risk for double recovery, and it is not intended to be an exhaustive list.

because the Company only produced \$25,000 in legal invoices to support its request for rate case expense.¹²³ Another example is the potential for double recovery in odor control costs and sludge removal expenses. Ms. Underwood's testimony has provided no calculations or supporting evidence to show she reviewed the underlying invoices recovered as sludge removal expenses to verify they were not also submitted for recovery as odor control costs in this Settlement. Thus, contentions that the costs submitted for recovery in this Settlement have not been considered or otherwise recovered in prior dockets is simply unsupported by the record in this Docket or any prior dockets.

Tennessee law states the "burden of proof to show that the increase, change, or alteration is just and reasonable shall be upon the public utility"¹²⁴ In this case, neither Berry's Chapel, nor the TRA Party Staff, have met the burden of proof necessary that the reduction of wrongfully obtained consumer monies, thereby increasing historical rates, is "just and reasonable" under the ratemaking principles of analyzing costs and determining whether costs recovered are reasonable and prudent costs necessary to provide utility service.

E. The Consumer Advocate recommends the Directors deny this Settlement because it forces consumers to abide by the settlement in Docket No. 08-00060 while allowing Berry's Chapel to breach it, which is unfair and can deter parties from future settlements.

It should be noted that collateral estoppel does not apply to legal issues resolved through settlements since the issues are not fully litigated. Nonetheless, there are many reasons to enforce settlements against settling parties, including but not limited to encouraging future settlements. The only source of authority for the odor control surcharge is the final order approving the settlement agreement in Docket No. 08-00060. There are no rules or other orders

¹²³ Exhibit 4, *Discovery Response of the CAD*, Docket No. 11-00198, pages 218-300 (Mar. 26, 2012) (showing the invoices provided total \$27,608.84). These invoices also show the Company's attempts to recover almost \$2000 in legal fees for legal expenses related to the show cause docket (Invoice No. 738046 for BABC). The legal expenses for show cause dockets are certainly not rate case expenses, nor should they be authorized for recovery when the show cause docket is a direct result of the utility's illegal activity (like this one).

¹²⁴ Tenn. Code Ann. § 65-5-103(a).

authorizing the surcharge or the continuation of the surcharge beyond what is in the order in Docket No. 08-00060. Thus, Berry's Chapel will only be compelled to follow the surcharge it agreed to if the TRA enforces the settlement agreement it approved and incorporated in its Final Order in Docket No. 08-00060.

The parties both made promises and undertook obligations in the settlement permitting recovery for odor control costs. The consumers agreed to pay \$30,973.02 for odor control costs in a surcharge over the period of a year, after which an accounting was to be provided to determine if the Company collected more or less than \$30,973.02. Berry's Chapel agreed to receive \$30,973.02 for odor control costs and to stop the surcharge after a year and submit an accounting. The Company also agreed "[p]rior to incurring any additional costs associated with odor control measures Lynwood will file a petition and obtain approval from the TRA."¹²⁵

The consumers upheld their end of the agreement. Berry's Chapel did not.

The Settlement Parties have not pointed—and cannot point—to any authorization by the TRA that allowed Berry's Chapel to continue the surcharge and continue applying odor control expenses against such surcharge. Nor can the Settlement Parties point to any authorization in any order or rule that the Company was permitted to treat this surcharge as a rider that states if the Company spends more than its authorized expenses in sludge removal, it can recuperate the additional expenses through the odor control surcharge. Indeed, the only indefinitely continuous riders the TRA has authorized that allow for recovery of all expenses incurred have been by rulemaking. For example, gas utilities have a continuous purchased gas rider indefinitely that was established by a rule allowing all affected parties due process through the rulemaking process.¹²⁶

¹²⁵ *Order Approving Settlement Agreement*, Docket No. 08-00060, pg. 6 (Apr. 29, 2009).

¹²⁶ Tenn. Regulatory Authority, Ch.1220-4-7.

Other riders are not indefinite in time or amount, but rather they are surcharges for a fixed period of time for recovery of a fixed amount of costs. For example, Kingsport Power recently was approved for a surcharge called a rider, but it is not an indefinite rider that permits the company to recover all expenses.¹²⁷ Rather, like the surcharge in Docket No. 08-00060, Kingsport Power submitted the costs it was seeking for recovery and the order approves only a limited amount of costs it can recover through the surcharge.¹²⁸ In all the riders fixed in time and amount, the TRA has issued a tariff reflecting the surcharge amount and the period of time it is allowed. The rider tariff is like any other tariff in that it is binding and has the effect of law,¹²⁹ and unless it is adjusted or otherwise extended through a ratemaking proceeding (rate case or otherwise), the surcharge expires when stated on the tariff.

Since there is nothing in existence at this time authorizing the surcharge, the only authorization that would permit Berry's Chapel to have charged the surcharge is this Settlement, if approved, which would be authorized over four years after the original odor control settlement agreement in Docket No. 08-00060 was approved and over one year after the utility finally stopped charging the illegal surcharge discovered when the Consumer Advocate and others insisted on a review by the Company to identify any and all wrongfully collected monies from consumers. Moreover, this Settlement would be authorized over the objections of one of the original parties in the Docket No. 08-00060 settlement that was breached.

The approval of this Settlement would have the effect of penalizing the party who abided by the settlement, which was approved in Docket No. 08-00060 and rewards the party who breached that agreement and unlawfully defied the TRA order. If the TRA does not enforce the

¹²⁷ See *In re: Petition of Kingsport Power Company D/B/A AEP Appalachian Power to Implement a Storm Damage Rider Tariff for Recovery of Storm Costs*, Docket No. 12-00051 (Nov. 28, 2012).

¹²⁸ *Id.*

¹²⁹ See *GBM Communications, Inc. v. United Mountain*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986 (cert. denied) (declaring tariffs are binding as law).

settlement agreements it approves, and allows parties to breach them, common sense indicates parties will avoid settlement since such agreements are unreliable and generally unenforceable if the other party breaches. The TRA needs to enforce the settlement in Docket No. 08-00060 and the Final Order incorporating it by reference to ensure other utilities comply with settlements, especially rider settlements, and do not keep collections that exceed authorized amounts.

Settlement agreements should be enforced as approved to help ensure parties feel their negotiated positions are protected. If parties start to distrust the enforceability of settlements, fewer settlements will occur. In the interest of judicial economy, lawful settlements should be encouraged. And encouragement to settle can only be accomplished if settling parties are certain the settlement agreement is enforceable.

F. This Settlement is against public policy and not in the best interest of consumers and, therefore, the Consumer Advocate recommends the Directors deny this Settlement.

Because this Settlement allows a utility to benefit from repeatedly violating the law, the implications of this Settlement are far-reaching and attempt to change the fundamental ratemaking principles protecting consumers.

First, Berry's Chapel charged customers illegally for *two years*. Under this Settlement, instead of getting full refunds of unauthorized and wrongfully collected monies with interest, the customers would only receive about half of what they paid in illegal charges (if the Company's calculations are correct). And the Company would actually be able to keep illegally charged rates. The Company would not only have zero penalties for its illegal behavior, it would actually benefit from violating the law more than if it had complied with the law.

Second, this Settlement allows a utility 100% of its request for costs without proof and without analysis to determine that such costs were necessary, reasonable, and prudent and not already recovered. Utilities are not entitled to recover 100% of their costs. This Settlement

sends the message that utilities can spend whatever they want and later ask—and receive—100% of their costs merely by alleging the customer “benefitted” from the cost. This approach can only lead to a path of encouraging inefficient utility management and higher rates for consumers. Moreover, it squarely contradicts the statutes intended to protect consumers.

Third, even though consumers are the ones out of their money, they are not represented in this Settlement. The consumers have no ability to control or otherwise influence utility management. Their only voice is through the TRA proceedings affording them due process to be heard. Taking away consumer monies without even showing that consumers have been notified unfairly tilts the scales of justice to favor utilities and necessarily violates consumers’ due process to protect their property.

Fourth, Berry’s Chapel has had two rate cases since it first illegally charged customers by extending the odor control surcharge without approval and both of those rate cases covered either the same exact costs or the same types of costs the Company seeks recovery for in this Settlement. To allow these expenses now undermines the ratemaking process and hinders the judicial economy that rate cases cover all costs and the resulting rates are binding on both utilities and consumers.

Fifth, this Settlement encourages utilities to file dockets requesting recovery of legal fees incurred to collect previously disallowed legal fees. The only “flood expenses” invoices submitted for this Settlement are for legal fees, and while legal fees associated with the flood damage were disallowed by the TRA in Docket No. 11-00198, the TRA did authorize 100% of the Company’s requested rate case expense despite its lack of supporting invoices. By attempting to recover legal fees associated with a previous docket, it appears the Company is creating an approach of never-ending dockets to collect legal fees here and portraying them as

“flood expenses.” Moreover, this Settlement clearly opens the door permitting even more legal fees associated with flood damage in future dockets: “Nothing in this agreement precludes [Berry’s Chapel] from seeking recovery of additional flood-related expenses, including legal expenses, at a later date.”¹³⁰ Thus, it is foreseeable that the Company will continue this same inappropriate path and attempt to recover even more legal fees in Docket No. 13-00052, even though the Company has been done with repairs after the flood for several years. The approach of creating dockets to recover legal fees incurred in prior dockets or, worse, legal fees incurred to collect legal fees disallowed in prior dockets should not be encouraged and should be stopped by disallowing such recovery.

Lastly, this Settlement raises the lingering critical policy question: *Why would a utility go through a rate case if it could just charge illegal rates, keep the proceeds, and receive no penalties?*

III. APPROVAL OF THIS SETTLEMENT DOES NOT TERMINATE OR OTHERWISE DISPOSE OF THE ATTORNEY GENERAL’S CLAIMS.

This Settlement asserts it can settle all “outstanding issues in this show cause proceeding.”¹³¹ As mentioned previously in Part II, the Settlement is clearly outside the scope of the original issues set forth by the Directors in the *Final Order* in Docket No. 11-00005. So, it is unclear what all the issues are that the Settlement Parties believe will be settled. Nevertheless, some of the issues the Settlement Parties appear to intend to settle are the consumer refunds and reduction of those refunds by allowing cost recovery to Berry’s Chapel. Meaning, a reasonable interpretation of the Settlement is the Settlement Parties’ belief that, if approved, it will resolve any claims for the consumer refunds and the Company will not be bound to return any additional illegally received funds to the consumers beyond what is stated in this insufficient Settlement.

¹³⁰ *Settlement Agreement*, Docket No. 11-00065, ¶ 24 (May 31, 2013).

¹³¹ *Settlement Agreement*, Docket No. 11-00065, pg. 1 (May 31, 2013).

As the Consumer Advocate shows in the following discussion, this Settlement *cannot* resolve the Attorney General's claims since the Consumer Advocate is not a settling party.¹³²

A. Neither the TRA Party Staff nor Berry's Chapel are representing the consumers and, therefore, consumers are a non-settling party in this Docket.

This Settlement is most disturbing because no one is representing consumers. When asked which settling party is representing consumers and/or other ratepayers, the TRA Party Staff refused to answer and asserted it as protected information as part of its "trial strategy."¹³³ Of course, this answer can only leave the troubling question of what "trial strategy" is being used when a party is attempting to give away another party's rights without their consent and, as shown below, without their representation. Nevertheless, since the TRA Party Staff refused to answer who is representing consumers, the Consumer Advocate has provided an analysis that leads to the conclusion that neither the TRA Party Staff nor Berry's Chapel actually allege they can represent the consumers.

The TRA Party Staff necessarily cannot represent consumers in this Settlement for several reasons. First, the TRA Party Staff is on the record as representing the agency.¹³⁴ Additionally, since there are no statutes, rules, or other orders conferring authority to the TRA Party Staff to represent any other person or entity other than the agency, the presumption is the TRA Party Staff is representing the agency only. Second, the agency itself cannot represent consumers in contested cases that increase or otherwise change rates because it does not have the statutory authority to do so. Third, since an agency cannot appeal its own decisions, any attempt by the agency to represent the consumers would violate the judicial review necessary under

¹³² The Consumer Advocate was not granted intervention until June 17, 2013. *Order Setting Procedural Schedule to Completion*, Docket No. 11-00065, pg. 3 (July 1, 2013).

¹³³ Exhibit 4, *Party Staff's Repsonses* [sic] to *First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065, DR # 8 (July 19, 2013).

¹³⁴ See, e.g., *Order Setting Procedural Schedule to Completion*, Docket No. 11-00065, pg. 3 (July 1, 2013).

Tennessee's Administrative Procedures Act.¹³⁵ For these reasons, although the consumers and the TRA may have common interests or overlapping claims at times,¹³⁶ the TRA cannot represent consumers in this Settlement.

Berry's Chapel's attorney cannot represent the consumers because under Tennessee's Rules of Professional Conduct as well as notions of fundamental fairness, Berry's Chapel's interests are adverse to the consumers' interests.¹³⁷

Based on the above legal analysis, it is reasonable to conclude that no entity is representing consumers in this Settlement.

B. The Consumer Advocate represents the consumers' interests, rights, and claims in this Docket, and it has claims that survive even if this Settlement is approved.

It cannot be disputed that the Attorney General, through the Consumer Advocate, not only has the authority but it has the statutory duty to represent the interests of Tennessee consumers.¹³⁸ In accordance with its statutory duty and authority, the Consumer Advocate is representing the consumers' interests in this Docket.

The consumers' interests in this Docket are their rights to the money they paid pursuant to Berry's Chapel's illegal charges. The Consumer Advocate is seeking remedies of restitution in the form of full refunds of all illegal charges, plus interest at the prime rate set by Tennessee's Commissioner of Financial Institutions, and respectfully requesting the equitable remedy of

¹³⁵ Tenn. Code Ann. § 4-5-322. It should be noted that there is authority in addition to this statute that permits the Attorney General to represent the public, including but not limited to any public entities like schools, that are not mentioned here for judicial economy purposes. The Attorney General does not waive its authority under any laws not mentioned here.

¹³⁶ This case is not necessarily one of the instances when the TRA and the consumers have common interests or overlapping claims. For example, when requesting any communication to consumers inquiring if they have issues with receiving less than full refunds, the TRA Party Staff refused to answer, asserting that the answer to such request was "irrelevant." Exhibit 4, *Party Staff's Responses [sic] to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065, DR # 6 (July 19, 2013). It is fair to say an advocate of the consumers would not find the consumers' concerns about refunds irrelevant. See Scope of Representation and Allocation of Authority Between Client and Lawyer, Rule 8, RPC 1.2.

¹³⁷ Conflict of Interest: Current Clients, Rule 8, RPC 1.7(a)(1).

¹³⁸ Tenn. Code Ann. § 65-4-118 (b).

statutory penalties against the utility to (1) promote justice for its multiple violations and complete disregard for the law, and (2) deter future illegal behavior. Moreover, the consumers' interests in this Docket (like in any other ratemaking docket) are that they receive just and reasonable rates after adequate notice and the opportunity for a full evidentiary hearing for any rate changes, including but not limited to the form of a reduction of the refunds for cost recovery, as set forth in this Settlement.¹³⁹

The consumers' claims are not settled in this Settlement; and, as a non-party, the Settlement is not enforceable against the consumers. Therefore, the consumers' claims remain even if this Settlement is approved.

C. The law does not allow settlements that dispose of claims or impose obligations onto non-settling parties.

A party cannot give away something that is not his. Meaning, a settling party cannot settle any claims that are not his claims in the first place, and a party cannot impose obligations on a non-settling party.

The Attorney General has issued an opinion on this very issue. In Opinion No. 11-06,¹⁴⁰ the Attorney General stated:

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.***

¹³⁹ This is a statutory process for rate increases. See, e.g., *In re: Petition of Kingsport Power Company D/B/A AEP Appalachian Power to Implement a Storm Damage Rider Tariff for Recovery of Storm Costs*, Docket No. 12-00051 (Nov. 28, 2012).

¹⁴⁰ Tenn. Op. Atty. Gen. No. 11-06 (Tenn. Ag.T.), 2011 WL 999217 (Jan. 2011) (emphasis added).

In its analysis, the Opinion relied on a U.S. Supreme Court case discussing non-settling parties' rights in the context of civil litigation:

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.¹⁴¹

Thus, settlements are only enforceable against the settling parties.

A “claim” is a very broad term. Black’s Law Dictionary defines a “claim” as follows:

1. The aggregate of operative facts giving rise to a right enforceable by a court <the plaintiff's short, plain statement about the crash established the claim>. — Also termed *claim for relief* (1808). 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional <the spouse's claim to half of the lottery winnings>. 3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.¹⁴²

The Federal Claims Court provides very thorough definitions of the various types of claims for Congress, a couple of which are as follows:¹⁴³

In order to determine the types of claims present here, it is first necessary to set forth their basic definitions.

. . . . A claim may be considered to be within the definition of a legal claim when the plaintiff has, or had, a claim redressable in a court of laws. . . .

. . . .

¹⁴¹ *Id.* (quoting *Local No. 93, Intern. Ass’n of Firefighters, AFL-CIO CLC. V. City of Cleveland*, 478 U.S. 501, 528-29 (1986) (internal citations omitted)).

¹⁴² BLACK’S LAW DICTIONARY, 9TH ED. 2009.

¹⁴³ *California Cannery & Growers Ass’n v. United States*, 7 Cl. Ct. 69, 76, 97-104 (1984).

Generally, equitable claims are defined as claims in which, in equity, justice and fairness, relief should be recommended. . . .

In this case, the consumers have a claim in the illegal charges they paid. Moreover, the consumers have an interest in not being obligated to pay for costs that have not undergone the level of review necessary to determine that such cost recovery is necessary, reasonable, and prudent. Accordingly, these are the claims the Consumer Advocate is asserting in this case.

The TRA has rejected a similar settlement between TRA staff and a utility in a prior docket, Docket No. 01-00704.¹⁴⁴ In Docket No. 01-00704, the Hearing Officer explained the settlement as: “This request renders the settlement a joint presentation of a settlement agreement for consideration by the Authority, rather than a signal to the Authority that the parties have settled their differences and seek approval of a petition through a contested case proceeding.”¹⁴⁵ The TRA rejected the settlement, stating: “Therefore, based upon the principles stated in the holding of the Tennessee Supreme Court in *Harbour v. Brown*, the Hearing Officer concludes that the proposed settlement agreement cannot be approved absent the consent of all parties to that agreement.”¹⁴⁶ Indeed, this Settlement offers the same request as that set forth in Docket No. 01-00704; similarly, it should be rejected because the Consumer Advocate has not approved it.

D. The applicable law does not allow approval of this Settlement because it attempts to dispose of valid claims and impose obligations on a non-settling party.

In this instance, the Consumer Advocate’s objections to this Settlement foreclose the resolution of this Docket in its entirety. First, since the customer refunds are a fixed amount (*i.e.*, all sums unlawfully and without approval by the TRA collected from consumers), the TRA Party Staff and Berry’s Chapel cannot give away any of it without necessarily infringing on the

¹⁴⁴ *Order Granting in Part and Denying in Part* Consumer Advocate’s Renewed Motion to Summarily Deny Motion to Approve Settlement Agreement and Alternatively to Treat the Motion as a Motion for Summary Judgment *and* denying Motion to Approve Settlement Agreement, Docket No. 01-00704 (Aug. 12, 2004) (filed as Exhibit 6).

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.* (citing *Harbour v. Brown*, 732 S.W.2d 598, 599 (Tenn. 1987)).

consumers' claims to that fixed amount. Meaning, parties can have different claims, but if the remedy to the various claims comes from the same finite source, neither party can unilaterally settle in a manner that reduces the finite source for the non-consenting party. Second, it is not the TRA who is actually paying the odor control costs and "flood damage" legal fees to Berry's Chapel, but rather it is the consumers who will bear this cost. Since this Settlement necessarily places the obligation on the consumers to bear the burden of the costs recovered in this Settlement, it cannot be approved without the Consumer Advocate's approval.

This Settlement is invalid in its current form because it disposes of a non-settling party's claims and imposes obligations on a non-settling party. Moreover, even if this Settlement is approved, (1) it would be unenforceable against the consumers since they are not approving it not only by the TRA but also by any other tribunal; (2) the consumers' claims survive the settlement; and (3) the Docket remains open to address the reasons it was originally opened for¹⁴⁷ and to address the consumers' claims. For these reasons, this Settlement should be rejected.

IV. CONCLUSION

For the aforementioned reasons, the Consumer Advocate recommends the complete denial of this Settlement. It is against public policy and it is not in the best interests of consumers. Moreover, it attempts to wrongfully dispose of the consumers' claims and impose obligations on consumers without their approval of the settlement.

¹⁴⁷ See *supra* Part II.A.

RESPECTFULLY SUBMITTED,



Charlena S. Aumiller (# 031465)
Assistant Attorney General
Office of the Attorney General and Reporter
Consumer Advocate and Protection Division
P. O. Box 20207
Nashville, TN 37202-0207
(615) 741-8726

Dated: July 29, 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 29, 2013, upon:

Shiva Bozarth, Esq.
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Henry Walker, Esq.
Bradley Arant Boult
Cummings, LLP
1600 Division St., Suite 700
Nashville, TN 37203


Charlena S. Aumiller

Disc
Attached

**IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION**

BERY'S CHAPEL UTILITY, INC.)	
)	
Petitioner,)	Case No. M2011-02116-COA-R12-CV
)	
v.)	
)	
TENNESSEE REGULATORY)	
AUTHORITY,)	Tennessee Regulatory Authority
)	Docket No. 11-00005
Respondent.)	

UNOFFICIAL TRANSCRIPT OF ORAL ARGUMENT

Clerk: Berry's Chapel Utility, Inc. versus Tennessee Regulatory Authority

Henry Walker: I enter this building with new appreciation.

Judge Clement: Okay. Is it because of the museum? Or the history?

Henry Walker: The article.

Judge Clement: The 75th year ...yes

Henry Walker: The thorough article I read on the decoration of the building, it's history

Judge Clement: Judge did a fabulous job researching that, Judge Bennet, Judge Dinkins and I had to write his opinions during that time (laughing) it took so long. Just kidding.

Henry Walker: This is a very simple little case

Judge Clement: You're Henry Walker?

Henry Walker: Yes, thank you.

Judge Clement: And how much time would you like to reserve?

Henry Walker: Uh, 5 minutes.

Judge Clement: Very good.

Henry Walker: Uh, this is a 800 customer utility operating in Williamson County. They provide wastewater service. For a period of 9 months they operated as a non-profit and they operated outside of the jurisdiction of the Tennessee Regulatory Authority and at the end of that 8 months, the State Representative from that area introduced a bill to change the law to say that no, that wastewater utility is in fact regulated by the Agency.

Judge Dinkins: So what's left here?

Henry Walker: The only thing that's left is whether or not they were regulated during that 9 month period because during that 9 month period they imposed a rate increase of \$20 a month on each customer and the TRA had a hearing on it and the TRA said 'we still think you're still subject to our jurisdiction and you need to stop charging that \$20 fee'. As soon as the TRA's decision was announced they stopped doing it and got re-regulated when the law changed.

Judge Dinkins: So in terms of the issues, just a non-moot issue, would that basically limit us to the third issue? Some sort of ...

Henry Walker: Basically, the TRA didn't order them to give the money back yet. But they did say it was illegal for them to impose it and so the issue is, you know, if the TRA was correct in that it was illegal for them to do it because they were still subject to the TRA's regulation, then presumably the TRA will order them to do a refund. Now, since that time, they've gotten re-regulated, they've gone through a rate increase, uh, and everything's fine. So we're really just talking about the potential refund of the money collected during that period.

Judge Dinkins: Okay.

Henry Walker: Which was about 800 customers, uh, \$20\$80,000.

Judge Dinkins: And basically we have to answer the 2nd issue to ... the 3rd

Henry Walker: Exactly.

Judge Clement: Is the issue as simple as whether a cooperative requires members?

Henry Walker: The issue is this – the statute says, passed in 1934, if you are a cooperative organization, association or cooperation not organized or doing business for profit, you're a non-utility. You're not regulated by the TRA. So Berry's Chapel says, look, we're a cooperation not organized or doing business for profit. That's what the statute says. The Consumer Advocate takes the position that they read the statute as saying, no, this is not exempting non-profits corporations, this is only exempting various kinds of cooperatives. Here's the way they read the statute, any cooperative organization, cooperative association or cooperative corporation not organized or doing business for profit. They say that it's not enough to be a non-profit corporation you have to be a cooperative non-profit corporation, which I think is redundant and a somewhat strange reading of the statute. And to me, the, the easy answer is to look at the caption of the bill – it says what the bill does.

Judge Clement: The 37 bill or the 2011?

Henry Walker: The 73 bill, 1935 when they passed the statute. It says here's what we're doing, we're exempting certain federal and state corporations, agencies, instrumentalities and other public bodies and they didn't say we're exempting various cooperatives. They said we're exempting certain non-profit organizations. In other words, they were exempting a group of non-profits. They were not exempting just cooperatives, they were exempting anyone who fit this definition as a non-profit. Cooperative,

Judge Clement: Certain non-profits, right?

Henry Walker: Well it is but

Judge Bennett: So it could be certain cooperative non-profits, couldn't it?

Henry Walker: You know, it also says certain state and federal agencies.

Judge Clement: But they're all exempt?

Henry Walker: I mean, you know, people who write these...

Judge Bennett: Certain can mean all or it can mean certain

Henry Walker: Right, right. And we have no clue as to what else that could mean. I tried to see if there was any legislative history, I did look up messages of the Governors of Tennessee and when this bill was introduced by the Governor all he did was read the caption language which I just read to you. This is one of a series of bills that took these organizations out of the TRA's jurisdiction because of TVA coming in. All utilities essentially were regulated by the old Public Service Commission until TVA came in and said look we want to have cooperatives, we want to have municipal distribution companies and those should not be regulated by the Public Service Commission. So that's when this series of bills were introduced and passed in 1935...

Judge Dinkins: Why does that make the agency's reading of the statute wrong?

Henry Walker: Well, I mean,

Judge Dinkins: It would seem that it was who enforced it

Henry Walker: The agency's reading of the statute is that a non-profit corporation is still subject to regulation unless it is a cooperative non-profit association. I don't think that's what the words mean. The words say you are deregulated if you are cooperative organization, association or corporation not organized or doing business for profit. We all know what cooperatives are. Cooperatives are owned by the members. Cooperatives don't have profits. But if they have a surplus, they either reinvest it or they distribute it to their members. That's different from a non for profit corporation. And I don't think, - they were being redundant when they said a cooperative organization and a cooperative corporation not organized for profit. It just doesn't make any sense. Again, it's a simple case because it all depends on how you read that argument. It's a question of law and you know, I think we, we didn't, neither side briefed this but I think we forget

that just because they aren't under the TRA's jurisdiction doesn't mean that they're not answerable to anybody. They would be just like a municipal utility or a cooperative or a public utility district. They're still answerable to the courts. They're still a public utility, they have to have just and reasonable and nondiscriminatory rates.

Judge Bennett: This organization was created when this utility district merged with a for profit utility district, correct?

Henry Walker: It was a device set up to take the for profit company and make it into a non-profit company and they did that by taking the for profit company, creating the non-profit and merging them all into it.

Judge Bennett: Okay. Now, when for profits take over non-profits the Attorney General has a role and reviews that transaction to make sure everything is on the up and up. This was the reverse of that. Was there any review by the Attorney General's office?

Henry Walker: The statute says expressly that a regulated utility can transfer its assets to a non-regulated utility without approval. And again, that was done to get ready for TVA. I was not their lawyer when this happened but you know, I'm sure, the briefs below explain that that's why it was done that way. Again, just because they're not regulated by the TRA, they still have to have nondiscriminatory, just and reasonable rates, it's just that you have to go to court to do it. It's a burdensome expensive process, that's why the TRA was created but not all utilities in this state are under the TRA's jurisdiction.

Judge Dinkins: Well, ...there was one other argument that was raised that, assuming that's true, you're not a non-profit, there's nothing that shows that you're a non-profit.

Henry Walker: The charter was filed and that says they're, let me just say

Judge Dinkins: I'm not sure that that, you know

Henry Walker: The agency did not question that issue. They're order which we're here appealing didn't say we have no evidence that they're really a non-profit, that was really what the Attorney General said so the agency did not question that they were a legitimate non-profit. They accepted the face value of the corporate charter.

Judge Clement: Thank you Mr. Walker. As you approach, will the two appellees each speak or just you?

Vance: Yes, we will both speak. My name is Vance Broemel with the Attorney

General and we

Judge Clement: How much time would you like?

Vance: And if you could notify at the 10 minute point, I may go a little past that but I would like to know that and the issue

Judge Clement: We'll set your timer for 10 minutes.

Vance: Okay and I assume the issue of whether the TRA can make this determination is still before us, there was no discussion of that, there were three issues in the brief. Is that still an issue?

Judge Clement: If it's in the brief unless he's affirmatively waived it, it's still in

Vance: Okay, good. Good afternoon, my name is Vance Broemel with the Attorney General, Consumer Advocate Division, and with me is Shiva Bozarth of the TRA and he will be speaking after me. Now the Tennessee Legislature has long recognized that utilities need special regulation and consumer protection. The reason for this is obvious that these are such vital indispensable services that for modern life you just can't do without them. So for utility services provided by cities or counties, regulation or control comes from the ballot box, the people can vote. They can notify their representative but for utilities controlled by individuals or corporations such as this utility the Legislature decided you needed the protection of the Tennessee Regulatory Authority. Now, but in the case before us today, Berry's Chapel is arguing that at the time of this case any utility could come into the TRA and say we have a charter, a non-profit charter, just go to the Secretary of State and file for one and 'lo and behold we're no longer regulated. You can't do anything to us because that's exactly what Berry's Chapel did. First, the persons who controlled, the individuals who control Berry's Chapel set up a non-profit corporation, Berry's Chapel Utility, Inc. but it was a utility in name only. Just in the name. There were no assets, no sewer equipment, no customers, nothing. Then the same people, John and Tyler Ring, the people who control Berry's Chapel, took another utility that they owned called Lynwood Utility, Inc. and merged it into it. And then they went to the TRA and to the public and announced sorry, you have no protection. All these people in Franklin, we can raise your rates, we can cut you off, we don't have to serve anybody. And they did this without going through a hearing, they just sent a letter...

Judge Clement: Well, didn't the statute for 60 or 70 years exempt non-profits?

Vance: No. It's our position that the statute we're talking about, it exempts cooperatives. It's very clear about that and if you look..

Judge Clement: Well why does it say cooperatives, and then the non-profit organizations or what

Vance: Because you have to understand that cooperative is read in front of each of those words and first of all, again, we decide that the utilities need protection with private utilities you've got the TRA, public utilities, you know municipals you have the ballot box and the cooperatives, you have the members. But with a non-profit you have nothing and you know, history is replete with non-profits paying exorbitant salaries, taking money, not doing anything. There's no oversight of these things of the sort a utility would get from the TRA.

Judge Clement: So you're reading of subsection 6(E), if I was to take out the words assoc – organization, association or then it would read any cooperative corporation not organized or doing business for profit?

Vance: Right. In essence, what we argue is what and we've discussed this before. What the Legislature did when it amended this statute and this was done at the time of the proceeding but in my, our view, it's a very sensible thing to do because what this utility was trying to do opens up a door for such potential abuse it's almost beyond belief that you could, that a utility could one day be regulated and go to the Secretary of State and pay a small fee, get a charter and say we're not regulated. So what the Legislature did was, and we cite this in our brief, a document called bill information which is attached to the legislation as it goes through, it states quite specifically, this bill clarifies, clarifies, it doesn't change anything, it clarifies that only cooperative organizations, cooperative associations and cooperative corporations not organized or doing business for profit are exempt from TRA regulation. Our position

Judge Clement: You're view is the door was already closed before this?

Vance: Well, yeah.

Judge Clement: And this has just added a couple of safety...

Vance: Yes because, you know, I think I can speak for all the attorneys in here, you know, we're all very confident of our case when we file it but you know, if the TRA had not agreed with us, you can't, I couldn't possible say that couldn't happen and so the people of Tennessee would be without any protection. So I think the Legislature did a very sensible thing and clarified exactly what they thought the law meant and going forward you can see, you couldn't raise this kind of issue anymore.

Judge Bennett: Did the legislative history debates or discussions of the bill indicate that

this was a clarification?

Vance: Well, I don't cite them in here but that was my understanding, yes from the, Mr. Walker referred to the Legislator involved here, Charles Sargent, that that's what he wanted to do but I did not cite that in the brief, no. I did cite the bill information which was what the people voting on it would look at and see what it did.

Judge Bennett: Yes, the bill information is just drafted by some lawyer in the bowels of the Legislative Plaza, uh, you know, it's hard to say whether that's reflective of all the members of the, or even the sponsors of the legislation, isn't it?

Vance: Well, I mean it's what we have. I can't say that there's anymore and it's you know, that's what they had so I don't know, I can't answer that with a citation to a recording, no. But again, looking at this statute as a whole and this is the point I want to make. If you look at 6(E) it says, it refers to the language non-profit, not organized or doing business for profit, well immediately after that in section 7 of these exemptions, there's an explicit exemption for non-profit home owners associations and there would have been no need for the Legislature to add this on if 6(E) already exempted any non-profit organization, association because here we have an association that in order for it to be exempted they needed explicit language. And the appellants in their brief argue well, that item 7 in there also was part of a bill that exempted them from utility district regulations and that's true but the bill did two things, it took non-profit associations out of TRA regulation and utility district regulation. So in other words, this idea that utilities need special protection, the idea is that the non-profit home owners association would be responsive to its members and they would therefore have some kind of accountability and control over such things as rates and service. Again, it's somewhat like a cooperative in that sense that the members themselves would set the rates and the quality of service. So, I just want to touch briefly on this notion that, it's the first item in their appeal that the TRA has no right to regulate a utility or determine who is a utility and who is not. I mean, this, if anything is even more radical than their position that a non-profit can be exempt from regulation. In other words, what they're saying is that someone can get a charter for a non-profit and then if the TRA says, you know, we're not sure about this, you know, maybe, are you a non-profit? We need to look into this because the record here shows there was no 501C3 status, no accounting as a non-profit, no showing where the profits went because see this was a regulated utility by the very definition it has a profit called a rate of return. Where did that money go? No one knows. Well what they're saying is that this utility is completely unanswerable to anyone. Because they could go to the TRA, according to them, does not have the authority to even ask them are you a non-profit? They say that is beyond

the expertise of the TRA.

Judge Bennett: So under their theory, they don't have the right to decide if they regulate someone or not?

Vance: That's exactly what they say.

Judge Bennett: Well how would you, how would they decide, how would it be determined if they could regulate someone or not? Would they have to sue them?

Vance: Apparently, the same answer they give to the poor rate payers. Go through an expensive and cumbersome process of going to court. You're going to have to go to court. And this is just, and again, at the Consumer Advocate we represent consumers, the idea is that the average consumer, it's very expensive for them to engage in litigation so the idea that the people in Cottonwood would have to go to court if a utility told them that we're no longer regulated, you can't use the Consumer Advocate, can't use the Attorney General, you're going to have to go to a court process. Again, it just completely undermines the whole notion of regulated utility service in Tennessee which is what the, you know, just been long the history of, Public Service Commission. And the 1935 Act, let me address that briefly. If you look at what it was without these exceptions, it is so broad that it regulates any utility, if it's owned by individual, co-partnership, association, corporation or joint stock company that owns, operates, manages, operates or controls any utility and that would be municipals, anything and then they list very explicit exemptions and they're for things like subdivisions of the state, municipal, you know, utilities, federal government corporations like the TVA and then cooperatives with the idea that all of these things have built in controls. And it says again, this point certain non-profits, that's very key, it's just not it, under their reading there's no limitation. If you're a non-profit organization, association or corporation, that's it. And that can't be the case. Okay, thank you very much.

Judge Clement: Thank you very much. And we'll set the time for 5 minutes for you.

Shiva Bozarth: Thank you your honor. May it please the court, good afternoon your honors. My name is Shiva Bozarth legal counsel for the Tennessee Regulatory Authority. The narrow question before the court this afternoon is whether or not the ruling of the agency is supported by substantial and material evidence in light of the entire record. The answer to the question of whether or not the TRA is empowered to interpret its own statutes, this court need look no further than BellSouth Advertising versus the Tennessee Regulatory Authority in which the Supreme Court ruled that the TRA had plenary authority in making determinations regarding public utilities and as Judge Bennett pointed out, how could the TRA even begin

to make a decision about whether we can or cannot regulate or raise rates or lower rates if we can't make the initial determination, is this or is this not a public utility. The interpretation of 65-4-101 found by the TRA, it should be found to be correct. The language prior to the amendment was unfortunately ambiguous. Under Colonial Pipeline versus Morgan, ambiguous language means that the TRA is forced to go and look at the broader statutory scheme in the legislative history. In the context of the history of this legislation, the purpose of this legislation is to protect the consumers and to balance the interest of the consumers versus the interest of the utility which is the very purpose of the Tennessee Regulatory Authority. Utilities are entitled to earn sufficient money in which to operate safely and if they're for profit entities to operate and make a reasonable rate of return. But on the other side of that balance scale is the notion that the consumers must be protected from unreasonable rates because they have to utilize the services. There is no other sewage system there – it's served by, that could serve these consumers that Berry's Chapel has.

...this balance those two interest and non-profit status does not simply provide the protection that Berry's Chapel would assert that it has. Non-profit projection does not protect the rate payers from unreasonably high rates or unreasonable disconnection from service or disconnection from service for no reason. Instead, non-profit status simply means that if in fact they are a non-profit the company won't earn a profit, it means the principals of the company won't generate enormous salaries for their own benefit. That is why the cooperative language must be read with the non-profit corporation as if it were one phrase.

Judge Dinkins: As I recall the non-profit act requires that it either be membership or, aren't there two ways of being a non-profit.

Shiva Bozarth: Your honor honestly, I'm a little, I'm not a 100% certain, I believe there are. This statute, because it requires the cooperative as well as the non-profit it would require membership control. In other words, the consumers should enough of them become members would be empowered to make decisions about rates and prevent an unreasonable rate being imposed upon them.

Judge Dinkins: Well that's what I was getting too. Under any scenario because this is a utility there's a, I guess, public policy for lack of a better term of having some involvement by members or customers oversight by something other than the people that set up the corporation.

Shiva Bozarth: That is correct your honor. That is the legislative intent behind the enabling statutes of the TRA and the specific exclusions from being a public utility, those exceptions are either the TRA stands in place of member control or customer control or the customers have some control of

the utility. This, the TRA's purpose again is to provide that bounds and as such the TRA's decision in this case was correct and we respectfully request that this court affirm it because of substantial and material evidence demonstrates that the agency acted correctly.

Judge Clement: Thank you. Mr. Walker you have 5 minutes.

Henry Walker: I just want to say this, cooperative and a non-profit corporation are two different things. They're not the same thing.

Judge Clement: Can't a cooperative be a non-profit?

Henry Walker: Well, by definition a cooperative is a non-profit in that the surplus earned by the cooperative doesn't belong to a corporation, it belongs to the members. They either reinvest it or they distribute dividends. Non-profit cooperative corporation is really kind of redundant. It's a cooperative, it's owned and operated by the members. That's different from a non-profit corporation and again, when the bill was written, when the Governor explained it to the Legislature he didn't say we're exempting a bunch of cooperatives, he said we're exempting a bunch of non-profits and that meant he's exempting non-profit corporations.

Judge Bennett: Then why is there, in number 7, why does it mention non-profits?

Henry Walker: That statute was written 40 years later and dealt with a specific situation where you have a utility district and a homeowners' association and I think it was not written frankly to be consistent with number 6.

Judge Bennett: You know, we don't, sometimes it's a stretch to make this presumption but the law presumes the Legislature knows what it's doing and won't do a thing, or useless thing, so what I hear you suggesting is they did a useless thing.

Henry Walker: Let me just say, that if you accept, well, I think the Attorney General and I would agree on one thing and that is that number 6 does exempt cooperative associations from regulation well, if that's true wouldn't that mean every homeowners association is already exempt from regulation? Isn't a homeowner's association a cooperative association so why do we even have section 7?

Judge Bennett: You tell me.

Henry Walker: Again, it was written 40 years later and the fact that it has a sentence in there about conflict with the local public utility district I think gives a clue as to where that originated. To conclude I just want to say that again, we have to remember it's not public policy, it's common law. Public utilities

have to have just and reasonable rates, they cannot discriminate in the way that they serve people. That's been the law for 500 years. The nineteenth century is filled with cases in which Tennesseans sued the water company because the rates were too high, because they weren't getting service. So is it expensive and inefficient way of doing it and that's why they created the Commission but it doesn't mean as counsel said, it doesn't mean that just because you're not regulated by the TRA that your service can be cut off or your rates can be anything.

Judge Dinkins: Okay. What I would ask you to explain to me, explain it to me. You have a unit that forms a non-profit, not a charitable purpose, not any... just non-profit, they take over a for profit utility, it was

Henry Walker: Their Company.

Judge Dinkins: Yeah, yeah. That was regulated, now why, it just doesn't make

Henry Walker: Well clearly they did it to get out from under regulation

Judge Dinkins: And we're supposed to believe that the Legislature sanctioned that sort of thing?

Henry Walker: Well again, the TRA doesn't regulate lots of entities but

JUMBLED CONVERSATION

Judge Dinkins: That's not what I said. And we're supposed to believe, and we're supposed to interpret the laws that the Legislature passed to produce that sort of result?

Henry Walker: Again, I was not their lawyer when they did this but the fact here

Judge Bennett: We hear that a lot.

Henry Walker: The statute is pretty clear that non-for-profit corporations are exempt from regulation and their lawyer said look, we're 800 customers, it's very expensive to go through a rate case. It's a lot cheaper to reorganize as a non-profit and raise the rates without going through a rate case.

Judge Dinkins: And charge whatever we want and let one of the 800 customers sue us for it.

Henry Walker: Well I think that's why the Legislature changed the law. If the law hadn't permitted that they wouldn't have changed it.

Judge Dinkins: Alright. Thank you.

Judge Clement: We're going to take a very brief recess to upgrade the quality of the panel.

BCUI
Docket No. 11-00065
Show Cause
Summary

Over Collections

\$20 increase	73,680.00	A/
Late Fees	534.68	B/
Odor Collections	49,885.68	C/
Minimum Bill Increase	10,177.31	D/
Incorrect Franklin Vol. Surcharge	<u>11,843.00</u>	E/
Total Over Collections	146,120.67	

Unrecovered Expenses

Odor Control Expense	(40,074.92)	F/
Additional Flood Costs	<u>(19,781.25)</u>	G/
Total Expenses	(59,856.17)	

(A) Company provided documentation on \$20. See Schedule 1A.

(B) See Company provided documentation on late fees to MVUD. Schedule 1B.

(C) See Odor Recoveries. Schedule 1C.

(D) See Minimum Bill. Schedule 1D

(E) Docket No. 11-00198, Direct Testimony of Hal Novak, p. 12 (April 23, 2012) and Rebuttal Testimony James Ford, p. 4 (May 22, 2012).

(F) See Odor Control Expenses. Schedule 1E.

(G) See Flood Cost Expense. Schedule 1F.

BCUI
Docket No. 11-00065
Show Cause
\$20 Increase


	No. Cust.		Rate	No. Mo.		Total	
HBTS						37,780	(A)
MVUD	6	(B)	20	5	(C)	600	
COF	353	(B)	20	5	(C)	35,300	
Total						73,680	

(A) Source company billing registries and supporting calculation of refunds due.

(B) Number of customers provided by Company.

(C) Rate was in place December 2010 through April 2011.

BCUI
Docket No. 11-00065
Show Cause
Late Fees

<u>Customer</u>	
	442.45
	37.36
	20.91
	21.08
	2.76
	<u>10.12</u>
Total	534.68

BCUI
Docket No. 11-00065
Show Cause
Odor Collections

Month	City of Franklin	Mallory Valley	H8TS / Lynwood	Total Volumes (Gallons)	Odor Surcharge (per 1,000 gallons)	Total Collected		
Jul-09	3,505,020	73,998	3,102,500	6,681,518	0.38	2,538.98		
Aug-09	6,002,130	82,998	3,004,900	9,090,028	0.38	3,454.21	Recoveries July 09 to June 10	25,939.35
Sep-09	3,969,930	54,000	3,095,600	7,119,530	0.38	2,705.42	Recoveries July 10 to August 10	5,730.03
Oct-09	4,036,790	51,000	2,352,400	6,440,190	0.38	2,447.27	Recoveries September 10 to June 11	20,872.96
Nov-09	2,499,080	40,002	2,321,100	4,860,182	0.38	1,846.87	Recoveries July 11 to June 12	28,316.37
Dec-09	2,294,190	123,000	2,376,000	4,793,190	0.38	1,821.41	Staff Total Recoveries	80,858.70
Jan-10	2,186,110	46,002	2,935,200	5,167,312	0.38	1,963.58	Approved in Docket No. 08-00060	30,973.02
Feb-10	2,110,920	37,002	2,821,600	4,969,522	0.38	1,888.42	Over-recovered	49,885.68
Mar-10	2,059,400	40,002	2,194,300	4,293,702	0.38	1,631.61		
Apr-10	1,502,580	40,002	2,492,900	4,035,482	0.38	1,533.48		
May-10	2,645,230	40,002	2,818,000	5,503,232	0.38	2,091.23		
Jun-10	2,783,050	43,002	2,481,500	5,307,552	0.38	2,016.87		
Jul-10	3,913,170	55,998	3,207,800	7,176,968	0.38	2,727.25		
Aug-10	4,895,664	81,000	2,925,400	7,902,064	0.38	3,002.78		
Sep-10	4,745,414	79,998	2,745,300	7,570,712	0.38	2,876.87		
Oct-10	3,676,094	67,998	3,298,600	7,042,692	0.38	2,676.22		
Nov-10	4,702,090	95,998	2,510,500	7,308,588	0.38	2,777.26		
Dec-10	3,080,962	45,997	2,462,300	5,589,259	0.38	2,123.92		
Jan-11	1,938,900	45,997	2,081,900	4,066,797	0.38	1,545.38		
Feb-11	2,576,309	46,998	2,732,700	5,356,007	0.38	2,035.28		
Mar-11	1,574,250	43,001	1,916,500	3,533,751	0.38	1,342.83		
Apr-11	1,783,260	47,999	2,755,100	4,586,359	0.38	1,742.82		
May-11	2,107,570	54,999	2,547,900	4,710,469	0.38	1,789.98		
Jun-11	2,215,900	67,998	2,880,300	5,164,198	0.38	1,962.40		
Jul-11	4,473,613	24,003	2,548,900	7,046,516	0.38	2,677.68		
Aug-11	5,082,364	109,998	2,987,300	8,179,662	0.38	3,108.27		
Sep-11	5,328,650	64,001	3,650,600	9,043,251	0.38	3,436.44		
Oct-11	5,237,502	74,998	2,857,900	8,170,400	0.38	3,104.75		
Nov-11	4,248,135	40,999	2,635,000	6,924,134	0.38	2,631.17		
Dec-11	2,986,400	36,001	2,660,100	5,682,501	0.38	2,159.35		
Jan-12	1,815,930	45,997	2,753,000	4,614,927	0.38	1,753.67		
Feb-12	2,240,950	72,900	2,466,900	4,780,750	0.38	1,816.69		
Mar-12	2,295,010	46,900	2,371,500	4,713,410	0.38	1,791.10		
Apr-12	1,939,400	48,800	2,704,700	4,692,900	0.38	1,783.30		
May-12	2,115,177	64,100	2,520,000	4,699,277	0.38	1,785.73		
Jun-12	2,983,133	83,800	2,902,100	5,969,033	0.38	2,268.23		
Totals	113,550,277	2,117,488	97,118,300	212,786,065	0.38	80,858.70		

BCUI
Docket No. 11-00065
Show Cause
Minimum Bill

Minimum Bill Difference

Month	Lynwood	HBTS	COF	MVUD
10-Dec		464.95	169.54	
11-Jan		688.85	291.91	
11-Feb		388.79	151.5	
11-Mar		977.9	537.81	
11-Apr		466.69	387.13	
11-May		576.96	228.43	
11-Jun		538.36	229.6	
11-Jul		583.53	139.83	
11-Aug		419.18	138.79	
11-Sep	382.52		198.94	
11-Oct	653.17		135.4	
11-Nov	580.39		172.73	
11-Dec	476.37		198.04	
Totals	2,092.45	5,105.21	2,979.65	10,177.31

BCUI
Docket No. 11-00065
Show Cause
Odor Expenses

	BCUI	Staff	Differences	
2008 Legal Fees	1,940.00	-	(1,940.00)	A/
2008 Consulting Fees	1,125.00	125.00	(1,000.00)	D/
2009 Legal Fees	5,520.91	5,105.00	(415.91)	F/
2009 Consulting Fees	2,125.00	2,125.00	-	Dec 08 Invoice
2010 Consulting fees Jan 10 to June 10	625.00	500.00	(125.00)	G/
Waste Management July 09 to June 10	29,254.71	18,430.71	(10,824.00)	H/
2010 Consulting fees July 10 to Aug. 10	250.00	250.00	-	
Consulting fees Sept. 10 to June 11	875.00	-	(875.00)	I/
Waste Management July 10 to Aug. 10	7,085.96	7,085.96	-	
Waste Management Sept. 10 to June 11	12,761.42	-	(12,761.42)	C/
Visions Inc.	1,190.00	490.00	(700.00)	B/
Additional Legal Fees Odor	6,378.75	5,963.25	(415.50)	E/
Total Additional Expenses	69,131.75	40,074.92	(29,056.83)	

A/ Check Nos. 1096, 1231, 1252, 1381 and 1404 considered in Docket No. 0800060

B/ Check Nos. 7415 was Def. Flood Cost according to invoice and financials

C/ Check Nos. 7142 and 7220 considered in Docket No. 11-00198. Check Nos. 7029 and 7048 were classified as sludge.
D/Check No. 1282 and 1366 were recovered in Docket No. 0800060. Check No. 1468 does not appear to have been charged to the odor account.

E/ Invoice No. 758932 appears to have only 3 hours worth of odor work at \$405 per hour.

F/ Invoice 1681 included \$10.91 for reimbursement for lunch and \$405 associated with a general matter instead of odorization.

G/ JV Entry no support.

H/ Check No. 2315 for \$140 was for flood work according to check stub and \$10,684 of sludge was built into rates.

I/ Invoices provided were not charged to odor.

BCUI

Docket No. 11-00065

Show Cause

Flood Expenses

Check No.	Invoice No.	Co. Amt	Staff Amt	Difference	
8298	738044	708.75	708.75	-	
8333	753664	-	-	-	
8298	775411	405.00	405.00	-	
8298	780543	708.75	605.00	(103.75)	A/
8333	785766	4,357.50	3,527.50	(830.00)	B/
1029	790885	7,366.25	7,158.75	(207.50)	C/
1283	795169	4,565.00	4,565.00	-	
1283	801590	933.75	933.75	-	
1283	807363	1,037.50	1,037.50	-	
1283	813125	415.00	415.00	-	
1283	835463	425.00	425.00	-	
				-	
Total		20,922.50	19,781.25	(1,141.25)	

A/ .25 hours removed should have been allocated to regulatory

B/ 2.0 hours removed should have been allocated to regulatory

C/ 0.5 hours removed should have been allocated to regulatory

RECEIVED

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

TRA DOCKET ROOM

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 LIMITED TO, TENN. CODE ANN.)
§§ 65-4-112, 65-4-113, 65-4-201, AND 65-5-101)

DOCKET NO. 11-00065

**PARTY STAFF'S REPSONSES TO FIRST DISCOVERY REQUEST OF THE
CONSUMER ADVOCATE AND PROTECTION DIVISION TO THE TENNESSEE
REGULATORY AUTHORITY PARTY STAFF**

To: Tennessee Regulatory Authority
c/o Shiva Bozarth
460 James Robertson Parkway
Nashville, TN 37243

This Discovery Request is hereby served upon the Tennessee Regulatory Authority Party Staff ("TRA Party Staff"), pursuant to Rules 26, 33, 34 and 36 of the Tennessee Rules of Civil Procedure and Tenn. Comp. R. & Reg. 1220-1-2-.11. We request that full and complete responses be provided pursuant to the Tennessee Rules of Civil Procedure. The responses are to be produced at the Office of the Tennessee Attorney General and Reporter, Consumer Advocate and Protection Division, 425 Fifth Avenue North, Nashville, Tennessee 37243, c/o Charlena S. Aumiller, Assistant Attorney General, on or before July 17, 2013.

PRELIMINARY MATTERS AND DEFINITIONS

Each discovery request calls for all knowledge, information and material available to the TRA Party Staff, as a party.

These discovery requests are to be considered continuing in nature, and are to be supplemented from time to time as information is received by the TRA Party Staff which would make a prior response inaccurate, incomplete, or incorrect. In addition, the Attorney General requests that the TRA Party Staff supplement responses hereto with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters, and the identity of each person expected to be called as an expert at hearing, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.

These discovery requests are to be interpreted broadly to fulfill the benefit of full discovery. The singular of any discovery request includes the plural and the plural includes the singular. To assist you in providing full and complete discovery, the Attorney General provides the following definitional guidelines.

The terms "and" and "or" shall be construed conjunctively or disjunctively as necessary to include any information that might otherwise be construed outside the scope of these requests.

The term "communication" means any transmission of information by oral, graphic, pictorial or otherwise perceptible means, including but not limited to personal conversations, telephone conversations, letters, memoranda, telegrams, electronic mail, newsletters, recorded or handwritten messages, or otherwise.

For purposes of these discovery requests, the term "you" shall mean and include: the TRA Party Staff, including the expert witness or the attorney.

The term "person" or "persons" as used herein refers to any natural person, corporation, firm, company, sole proprietorship, partnership, business, unincorporated association, or other entity of any sort whatsoever. Where a company or organization is the party being served, all responses must include the company's response. Moreover, the TRA Party Staff's designated person for responding must assure that the TRA Party Staff person provides complete answers. A complete answer must provide a response which includes all matters known or reasonably available to the company.

The term “identity” and “identify” as used herein, with respect to any person, means to provide their name, date of birth, current residence address, current residence telephone number, current business (physical and mailing) address, current business telephone number, and the occupation or job title of that person; with respect to an entity, those terms mean to provide the name by which said entity is commonly known, the current (physical and mailing) address of its principal place of business, and the nature of business currently conducted by that entity; with respect to any document, those terms mean to provide the date of the document, the nature of the document, the title of the document, the reference number (if any) of the document, and the current location of the document, including the identity of the person or entity in possession of the document.

The term “document” as used herein, means any medium upon which intelligence or information can be recorded or retrieved, such as any written, printed, typed, drawn, filmed, taped, or recorded medium in any manner, however produced or reproduced, including but not limited to any writing, drawing, graph, chart, form, work paper, spreadsheet, note, photograph, tape recording, computer disk or record, or other data compilation in any form without limitation. Produce the original and each copy, regardless of origin or location, of any book, pamphlet, periodical, letter, note, report, memorandum (including memoranda, note or report of a meeting or conversation), spreadsheet, photograph, videotape, audio tape, computer disk, e-mail, or any other written, typed, reported, transcribed, punched, taped, filmed, or graphic matter, however produced or reproduced, which is in your possession, custody or control or which was, but is no longer, in your possession, custody, or control. If any such document was, but no longer is, in your possession or control, state what disposition was made of it and when. If a document exists in different versions, including any dissimilar copies (such as a duplicate with handwritten notes on one copy), each version shall be treated as a different document and each must be identified and produced.

If you produce documents in response to these discovery requests, produce the original of each document or, in the alternative, produce a copy of each document and identify the location

of the original document. If the “original” document is itself a copy, that copy should be produced as the original.

If any objections are raised on the basis of privilege or immunity, include in your response a complete explanation concerning the privilege asserted.

If you contend that you are entitled to refuse to fully answer any of these discovery requests, state the exact legal basis for each such refusal.

If any of the interrogatories are not answered on the basis of privilege or immunity, include in your response to each such interrogatory a written statement evidencing:

- (a) the nature of the communication;
- (b) the date of the communication;
- (c) the identity of the persons present at such communication; and
- (d) a brief description of the communication sufficient to allow the Authority to rule on a motion to compel.

If, for any reason, you are unable to answer a discovery request fully, submit as much information as is available and explain why your answer is incomplete. If precise information cannot be supplied, submit 1) your best estimate, so identified, and your basis for the estimate and 2) such information available to you as comes closest to providing the information requested. If you have reason to believe that other sources of more complete and accurate information exist, identify those sources.

If any information requested is not furnished as requested, state where and how the information may be obtained or extracted, the person or persons having knowledge of the procedure and the person instructing that the information be excluded.

Provide all responses in the native format in which they are maintained such as Microsoft Excel or Microsoft Word with all formulas intact.

FIRST DISCOVERY

1. Please identify any costs categorized as odor control or flood damage that do not have a detailed invoice supporting it (*e.g.*, Visions invoices for odor control, etc.) or is an allocation (*i.e.*, indirect cost rather than a directly identifiable cost) and explain how the TRA Party Staff determined that the cost was actually for odor control or flood damage.

RESPONSE:

Berry's Chapel Utility, Inc. ("BCUI") allocated the amounts and Staff found no basis to dispute that allocation. The Consumer Advocate has been furnished with a copy of every invoice for every cost for odor control and flood damage. At this time Party Staff is unaware of any costs unsupported by an invoice.

2. For all costs calculated using an allocation method (*e.g.*, the 50/50 allocation of flood damage legal fees, etc.), please explain what the allocation is, who determined it, and what is it based on (*i.e.*, how was this allocation method determined).

RESPONSE:

Legal bills for recovery of flood damages were submitted by the law firm of Bradley Arant Boult Cummings, LLP. The firm's invoices include several matters: recovery of flood damage expenses; settlement work in this docket, and general regulatory matters. The Party Staff has reviewed the legal bills, the narrative descriptions of the work performed, and a sample of daily time sheets, which indicate how the bills were allocated among various regulatory matters. The Party Staff has reviewed the allocation percents and has found no reason to dispute their reasonableness. Copies of the legal bills and the narrative descriptions of the legal work performed have been filed in this docket.

3. Please refer to the Direct Testimony of Tiffany Underwood, Schedule 1F. Please identify which specific charges are excluded under notes A-C, and the basis she determined that these should be recorded to “regulatory”.

RESPONSE:

BCUI notified Party Staff on May 9, 2013 that these adjustments needed to be excluded from flood cost. The specific charges excluded were 0.25 hours for March 1 from Invoice 780543, 1.5 hours from April 4 and 0.5 hours from April 11 from Invoice 785766 and 0.5 hours for May 31 from Invoice 790885.

4. Please explain the difference between the underlying services that are recorded as sludge removal expense or odor control costs.

RESPONSE:

Sludge removal costs are based on what is required to operate the facility safely. Odor control costs are those costs above and beyond the cost of sludge removal which were necessary to reduce or control the odor.

5. When vendors work on both sludge removal and odor control (*e.g.*, Waste Management), please explain how Ms. Underwood ensured that the invoice was not already recovered under sludge removal expense.

RESPONSE:

Ms. Underwood reviewed Docket Nos. 11-00198, 09-00034, 08-00060 and 07-00007 to ensure that none of the invoices listed in the odor control summary, attached to her testimony as Exhibit B, were included in previous dockets. She then looked at how much the Authority allowed for sludge removal in Docket Nos. 11-00198, 09-00034 and 07-00007 and compared the amounts to the total that BCUI spent in both odor control and sludge removal. Based on the amount of

sludge removal expense allowed, she made an adjustment of \$10,684 to remove odor control expense that was previously built into rates.

6. Please provide details of all consumers contacted determining that there is no longer an odor problem (*i.e.*, please provide details including but not limited to who was contacted along with the person's contact information, when the contact occurred, what the consumer was asked about odor problems, and what the consumer said about odor problems).

RESPONSE:

OBJECTION – A response to this Interrogatory is irrelevant and is unlikely to lead to the discovery of relevant information.

7. Please provide details of all consumers contacted inquiring if they have any issues with receiving less than 100% recovery of illegal and unauthorized charges from the utility.

RESPONSE:

OBJECTION – A response to this Interrogatory is irrelevant and is unlikely to lead to the discovery of relevant information.

8. Please identify the party to the settlement who is representing consumers and/or other ratepayers.

RESPONSE:

OBJECTION – The response to this Interrogatory constitutes the attorney's mental impressions and trial strategy. Therefore, it is subject to the work product doctrine and is privileged.

9. Please identify and explain the TRA Staff's rights, interest, and/or claims in the flood damage costs and odor control costs.

RESPONSE:

OBJECTION – The response to this Interrogatory constitutes the attorney’s mental impressions and trial strategy. Therefore, it is subject to the work product doctrine and is privileged.

10. Refer to the Direct Testimony of Tiffany Underwood, p. 3, lines 9-10. Define “rate making mindset” as utilized by Ms. Underwood.

RESPONSE:

A rate making mindset would require an analysis of all revenues, expenses, and rate base to determine whether an adjustment to base rates was necessary.

11. Refer to the Direct Testimony of Tiffany Underwood, p. 3, lines 9-10. How would Ms. Underwood’s analysis and testimony have differed if she had used a “rate making mindset”?

RESPONSE:

OBJECTION – A response to this Interrogatory is irrelevant and is unlikely to lead to the discovery of relevant information.

12. Refer to the Direct Testimony of Tiffany Underwood, p. 14, lines 9-16. Provide the time sheets and any additional documents (other than the legal invoices attached in her testimony) Ms. Underwood relied upon, considered, or otherwise reviewed in preparing her testimony and the resulting settlement amount of flood damage legal fees intended to offset customer refunds.

RESPONSE:

OBJECTION – These items are provided in a redacted form. The information that has been redacted relates to clients of Bradley Arant Boult Cummings, LLP other than BCUI and therefore are not relevant nor are they likely to lead to the discovery of relevant information. See attachment 1.

13. When the TRA Directors opened Docket No. 11-00065, Director Hill Stated the docket was to “address the ramifications of the decision in 11-00005.” Please explain by what authority the TRA Party Staff has included in the Settlement Agreement the recovery of attorney’s fees for flood damage (Settlement Agreement, ¶¶ 12-13) and odor control expenses (Settlement Agreement, ¶¶ 11, 13).

RESPONSE:

OBJECTION – The response to this Interrogatory constitutes the attorney’s mental impressions and trial strategy. Therefore, it is subject to the work product doctrine and is privileged.

Respectfully submitted,



Shiva K. Bozarth, BPR No.22685
Legal Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Attachment 1

to

**PARTY STAFF'S REPSONSES TO
FIRST DISCOVERY REQUEST OF
THE CONSUMER ADVOCATE AND
PROTECTION DIVISION TO THE
TENNESSEE REGULATORY
AUTHORITY PARTY STAFF**

ATTORNEYS DAILY TIME RECORD

Thursday March 1

[illegible]

MONTH	DAY	YEAR

Net Apr. 14

ATTORNEYS DAILY TIME RECORD

ATHS

4910123

[illegible]

WORK DONE

May 5

215-512

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ACCOUNT NUMBER	MATTER	CLIENT	MATTER NAME	TIME		WORK DONE
				HOURS	TENTHS	
[REDACTED]			[REDACTED]	[REDACTED]		[REDACTED]
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			[REDACTED]	[REDACTED]		[REDACTED]
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			(Flood) being changed to [REDACTED] (Note was)	[REDACTED]		Met with Jim do ga over rebuttal Met with Tim de ga over rebuttal
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MONTH	DAY	YEAR
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DAY

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ACCOUNT	MATTER NUMBER	CLIENT	MATTER NAME	TIME		WORK DONE
				HOURS	TENTHS	
			[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
			[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
		(regulatory)	Berry's Chapel	1		Call from Tyler, about Tyler about v conditions proposed by Staff and sent co call to Shiva to discuss certification of
			[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
			[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
		(flood)	Berry's Chapel	1.2		to and from Green,
		(rate case)	Berry's Chapel			asked from Tyler about his testimony, R on response to questions from CAD. Worked
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Wed June 6

ACCOUNT	MATTER NUMBER	CLIENT	MATTER NAME	TIME		WORK DONE
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ATTORNEYS DAILY TIME RECORD

Monday June 11 - Dep't

[illegible]

Tuesday 6/12

ATTORNEYS DAILY TIME RECORD

Reviewed and
Version of New
with

MONTH	DAY	YEAR
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BRADLEY ARANT
BOULT CUMMINGS
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ALABAMA | DISTRICT OF COLUMBIA | MISSISSIPPI | NORTH CAROLINA | TENNESSEE

Berry's Chapel Utility f/k/a Lynwood Utility Corporation
Attention Tyler Ring
321 Billingsly Court, Suite 4
Franklin, Tennessee 37067

April 26, 2012
Matter No. 202510-301001
Atty: HW
Invoice No. 780543

Federal Tax ID: 63-0243316

RE: Regulatory

For Legal Professional Services Posted Through 03/31/12	\$23,052.50
For Expenses Posted Through 03/31/12	\$86.34
TOTAL THIS INVOICE	\$23,138.84
Previous Outstanding Balance as of 04/26/12	\$42,088.70
CURRENT AMOUNT DUE THIS MATTER	\$65,227.54

Outstanding Invoice(s) as of April 26, 2012

<u>Inv Date</u>	<u>Inv Number</u>	<u>Inv Amount</u>	<u>Payments</u>	<u>Balance Due</u>
07/27/11	734235	\$8,606.25	\$6,606.25	\$2,000.00
09/26/11	743337	\$2,736.85	\$0.00	\$2,736.85
10/20/11	747871	\$7,920.85	\$0.00	\$7,920.85
11/18/11	753663	\$7,204.25	\$0.00	\$7,204.25
12/13/11	758932	\$5,797.50	\$0.00	\$5,797.50
01/24/12	764782	\$6,996.25	\$0.00	\$6,996.25
02/27/12	769756	\$6,901.25	\$0.00	\$6,901.25
03/30/12	775411	\$2,531.75	\$0.00	\$2,531.75
Total Outstanding				\$42,088.70

RE: Regulatory

Description of Services

<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
02/23/12	(regulatory) Call from Jim; talked to Terry and Ryan; read hearing notice from TRA.	HW	0.50
02/23/12	(regulatory) Got information from Jim Ford in preparation for hearing on show cause issues; talked to Lisa at TRA; got list of complaints from Lisa and sent to Jim.	HW	1.00
02/24/12	(regulatory) Worked on preparation for show cause hearing.	HW	1.00
02/27/12	(regulatory) Attended TRA hearing for report on responses to customer complaints; prepared for hearing; follow up discussion with CAD.	HW	2.50
02/28/12	(rate case) Two calls from Jim; long discussion with Vance at KAD; emails to hearing officer about pre-hearing conference.	HW	1.00
02/29/12	(regulatory) Discussion with David Foster about pending dockets; two calls from Jim Ford.	HW	1.00
02/29/12	(rate case) Preparation for pre-hearing conference on rate case; emails to and from Hearing Officer.	HW	1.00
03/01/12	(rate case) Attended pre-hearing conference on rate case docket; talked to Scott afterwards; talked to Jim Ford.	HW	1.00
03/01/12	(regulatory) Attended pre-hearing conference at TRA on Grand Jurors' petition; read staff data requests on show cause docket; called Jim Ford to discuss drafted response.	HW	1.00
03/02/12	(regulatory) Call to David about response to staff data requests; drafted letter to Jerry Kettles; call from Jim Ford; drafted response to question on CCN.	HW	1.25
03/07/12	(rate case) Call and email from Scott about missing discovery responses; sent email to Jim.	HW	1.00
03/08/12	(rate) Meeting between Rings and Vance and Scott at AG's office; call to Scott to set up meeting; follow up discussion with John and Tyler.	HW	1.50

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<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
03/08/12	(rate) Call from Tyler about hiring Terry; call to Vance to discuss; call to David Foster to discuss.	HW	0.75
03/09/12	(rate) Call from Tyler about hiring Terry; call to Vance to discuss; call to Foster to discuss; draft motion on procedure and appointment of staff as a party and sent to Scott and Vance for review.	HW	1.25
03/12/12	(rate) Call to Tyler about discovery; call from Jim Ford about CAD meeting and motion to be filed at TRA; emails to and from Scott and Vance; finalized joint motion and filed at TRA; conference call with Scott to Hearing Officer.	HW	2.25
03/12/12	(regulatory) Worked on motion on flood control docket to postpone testimony	HW	0.25
03/13/12	(rate) Call from Scott Jackson about meeting at Berry's Chapel office; emails to and from Scott on discovery issues; call to Jim Ford on discovery issues.	HW	1.00
03/13/12	(regulatory) Worked on court of appeals brief; talked to Heather about argument; read briefs and order from TRA docket; looked up TCA statute on appeals.	HW	1.00
03/13/12	(regulatory) Finished and filed motion with Hearing Officer on flood surcharge; talked to Jim Ford about flood issues; talked to Scott about motion and about meeting at Berry's Chapel office; email from Hearing Officer about granting of motion.	HW	0.75
03/13/12	Conference with Mr. Walker regarding brief to be filed with Court of Appeals	HHW	0.50
03/14/12	(rate) Email from Scott about Friday meeting since response; call to Jim Ford; call to TRA about staff participation.	HW	0.50
03/15/12	Draft and revise appellate brief to Court of Appeals; conferences with H. Wright regarding drafting same	MMB	3.25
03/15/12	Conference with Ms. Burton regarding Appellant Brief	HHW	0.25
03/15/12	(rate) Call from Jim Ford to prepare for meeting; call to David Foster; prepared for meeting on discovery.	HW	1.00
03/16/12	Draft and revise appellate brief; conferences with H. Wright regarding same	MMB	4.25

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<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
03/16/12	(rate) Meeting with Attorney General at company offices; handle discovery issues and other rate case issues; discussion with clients before and after meeting with Attorney General's office.	HW	3.00
03/16/12	Discussion of flood control issues in meeting with Attorney General at company offices; discussion of show cause issues also.	HW	1.25
03/18/12	Attend to e-mail with H. Wright regarding appellate brief	MMB	0.25
03/18/12	Review and revise Appellant Brief	HHW	1.75
03/19/12	Revise appellate brief; attend to e-mail with H. Walker and H. Wright regarding same; conferences with H. Walker regarding same	MMB	5.25
03/20/12	Revise brief to the Court of Appeals in preparation for filing; conferences with H. Walker regarding same	MMB	4.00
03/20/12	Call from Jim about responses to discovery; flood purchase issues and making refund	HW	0.00
03/20/12	Finalized court of appeals brief on appeal of TRA decision.	HW	1.50
03/21/12	Spent time with TRA Chairman Hill.	HW	1.00
03/21/12	Read final version of brief; calls to CAD about reply brief; call to TRA General Counsel about reply brief; call from Court Clerk's office; call to Melissa Burton.	HW	1.50
03/22/12	(rate) Talked to David about assigning staff to rate case; call from Jim Ford.	HW	0.75
03/22/12	Call from Tyler on easement issue; reviewed easement language and called him back to discuss solution.	HW	1.00
03/23/12	Call from John Ring about foreclosure; talked to Richard Warren; call to Tyler to explain answer and discuss other issue.	HW	0.75
03/26/12	Further discussion with Tyler about indemnity letter.	HW	0.25
03/26/12	Drafted indemnity agreement for new customer to sign.	HW	0.75
03/27/12	(rate case) Call from Scott about discovery issues; read Hearing Officer's order; call to Jim Ford.	HW	0.75



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<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
03/27/12	Got address for indemnity letter; email to Tyler; discussed show cause proceeding with Jean Stone; discussed show cause docket with CAD.	HW	0.75
03/28/12	(rate case) Email and follow up call from Scott with supplemental discovery requests; reviewed requests; call to Jim Ford to discuss response.	HW	1.25
03/28/12	Call from TRA staff on show cause issue; discussed show cause issues with Scott; emailed indemnity letter to Tyler.	HW	0.75
03/29/12	(rate case) Talked to TRA staff about intervening in rate case. Discussion with Jim about response to CAD's data request; discuss date requests with Ryan at CAD; went over questions again.	HW	1.50
03/29/12	Sent transcript of TRA meeting to Tyler Ring and Jim Ford; call from Tyler to discuss; call from Jim to discuss; call from TRA staff on show cause docket.	HW	1.00
03/30/12	Meeting with staff at TRA to discuss show cause proceeding; set up meeting with company and staff; call to Shiva about brief; call from John about transcript and meeting with staff; emails to and from John and Tyler.	HW	1.25
03/30/12	(rate case) Talked to TRA staff about rate case in meeting at TRA; follow-up emails to and from Jim, Tyler and John; call from John.	HW	1.25
Total Legal Professional Services Posted Through 03/31/12			\$23,052.50

Description of Expenses

	<u>Amount</u>
Copy Charges	\$29.50
Copy Charges - OUTSIDE SOURCES	\$46.84
Messenger/Delivery Charges	\$10.00
Total Expenses Posted Through 03/31/12	\$86.34
Total This Invoice	<u>\$23,138.84</u>

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Berry's Chapel Utility f/k/a Lynwood Utility Corporation
Attention Tyler Ring
321 Billingsly Court, Suite 4
Franklin, Tennessee 37067

June 27, 2012
Matter No. 202510-301004
Atty: HW
Invoice No. 790885

Federal Tax ID: 63-0243316

RE: ~~Smith~~

For Legal Professional Services Posted Through 05/31/12	\$7,366.25
For Expenses Posted Through 05/31/12	\$0.00
TOTAL THIS INVOICE	\$7,366.25
Previous Outstanding Balance as of 06/27/12	\$4,357.50
CURRENT AMOUNT DUE THIS MATTER	\$11,723.75

Outstanding Invoice(s) as of June 27, 2012

<u>Inv Date</u>	<u>Inv Number</u>	<u>Inv Amount</u>	<u>Payments</u>	<u>Balance Due</u>
05/24/12	785766	\$4,357.50	\$0.00	\$4,357.50
Total Outstanding				\$4,357.50



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Berry's Chapel Utility f/k/a Lynwood Utility Corporation
Attention Tyler Ring
321 Billingsly Court, Suite 4
Franklin, Tennessee 37067

May 24, 2012
Matter No. 202510-301004
Atty: HW
Invoice No. 785766

Federal Tax ID: 63-0243316

RE: Flood

For Legal Professional Services Posted Through 04/30/12

\$4,357.50

For Expenses Posted Through 04/30/12

\$0.00

TOTAL THIS INVOICE

\$4,357.50

RE: Flood

Description of Services


<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
04/04/12	Met with Tyler, John and Jim prior to meeting at TRA; meeting at TRA with staff to discuss various proceedings at TRA; follow up emails to and from Shiva to send him motion to file in court.	HW	2.50
04/09/12	Talked to Jim about TRA staff and flood issue.	HW	0.25
04/11/12	Call from Scott about more discovery; call to Jim to discuss; second call from Scott and conference call with Hearing Officer; call to Jim to discuss; call from Tyler about refund and flood issues; discussed regulation of wastewater companies with Chairman Hill and impact of new statute; wrote agreed order on continuance and sent to Scott; filed order at TRA; emails to and from Scott and Hearing Officer.	HW	1.25
04/12/12	Call from Scott; emails to and from Jim; read Hearing Officer's order.	HW	0.75
04/16/12	Message from Jim about giving additional information to TRA; call from Tyler; call from Scott about joint status motion; read Scott's draft and approval for filing.	HW	1.25
04/17/12	Emails to and from Scott and Laura to put Dave and Jim in touch.	HW	0.25
04/20/12	Call from Jim about his discussions with Dave; call to Tyler with update; call to Ryan about review of Dave's draft and discussion of other dockets.	HW	0.50
04/23/12	Read CAD testimony on flood issue; call to Jim; call to Tyler.	HW	0.75
04/24/12	Continued reading testimony; talked to David Foster at TRA about refund issue from flood money.	HW	0.50
04/26/12	Call to Hearing Officer about filing rebuttal and hearing date and impact of reorganization of TRA; checked procedural schedule.	HW	0.75



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Matter No. 202510-301004
Invoice No. 785766

<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
04/27/12	Call from Tyler to discuss flood surcharge issue; emails to and from Tyler and Jim on same issue; emails to and from Hearing Officer on pre-hearing conference.	HW	0.75
04/30/12	Call from Jim about his reaction to the CAD testimony on flood issues; preparing for meeting to discuss flood issue; call from Tyler.	HW	1.00
Total Legal Professional Services Posted Through 04/30/12			\$4,357.50
Total This Invoice			<u>\$4,357.50</u>

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Berry's Chapel Utility f/k/a Lynwood Utility Corporation
Attention Tyler Ring
321 Billingsly Court, Suite 4
Franklin, Tennessee 37067

July 23, 2012

Matter No. 202510-301004

Atty: HW

Invoice No. 795169

Federal Tax ID: 63-0243316

RE: Flood

For Legal Professional Services Posted Through 06/30/12

\$4,565.00

For Expenses Posted Through 06/30/12

\$0.00

TOTAL THIS INVOICE

\$4,565.00

Previous Outstanding Balance as of 07/23/12

\$11,723.75

CURRENT AMOUNT DUE THIS MATTER

\$16,288.75

Outstanding Invoice(s) as of July 23, 2012

<u>Inv Date</u>	<u>Inv Number</u>	<u>Inv Amount</u>	<u>Payments</u>	<u>Balance Due</u>
05/24/12	785766	\$4,357.50	\$0.00	\$4,357.50
06/27/12	790885	\$7,366.25	\$0.00	\$7,366.25
Total Outstanding				\$11,723.75

RE: Flood

Description of Services

<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
06/01/12	Fax from Jim with cross-ex questions; call from Jim; call from Tyler.	HW	0.75
06/04/12	Call from Tyler about his testimony; read Tyler's email on responses to questions from CAD; worked on cross-examination.	HW	0.50
06/05/12	Attended pre-hearing conference on rate/flood docket; read supplemental testimony of CAD and called Scott Jackson.	HW	1.00
06/06/12	Met with Scott, Tyler and John to prepare for rate and flood cases; went over Tyler's summary and prepared him for cross examination; prepared cross-ex for Dave Peters; call to CAD about hearing; read Hearing Officer's order; read comments filed by consumers; wrote filing on public notice to file at TRA.	HW	2.50
06/07/12	Hearing on flood issues at TRA.	HW	1.50
06/08/12	Attended TRA conference for decision on rate case; met with TRA staff following conference to discuss tariff changes; call to Paul Green to get tariff language from TWSI; call to Tyler to discuss case result; call to David Foster to discuss order language and filing of additional claims for flood damage; talked to Tyler again about final order and tariff language; worked on tariff filing.	HW	1.75
06/11/12	Worked on draft of revised tariff and sent to Jim and Paul Green for review; several discussions with TRA staff on tariff issues; looked up 2009 Lynnwood tariff; several discussions with Jim on tariff issues; read final draft of tariff and filed at TRA; call to CAD about tariff issues and odorization tariff; talked to Tyler about hiring Terry; talked to CAD on same issue; talked to Foster about hiring Darlene.	HW	1.25
06/12/12	Call from Jim about elementary school rate, flood amount, and revenue requirement; second call from Jim on same issues; call to David Foster to discuss all three issues and compliance with order; talked to Jim about hiring new accountant; call to CAD; call to Foster on same issue.	HW	0.50

Matter No. 202510-301004
Invoice No. 795169

4

<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
06/28/12	Discussed with Tyler notice to customers of flood surcharge; checked language of TRA motion on flood issue; talked to Terry Buckner; talked to David Foster again on flood issue; talked to Ryan on same issue.	HW	1.25

Total Legal Professional Services Posted Through 06/30/12

\$4,565.00

Total This Invoice

\$4,565.00

 BRADLEY ARANT
BOULT CUMMINGS

TENNESSEE REGULATORY AUTHORITY



460 James Robertson Parkway
Nashville, Tennessee 37243-0505

shiva.bozarth@tn.gov

Sharla Dillon
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: In Re: Berry's Chapel Utility Inc.

Dear Ms. Dillon:

Attached hereto please find pages 1 through 5 of exhibits that were inadvertently not filed with the testimony of Tiffany Underwood. These should be filed as Supplementary Exhibit 1 to the Testimony of Tiffany Underwood.

Please accept my apologies for this error and do not hesitate to contact me if you any questions whatsoever.

Sincerely,

A handwritten signature in black ink, appearing to read "Shiva K. Bozarth", is written over a horizontal line.

Shiva K. Bozarth

Legal Counsel

Encl: Supplementary Exhibit 1 to the Testimony of Tiffany Underwood



**BRADLEY ARANT
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ALABAMA | DISTRICT OF COLUMBIA | MISSISSIPPI | NORTH CAROLINA | TENNESSEE

Berry's Chapel Utility f/k/a Lynwood Utility Corporation
Attention Tyler Ring
321 Billingsly Court, Suite 4
Franklin, Tennessee 37067

June 27, 2012
Matter No. 202510-301004
Atty: HW
Invoice No. 790885

Federal Tax ID: 63-0243316

RE: Flood

For Legal Professional Services Posted Through 05/31/12	\$7,366.25
For Expenses Posted Through 05/31/12	\$0.00
TOTAL THIS INVOICE	\$7,366.25
Previous Outstanding Balance as of 06/27/12	\$4,357.50
CURRENT AMOUNT DUE THIS MATTER	\$11,723.75

Outstanding Invoice(s) as of June 27, 2012

<u>Inv Date</u>	<u>Inv Number</u>	<u>Inv Amount</u>	<u>Payments</u>	<u>Balance Due</u>
05/24/12	785766	\$4,357.50	\$0.00	\$4,357.50
Total Outstanding				\$4,357.50

(2)

RE: Flood

Description of Services

<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
05/01/12	Meeting with Tyler, John and Jim to go over CAD testimony on flood, settlement documents.	HW	1.00
05/02/12	Call to CAD to discuss issues related to flood expenses; two calls to Jim Ford.	HW	0.75
05/03/12	Pre-hearing conference at TRA; discussion with CAD; call from Jim.	HW	0.50
05/04/12	Calls to CAD, staff and Jim to set up meeting at TRA; went over draft rebuttal testimony.	HW	0.75
05/07/12	Prepared for meeting at TRA; call from Shiva.	HW	0.50
05/08/12	Met with Jim to go over rebuttal.	HW	1.00
05/09/12	Met with CAD and TRA staff to discuss rate case, show cause and flood issues.	HW	1.50
05/14/12	Call to Shiva about flood surcharge issue; call to Tyler to set up meeting with staff; call to Shiva to confirm meeting; call from Jim Ford.	HW	0.50
05/16/12	Met at TRA with John and Tyler to discuss surcharge issue and flood damage.	HW	0.75
05/17/12	Call from Tyler; call from Jim; emails back and forth on flood and related matters.	HW	0.75
05/21/12	Reviewed rebuttal testimony and made edits; call to Jim Ford; call to CAD about extension; call to Hearing Officer on extension; several emails about extension issue; second call to Jim about rebuttal.	HW	1.50
05/22/12	Three calls to and from Jim Ford; emails to and from Myra on getting rebuttal filed; email from Hearing Officer; sent response.	HW	0.75
05/23/12	Calls from Shiva, Ryan and Jim Ford on settlement.	HW	0.75
05/24/12	Two conference calls with Jerry and Shiva on rate issues; call to Jim Ford about meeting and to go over accounting issues; read Hearing Officer's Notice of Hearing.	HW	0.75



Matter No. 202510-301004
Invoice No. 790885

3

<u>Date</u>		<u>Tkpr</u>	<u>Hours</u>
05/25/12	Call to Jim to prepare for meeting with CAD and TRA staff.	HW	1.75
05/30/12	Preparation for testimony of Jim Ford; call to Jim; call to Tyler.	HW	1.25
05/31/12	Hearing at TRA; meeting with clients prior to hearing and follow up discussions about strategy and next steps.	HW	3.00
Total Legal Professional Services Posted Through 05/31/12			\$7,366.25
Total This Invoice			<u>\$7,366.25</u>



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4

Berry's Chapel Utility f/k/a Lynwood Utility Corporation
Attention Tyler Ring
321 Billingsly Court, Suite 4
Franklin, Tennessee 37067

June 27, 2012
Matter No. 202510-301004

REGARDING: Flood

INVOICE: 790885

TOTAL: \$11,723.75

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Wire Payments to:
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Account No. 7132542275
ABA No. (wires): 062005690

Check Payments with Remittance to:
BRADLEY ARANT BOULT CUMMINGS, LLP
Post Office Box 340025
Nashville, TN 37203-0025
For Wires and ACH:
Please reference the File Number, Invoice Number and/or
Attorney Contact in the remarks section.



ALABAMA | DISTRICT OF COLUMBIA | MISSISSIPPI | NORTH CAROLINA | TENNESSEE

6

Berry's Chapel Utility f/k/a Lynwood Utility Corporation
Attention Tyler Ring
321 Billingsly Court, Suite 4
Franklin, Tennessee 37067

June 27, 2012
Matter No. 202510-301001

REGARDING: Regulatory

INVOICE: 790884

TOTAL: \$77,389.89

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BRADLEY ARANT BOULT CUMMINGS, LLP
Post Office Box 340025
Nashville, TN 37203-0025

For Wires and ACH:
Please reference the File Number, Invoice Number and/or
Attorney Contact in the remarks section.

August 12, 2004

DOCKET NO.
01-00704

¹ The *Renewed Motion* incorporates by reference the *Consumer Advocate's Objection to the Motion for Approval of Settlement Agreement Filed by Atmos Energy Corporation and the Staff of the Tennessee Regulatory Authority*, pp 1-6 (May 17, 2004) and *The Consumer Advocate Division's Reply Opposing Approval of the Proposed Settlement*, pp 1-2 (May 28, 2004). See *Consumer Advocate's Renewed Motion to Summarily Deny Motion to Approve Settlement and Alternatively to Treat the Motion as a Motion for Summary Judgment*, pp 1-2 (June 3, 2004). By disposition of the *Renewed Motion*, the Hearing Officer is also disposing of the previous requests for dismissal incorporated therein.

Motion to Summarily Deny Motion to Approve Settlement and Alternatively to Treat the Motion as a Motion for Summary Judgment ("Response") on June 7, 2004. United Cities Gas Company ("Atmos Energy Corporation" or "Atmos") did not file a response to the Consumer Advocate's *Renewed Motion*, but adopted the Staff's *Response* orally on June 8, 2004.²

In the *Renewed Motion*, the Consumer Advocate urges denial of the *Motion to Consolidate and for Approval of Settlement Agreement* (hereinafter "*Motion to Approve Settlement Agreement*")³ on the basis that, because of the Consumer Advocate's opposition, not all parties have agreed to the proposed settlement. In its *Response*, Staff argues that this case is distinguishable from a settlement where all three parties have joined in the presentation of a settlement agreement for consideration by the Authority because Staff and Atmos are merely signaling to the Authority that they have settled their differences and seek approval of a petition through a contested case proceeding. Because of this distinction, Staff urges denial of the *Renewed Motion*.

Findings and Conclusions

After due consideration of the arguments presented by Atmos, the Consumer Advocate and Staff, the Hearing Officer makes the following findings:

Staff and Atmos are parties to this proceeding. By virtue of the granting of the request for intervention by the voting Panel on April 30, 2002, the Consumer Advocate is

² Transcript of Proceedings, pp. 3-4 (June 8, 2004)

³ By agreement of the Parties, the issue of consolidation of the dockets was separated from the issue of approval of the proposed settlement agreement and consolidation was granted at the Status Conference on April 22, 2004. See *Order Granting Motion to Consolidate and to Approve Settlement Agreement in Part, Granting Motion for Extension of Time to Respond in Part, and Setting Procedural Schedule* (April 28, 2004). Therefore, to indicate more accurately the remaining issue to be determined in the motion, the *Motion to Consolidate and for Approval of Settlement Agreement* will be referred to as the "*Motion to Approve Settlement Agreement*" in this Order.

a party to this proceeding. The Consumer Advocate as a party has not consented to the proposed settlement agreement in this case.

In *Harbour v. Brown*, 732 S.W.2d 598 (Tenn. 1987), the Tennessee Supreme Court held that a valid consent judgment cannot be entered by a court when one party withdraws his consent and this fact is communicated to the court prior to the entry of the judgment. The Court has further stated that a valid consent judgment cannot be rendered by a court when the consent of one of the parties thereto is wanting.⁴

Staff and Atmos in the *Motion to Approve Settlement Agreement* filed on March 8, 2004 requested approval of the Settlement Agreement by the Authority at the March 22, 2004 Authority Conference. This request renders the settlement a joint presentation of a settlement agreement for consideration by the Authority, rather than a signal to the Authority that the parties have settled their differences and seek approval of a petition through a contested case proceeding.

Therefore, based upon the principles stated in the holding of the Tennessee Supreme Court in *Harbour v. Brown*, the Hearing Officer concludes that the proposed settlement agreement cannot be approved absent the consent of all parties to that agreement. Because the Consumer Advocate is a party and has not consented to the proposed settlement, the *Renewed Motion* is granted to the extent that the *Motion for Approval of Settlement Agreement* cannot be approved and therefore must be denied. Further, because the Consumer Advocate is a party and has not consented to the proposed settlement agreement, the *Motion to Approve Settlement Agreement* must be denied. The Consumer Advocate's alternate request to treat the *Motion for Approval of Settlement*

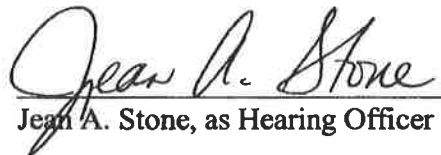
⁴ *Harbour v Brown*, 732 S W 2d 598, 599 (Tenn 1987)

Agreement as a motion for summary judgment is rendered moot by the granting of summary denial of that motion and, therefore, is denied.

IT IS THEREFORE ORDERED THAT:

1. The *Consumer Advocate's Renewed Motion to Summarily Deny Motion to Approve Settlement and Alternatively to Treat the Motion as a Motion for Summary Judgment* filed on June 3, 2004 is granted in part only as to the summary denial of the motion to approve the settlement agreement. Accordingly, the alternate motion to treat the motion to approve the settlement agreement as a motion for summary judgment is rendered moot and therefore is denied; and

2. The *Motion to Approve Settlement Agreement* filed on March 8, 2004 is denied.


Jean A. Stone, as Hearing Officer