

IN RE:)	
)	
INVESTIGATION AS TO WHETHER A)	T.R.A. DOCKET ROOM
SHOW CAUSE ORDER SHOULD BE)	
ISSUED AGAINST BERRY'S CHAPEL)	
UTILITY, INC. AND/OR LYNWOOD)	
UTILITY CORPORATION FOR)	DOCKET NO. 11-00065
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 IN SUPPORT OF THE SETTLEMENT AGREEMENT

Comes now the Tennessee Regulatory Authority staff participating as a party ("Party Staff") who respectfully request that the Tennessee Regulatory Authority ("TRA" or the "Authority") approve the Settlement Agreement filed by Party Staff and Berry's Chapel Utility, Inc. ("BCUI") with the Authority on May 31, 2013.

I. Statement of Facts

1. BCUI is a wastewater treatment system operating in Williamson County, Tennessee.
2. On September 1, 2010, BCUI acquired the system from Lynwood Utility Corporation ("Lynwood") without prior approval from the Authority.
3. On September 17, 2010, the Authority received notice from BCUI that since BCUI was a non-profit corporation, BCUI was a "non-utility" and exempt from the TRA's regulation under T.C.A. § 65-4-101.
4. On June 6, 2011, T.C.A. §65-4-101 was amended to state that non-profit entities such as BCUI are subject to regulation by the Authority.
5. On August 5, 2011, the Authority issued an Order in Docket No. 11-00005 declaring that BCUI remained subject to the Authority's jurisdiction prior to the amendment of T.C.A. § 65-4-101.

6. On December 21, 2012, the Court of Appeals for the Middle District of Tennessee affirmed the Authority's decision that BCUI remained a public utility subject to the Authority's jurisdiction prior to the statutory amendment.
7. On June 7, 2012, the Authority approved *nunc pro tunc* the transfer of Lynwood's Certificate of Convenience and Necessity ("CCN") to BCUI in Docket No. 12-00046. BCUI agreed to conditions on its CCN which were designed to ensure that the company operates in a prudent and legal manner going forward.
8. During the period when BCUI believed it was not under the Authority's jurisdiction, BCUI imposed several charges and other fees that were not approved by the TRA. These fees were illegal.
9. BCUI ceased collecting these illegal fees and is now in compliance with the Authority's orders and rules.
10. The Authority's August 5, 2011, Order in Docket No. 11-00005, opened "a new docket to address the ramifications from its declaration that Berry's Chapel is a public utility subject to TRA jurisdiction."¹ The Authority specifically requested that this new docket consider 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 The docket was further ordered to consider what if any action should be taken against BCUI for operating without a CCN, merging with Lynwood without approval from the TRA, and illegally increasing rates.³
11. The Settlement Agreement offered by Party Staff and BCUI is a resolution of these issues wherein BCUI acknowledges they have violated the law and the authority imposes a punishment for these violations.

II. Statement of Positions

12. Party Staff would assert this is an enforcement action against BCUI for violations of the law. Furthermore, in the context of an enforcement action the Authority may take actions that affect utility rates.

¹ *In Re: Consumer Advocate's petition for Declaratory Order that Berry's Chapel Utility, Inc. is a Public Utility Under Tennessee Law and Should be Regulated by the TRA*, Docket No. 11-00005, Order Declaring Berry's Chapel Utility, Inc. to be a Public Utility, Pg. 19 (August 5, 2011).

² *Id.*

³ *Id.*

13. Party Staff would assert that the only necessary parties to the resolution of the issues in this case are Party Staff and BCUI. The Consumer Advocate Division in the Office of the Attorney General (“CAD”) is entitled to represent the interests of consumers by objecting to the Settlement Agreement but it cannot preclude resolution simply by objecting as they have no claims at issue.
14. The Settlement Agreement represents a reasonable settlement of issues surrounding BCUI’s illegal activity given the requirements of the law.

A. This Docket is an Enforcement Action

15. Party Staff was ordered to identify whether a hearing was necessary to decide the outcome of the \$20 illegal fees and what to do about BCUI illegally increasing rates. Party Staff complied with these instructions. The Settlement Agreement resolves these allegations and penalizes BCUI.
16. BCUI has acknowledged that their past conduct in raising rates and continuing others without permission was illegal. They have since ceased the illegal activity and negotiated a CCN with sufficient protections to ensure the TRA that this conduct does not recur.
17. The TRA is authorized to exercise “practically plenary authority over the utilities within its jurisdiction.”⁴ This broad grant of authority empowers the TRA to resolve the issues and conclude the enforcement action. A recent Tennessee Court of Appeals decision soundly rejects the CAD’s argument that the TRA cannot take action affecting rates outside of a case affecting base rates.⁵ Instead the Court found that Authority’s powers to effect rates are limited only when the legislature has expressly stated a limitation.⁶

B. Party Staff and BCUI are the Only Necessary Parties

18. The Party Staff was instructed to assist the Authority in determining what if any action should be taken regarding the actions of BCUI.
19. Party Staff complied with these instructions and evaluated all of the available evidence. Based upon that evaluation it was determined that the best course of action was settlement.

⁴ *Tenn. Cable Television Assoc. v. Tenn. Public Service Comm.* 844 S.W.2d 151, 159 (Tenn. Ct. App., 1992).

⁵ *Consumer Advocate & Protection Division v. Tennessee Regulatory Authority*, 2012 WL 1964593, at *17 (Tenn. Ct. App. 2012)

⁶ *Id.*

20. In the current case, both Party Staff and BCUI filed testimony and exhibits along with the Settlement Agreement.
21. Other Tennessee state agencies routinely settle cases after investigation. These settlements are presented by an agency attorney on behalf of the agency without any testimony or evidence other than the agreement of the parties.⁷ Often these settlements involve misconduct that has harmed individuals the victims of the misconduct do not have an opportunity to prevent the settlement.
22. This is because it is the agency that is responsible for the public good. The TRA is no different. The mission of the Authority is “to promote the public interest by balancing the interests of utility consumers and providers...”⁸
23. To adopt the CAD’s position would be akin to allowing the victims of a robbery to preclude a plea bargain because they sought more punishment. This proposition flies in the face of the Authority’s broad and plenary authority to regulate public utility companies.
24. Without a related “claim” that this Authority can resolve the CAD cannot preclude the Settlement Agreement as a resolution of these issues.⁹ In any enforcement action individuals do not have claims and instead it is the Authority fulfilling its role of enforcing the law for the public good. There are no individual claims in enforcement actions and the CAD cannot raise a claim on behalf of the consumers cumulatively or individually.

C. The Settlement Agreement Complies with the Requirements of the Law

25. The law requires that the TRA consider certain factors whenever it imposes penalties on a utility.¹⁰ The Authority must consider the following three factors: the size of the utility; the gravity of the violation; and the good faith of the utility in achieving compliance.¹¹
26. Party Staff is aware that BCUI is small utility with a history of financial difficulties.

⁷ See *In the Matter of Brian J. Wilkinson, D.D.S.* Case No. 2011021781, *Before the Tennessee Board of Dentistry* (attached as Exhibit 1)

⁸ Tennessee Regulatory Authority Mission Statement

⁹ Tenn. Atty. Gen. Op. 11-06 (January 11, 2011)

¹⁰ Tenn. Code Ann. § 65-4-116(b)

¹¹ *Id.*


27. Party Staff considered that BCUI's illegal conduct occurred during a period when BCUI relied upon the advice of counsel to believe that it was unregulated and did not result in service interruptions for consumers.
28. BCUI has worked diligently with Party Staff to resolve issues and restore trust with the TRA. BCUI voluntarily began making customer refunds in April of 2013, these refunds will total almost \$75,000 and will be returned to the consumers who paid the over collections dollar for dollar.
29. This Settlement Agreement requires that BCUI pay an almost \$8,000 penalty into a financial security for the benefit of the consumers. This is in addition to other moneys that BCUI must utilize as a financial security for the benefit of the consumers.

III. Conclusion

30. Party Staff has reviewed the Initial Brief of Berry's Chapel and adopts the arguments and positions therein.
31. Party Staff asserts that when the Authority considers all the facts in this case as well as the statutorily required factors the most reasonable and responsible decision will be to ratify the Settlement Agreement

WHEREFORE, Party Staff respectfully requests that the Authority deny the objections of the CAD and approve the Settlement Agreement.

Respectfully submitted,



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

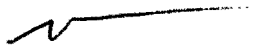
CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served a copy of the foregoing document on the following persons by U.S. Mail:

Henry M. Walker
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, TN 37203

Charlena Aumiller
Vance L. Broemel
Assistant Attorney General
Office of Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202

This the 13th day of August, 2013.



Shiva K. Bozarth

**STATE OF TENNESSEE
DEPARTMENT OF HEALTH**

IN THE MATTER OF:)	BEFORE THE TENNESSEE
)	BOARD OF DENTISTRY
BRIAN J. WILKINSON, D.D.S.)	
RESPONDENT)	CASE NUMBER: 2011021781
)	
CHATTANOOGA, TENNESSEE)	
TENNESSEE LICENSE NO.: 8415)	

CONSENT ORDER

Come now the Division of Health Related Boards of the Tennessee Department of Health (hereinafter the "Division"), by and through the Office of General Counsel, and Respondent Brian J. Wilkinson, D.D.S. (hereinafter "Respondent"), and respectfully move the Tennessee Board of Dentistry (hereinafter the "Board") for approval of this Consent Order affecting Respondent's license to practice dentistry in the State of Tennessee.

The Board is responsible for the regulation and supervision of dentists licensed to practice in the State of Tennessee. *See Tennessee Dental Practice Act* (hereinafter the "Practice Act"), Tennessee Code Annotated Section (hereinafter "TENN. CODE ANN. §") 63-5-101, *et seq.* It is the policy of the Board to require strict compliance with the laws of this State, and to apply the laws so as to preserve the quality of dental care provided in Tennessee. It is the duty and responsibility of the Board to enforce the Practice Act in such a manner as to promote and protect the health, safety and welfare of the citizens of the State of Tennessee, including by disciplining dentists who violate the provisions of TENN. CODE ANN. § 63-5-101, *et seq.*, or the Rules and Regulations promulgated by the Board and recorded in the Official Compilation Rules and Regulations of the State of Tennessee (hereinafter "TENN. COMP. R. & REGS.").



Respondent, by his signature to this Consent Order, waives the right to a contested case hearing and any and all judicial review in this matter. Respondent agrees that presentation to and consideration of this Consent Order by the Board for ratification and all matters divulged during that process shall not constitute unfair disclosure such that the Board or any of its members shall be prejudiced to the extent that requires their disqualification from hearing this matter should this Order not be ratified. Likewise, all matters, admissions and statements disclosed or exchanged during the attempted ratification process shall not be used against Respondent in any subsequent proceeding unless independently entered into evidence or introduced as admissions.

I. STIPULATIONS OF FACT

1. Respondent has been at all times pertinent hereto been registered by the Board as a dentist in the State of Tennessee, having been granted license number 8415 by the Board on July 19, 2005, which currently has an expiration date of September 30, 2013.
2. Respondent placed mandibular implants to support a lower denture on patient L.K.
3. Following placement of the implants and fitting with the denture plate, patient L.K. experienced mouth sores and complained of pain.
4. On or about July 2011, a pharmacist expressed concern to the Respondent that he appeared to be performing pain management versus treating any acute or chronic dental condition.
5. Between November 2010 and July 2011 Respondent prescribed one thousand sixty-two (1,062) Lortab 10/500mg tablets and one hundred fifty-three (153) Valium tablets to patient L.K.

6. Respondent stated the prescription for Valium was given because the patient clenched her teeth at night.
7. Respondent discussed with patient L.K. the medication he prescribed for her and she denied an addiction to the medication. Respondent then suggested a referral to pain management assistance however the patient declined to do so.
8. Respondent admits he does not like the idea of anyone being in pain and may have been too liberal in his prescribing of controlled substances.

II. GROUNDS FOR DISCIPLINE

The facts stipulated in paragraphs one through two in the Stipulations of Fact, *supra*, are sufficient to establish that grounds for discipline of Respondent's dental license exist. Specifically, Respondent has violated the following statutes or rules which are part of the Tennessee Dental Practice Act, (TENN. CODE ANN. § 63-5-101, *et seq.*) for which disciplinary action before the Board is authorized:

9. The facts stipulated in paragraphs 1 through 9, *supra*, constitute a violation of TENN. CODE ANN. § 63-5-124(8):

Dispensing, prescribing or otherwise distributing any controlled substance or any other drug not in the course of professional practice; or not in good faith to relieve pain and suffering or not to cure an ailment, physical infirmity or disease

III. POLICY STATEMENT

The Tennessee Board of Dentistry takes the following action in order to protect the health, safety and welfare of the citizens of the State of Tennessee and ensure that the public confidence in the integrity of the dental profession is preserved.

IV. ORDER

NOW THEREFORE, Respondent, for the purpose of avoiding further administrative action with respect to this cause, agrees to the following

10. The Tennessee dental license of Brian J. Wilkinson, D.D.S., license number 8415, is hereby placed on **PROBATION** for a period of three (3) years effective the date of entry of this Consent Order.
11. During the term of probation, Respondent must enroll in and successfully complete the three (3) day medical course entitled "*Prescribing Controlled Drugs*" offered at The Center for Professional Health at Vanderbilt University Medical Center located in Nashville, Tennessee, or an equivalent course approved in advance by the Board. Within thirty (30) days after completion of such course, Respondent shall mail or deliver proof of compliance with this course requirement to: **Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 227 French Landing, Suite 300, Heritage Place Metro Center, Nashville, Tennessee 37243.** Any Continuing Education (hereinafter "CE") course hours earned from attendance and

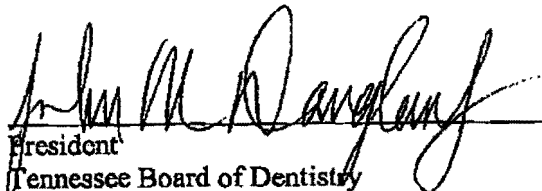
completion of the course required by this paragraph shall be in addition to the CE hours required to maintain licensure.

12. Upon filing of a Request for Order of Compliance by Respondent, expiration of the three (3) year time period, and demonstrating to the Board successful completion of the coursework ordered above, Respondent's probation may be lifted at the Board's discretion.
13. Respondent must pay one (1) "Type A" civil penalty, in the amount of one thousand dollars (\$1,000.00), for a total assessment of one-thousand dollars (\$1,000.00), representing the failure to prescribe in good faith as outlined in paragraph five (5) of the Stipulations of Fact, *supra*. Any and all civil penalties shall be paid within thirty (30) days of the effective date of this Consent Order. Any and all civil penalty payments shall be paid by certified check, cashier's check, or money order payable to the State of Tennessee, which shall be mailed or delivered to: **Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, 227 French Landing, Suite 201, Heritage Place Metro Center, Nashville, Tennessee 37243**. A notation shall be placed on said check that it is payable for the civil penalty of **Brian J. Wilkinson, COMPLAINT NO. 201102178**.
14. Respondent must pay, pursuant to TENN. CODE ANN. § 63-1-144(a)(4), the actual and reasonable costs of prosecuting this case to the extent allowed by law, including all costs assessed against the Board by the Division's Bureau of Investigations in connection with the prosecution of this matter. These costs will be established by an Assessment of Costs prepared and filed by counsel for the Department. Said costs shall not exceed one thousand dollars (\$1,000).

15. Any and all costs shall be paid in full within thirty (30) days after the issuance of the Assessment of Costs unless Respondent makes arrangements for an extended payment plan for the assessed costs through the Disciplinary Coordinator of the Division of Health Related Boards. Payment shall be made by **certified check, cashier's check, or money order**, payable to the **State of Tennessee, Department of Health**. Any and all payments shall be forwarded to the **Disciplinary Coordinator, The Division of Health Related Boards, Tennessee Department of Health, Heritage Place Metro Center, 227 French Landing, Suite 201, Nashville, Tennessee 37243**. A notation shall be placed on said money order or such check that it is payable for the costs of **Brian J. Wilkinson, COMPLAINT NO. 201102178.**
16. During the period of Probation, Respondent shall maintain good and lawful conduct and any violation of law will be a violation of the terms of this Order.
17. Respondent understands that this is a formal disciplinary action and will be reported to the Health Integrity and Protection Data Bank (H.I.P.D.B.) and/or similar agency.

V. APPROVAL BY THE BOARD

This **CONSENT ORDER** was approved by a majority of a quorum of the Tennessee Board of Dentistry at a public meeting of the Board and signed this 1st day of February, 2013



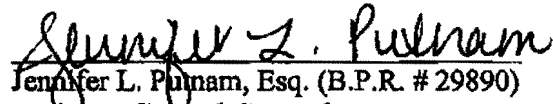
President
Tennessee Board of Dentistry

APPROVED FOR ENTRY:



Brian J. Wilkinson, D.D.S.
Respondent

11-27-12
DATE



Jennifer L. Pulnam, Esq. (B.P.R. # 29890)
Assistant General Counsel
Office of General Counsel
Tennessee Department of Health
220 Athens Way, Suite 210
Nashville, Tennessee 37243
(615) 741-1611

12/3/12
DATE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon Respondent Brian J. Wilkinson, D.D.S., 2352 Sargent Daly Drive, Chattanooga, Tennessee, 37421 and Shallowford Dental Care, PLLC, 7613 Shallowford Road, Chattanooga, Tennessee 37421, by delivering same in the United States Mail, Certified Numbers 7012 1640 0002 3921 8545 and 7012 1640 0002 3921 8552, return receipts requested, and United States First Class Postage Pre-Paid Mail, with sufficient postage thereon to reach its destination.

This 8th day of February, 2013.

Jennifer L. Putnam
Jennifer L. Putnam, Esq.
Assistant General Counsel