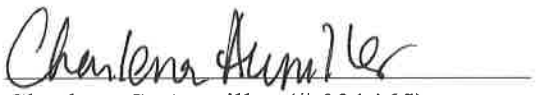
IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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	)	

CONSUMER ADVOCATE'S REPLY BRIEF

RESPECTFULLY SUBMITTED,



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CONSUMER ADVOCATE'S REPLY 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 Reply Brief in Tennessee Regulatory Authority ("TRA" or "the Authority") Docket No. 11-00065.

I. INTRODUCTION

The Consumer Advocate incorporates the Introduction from its *Initial Brief*, filed in this Docket on July 29, 2013.

In this Reply Brief, the Consumer Advocate addresses issues raised by the TRA Party Staff and Berry's Chapel Utility, Inc. ("Berry's Chapel" or "Utility") in two separate initial briefs and the TRA Party Staff's discovery responses.[1] In Part II, the Consumer Advocate replies to the TRA Party Staff's initial brief and discovery responses, which covers any similar arguments made by Berry's Chapel. The Consumer Advocate replies to the Berry's Chapel's initial brief in Part III. In Part IV, the Consumer Advocate provides its Conclusion recommending the Directors deny this Settlement in its entirety.

II. THE CONSUMER ADVOCATE RECOMMENDS THE DIRECTORS DENY THIS SETTLEMENT BECAUSE THE TRA PARTY STAFF HAS FAILED TO SHOW THAT IT COMPLIES WITH THE LAW, INCLUDING BUT NOT LIMITED TO HOW AUTHORIZING COST RECOVERY IS AN ENFORCEMENT ACTION.

The TRA Party Staff and the Consumer Advocate agree that the Utility's charges that varied from the approved tariff are illegal.[2]

The Consumer Advocate respectfully disagrees with the TRA Party Staff on many of its other positions. In its initial brief, the TRA Party Staff sets forth its position in paragraphs 12

[1] *Initial Brief in Support of the Settlement Agreement*, Docket No. 11-00065 (Aug. 12, 2013); *Initial Brief of Berry's Chapel*, Docket No. 11-00065 (Aug. 12, 2013); *Party Staff's Second Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065 (Aug. 12, 2013); *Party Staff's Third Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065 (Aug. 13, 2013).

[2] *See Initial Brief in Support of the Settlement Agreement*, Docket No. 11-00065, ¶ 8 (Aug. 12, 2013) (". . . BCUI imposed several charges and other fees that were not approved by the TRA. These fees were illegal").

through 14, including asserting the Docket is purely an enforcement action; the TRA can affect rates in enforcement actions; the Settlement can be approved regardless of the Consumer Advocate's objections because it has no claims; and, lastly, argues that the Settlement allowing only 50% of refunds to consumers is reasonable.[3] In addition to its initial brief, the TRA Party Staff filed discovery responses pursuant to the Hearing Officer's orders regarding the Consumer Advocate's *Motion to Compel*.[4] In these responses, the TRA Party Staff indicates that it has not contacted any consumers about the odor control issues or whether they have an issue with getting a refund of only half of monies paid pursuant to illegal charges.[5] Moreover, the TRA Party Staff contends that the TRA itself is representing consumers in the Settlement.[6]

In this Part, the Consumer Advocate explains why each of these positions does not comply with the law and, therefore, the Settlement should be denied. First, this Settlement goes beyond an enforcement action when it authorizes cost recovery to the Utility.[7] Second, the TRA Party Staff cites no authority indicating the TRA may affect rates in an enforcement action without following the requirements set forth in Tenn. Code Ann. § 65-5-103 and related rules, including but not limited to TRA Rule 1220-4-1-.05(2). Third, the consumers have claims in the monies they paid pursuant to illegal charges; the Consumer Advocate represents consumers'

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[3] *Id.* ¶¶ 12-14.

[4] *Party Staff's Second Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065 (Aug. 12, 2013); *Party Staff's Third Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065 (Aug. 13, 2013).

[5] *Party Staff's Third Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065, Data Response No. 6 (Aug. 13, 2013). The responses show a complaint was filed on July 21, 2011, which is about 15 months after the April 30, 2010 expiration of the odor control surcharge according to the tariff. *Revised Page No. 9 of Lynwood's Tariff*, Docket No. 08-00060, pg. 2 (Mar. 31, 2009); *see also Letter to Henry Walker from the Consumer Advocate*, Docket No. 08-00060 (June 20, 2011) (indicating the expiration date of the surcharge as Apr. 30, 2010 and requesting the Utility to stop its illegal charges).

[6] *Party Staff's Third Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065, Data Response No. 8 (Aug. 12, 2013)

[7] First discussed in *Initial Brief*, Docket No. 11-00065, pg. 11 (July 29, 2013) ("This Settlement, however, goes well beyond the investigative or enforcement function.").

interests in those claims in this Docket, and, therefore, this Settlement cannot be approved because it would inappropriately attempt to dispose of the Consumer Advocate's claims without its agreement.[8] Fourth, this Settlement does not otherwise comply with the law and, therefore, it should be denied.[9] Fifth, the TRA cannot represent consumers in this action or any other action because it does not have the statutory authority to represent consumers.[10]

A. Enforcement actions permit enforcement of existing laws, not the creation of new laws like this Settlement attempts when it incorrectly changes the effective rates for 2009 to 2011.

This Settlement goes beyond an enforcement action when it authorizes cost recovery to Berry's Chapel. Black's Law Dictionary defines "enforcement" as "[t]he act or process of compelling compliance with a law, mandate, command, decree, or agreement." The law sought to be enforced in this Docket are the tariffs and laws that existed at the time of the illegal charges and collections.[11] The tariffs that existed from 2009 to 2011 are the legal rates, and anything else collected pursuant to illegal charges was an illegal rate. Any allowance in this Docket to vary the billing or collection different from the then-existing tariffs would result in a rate change that improperly modifies the tariffs in effect during the period of illegal charges.

Many enforcement actions are conducted to determine whether the law was broken. In

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[8] First discussed in *Initial Brief*, Docket No. 11-00065, Part III.B, pgs. 42-43. Moreover, consumers may also possess private rights of action against Berry's chapel for its illegal billing and collection activities relating to any amounts not authorized by a tariff at the time of its collection. Any amounts recovered in this Docket would offset any damages available under private civil rights. For example, if 100% of the illegally taken monies are returned here with interest, the private actions would likely be significantly minimized since there *may* not be any additional damages beyond the illegally taken monies and the interest for the period of time the monies were wrongfully withheld.

[9] First discussed in *Initial Brief*, Docket No. 11-00065, Part II, pgs. 6-39 (including discussions of how the Settlement violates the fairness intended by Tennessee's Administrative Procedures Act in Part II.A; violates judicial principles in Part II.B; violates prohibition against retroactive ratemaking and the filed rate doctrine in Part II.C; violates fundamental ratemaking principles in Part II.D; violates basic fairness of forcing one party to abide by a settlement while allowing another to breach the agreement in Part II.E; and violates general public policy and is not in the best interest of consumers in Part II.F).

[10] First discussed in *Initial Brief*, Docket No. 11-00065, Part II.A, pgs. 8-11; III.A, pgs. 40-41.

[11] *Id.* Part II.C.2, pg. 26 (showing that provisions of a tariff are binding upon the customers *and* the utility and tariffs have the effect of law) (citing *GBM Communications, Inc. v. United Mountain*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986) (cert. denied)); *cf. Initial Brief of Berry's Chapel*, Docket No. 11-00065, pg. 8, n.16 (indicating customers are bound by tariffs but silent as to the binding effect of tariffs on utilities).

this case, however, it is undisputed that Berry's Chapel's charges were illegal. The only enforcement actions that remain are to enforce compliance with the law and to determine the appropriate remedies and penalties.

In an enforcement action compelling compliance with the law, the tariffs would be enforced and any and all illegal charges would be refunded to the payors. Under this Settlement, however, the customers who paid monies pursuant to illegal charges are only expected to get approximately 50% of their money. Thus, this Settlement cannot be solely an enforcement action since it leaves the customers paying more than the legal rates in the then-existing tariffs.

Instead of enforcing the law, this Settlement would have the effect of changing the law by changing the authorized rates from the tariffs effective for 2009 to 2011 (the period of time of the illegal surcharges and collections) in the year 2013. As pointed out in its *Initial Brief*, the Consumer Advocate demonstrated how the rates would increase during the period of illegal charges if this Settlement is approved:

> [a]ssume 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.[12]

Attempts to create new law or change existing law far exceed the scope of a TRA enforcement action.

The tariff is the law, and following the law is not discretionary. The only discretion the TRA Party Staff has in a TRA enforcement action is to recommend a penalty. The TRA Party

[12] *Initial Brief*, Docket No. 11-00065, pgs. 25-26 (July 29, 2013).

Staff does not have the discretion to determine whether a utility must comply with the law, especially when the illegality is certain.

This Settlement should be denied because it attempts to modify previous tariffs and otherwise circumvent the safeguards set forth in the statute, TRA rules, and case law regarding rate increases by cloaking the rate increase as a TRA "enforcement action." To allow a utility to charge an effective rate that varies from the tariffs and bypass the procedural requirements related to rate changes as a result of breaking the law actually makes this Settlement anything but an enforcement action. Instead of just breaking the law requiring the Utility to adhere to the tariff, this Settlement allows Berry's Chapel to get a rate increase without undergoing any of the review and evaluation required for a rate change. Therefore, this Settlement actually permits Berry's Chapel to break even more laws than before this "enforcement" action was instituted. This is unfair to consumers and other utilities that follow the correct procedures.

B. The law requires the TRA to provide public notice and hearing for any rate changes as well as determine whether the costs recovered for services are necessary, reasonable, and prudent.

Any rate changes—base rate or otherwise—are subject to Tenn. Code Ann. §§ 65-5-101, *et seq.*, related TRA Rules (*e.g.*, the public notice requirements set forth in TRA Rule 1220-4-1-.05(2) for rate changes), and interpretive case law, such as the interpretations in the *Chattanooga Gas* case cited by TRA Party Staff and Berry's Chapel.[13]

The TRA Party Staff contends 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."[14] The Consumer Advocate, however, has made no such argument in this Docket. Indeed, there is nothing in its *Initial Brief* or elsewhere in the record where the

[13] *Consumer Advocate & Protection Division v. Tennessee Regulatory Authority*, 2012 WL 1964593, at *17 (Tenn. Ct. App. 2012). The case was appealing an order from a rate case brought by the utility Chattanooga Gas.
[14] *Initial Brief in Support of the Settlement Agreement*, Docket No. 11-00065, ¶ 17 (Aug. 12, 2013).

Consumer Advocate states that this rate increase can only occur through a hearing for base rates. Rather, the Consumer Advocate asserts that rate changes—even if not a base rate change—are still subject to the statutes, rules, and interpretive case law that incorporates important public safeguards for ratemaking proceedings (which includes but is not limited to rate cases).[15] Again, cloaking a rate change as a TRA enforcement action does not permit the TRA Staff to change rates without abiding by the law governing rate changes.

The Consumer Advocate's assertion that all rate changes are subject to the law is supported by statutory language, the practice of the TRA in other ratemaking proceedings, and the very case law cited by the TRA Party Staff. The primary statutory grant of authority is found in Tenn. Code Ann. § 65-4-104, which gives the TRA "general supervisory and regulatory power, jurisdiction and control over all public utilities, and also over their property, property rights, facilities, and franchises, ***so far as may be necessary for the purpose of carrying out the provisions of this chapter***."[16] When it comes to rate changes, the statutes clearly require notice and a hearing.[17] Moreover, the TRA is required to ensure that rates, including any changes, are "just and reasonable" and, in doing so, "the authority ***shall*** take into account the safety, adequacy and ***efficiency or lack thereof*** of the service or services furnished by the public utility."[18]

Nothing in the statutory language makes these safeguards applicable only to changes to base rates. Rather, Tenn. Code Ann. § 65-5-103 broadly covers "***any***" rate, charge, or schedule thereof. Indeed, the Court of Appeals held in *Chattanooga Gas* that "the power granted by the

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[15] If the only method to determine just and reasonable rate is by performing a full rate case, then a rate case must be conducted. The Consumer Advocate does not seek a rate case for the costs submitted for recovery in this Settlement because it asserts these costs were determined in three previous ratemaking proceedings, as discussed fully in Part II.B of its *Initial Brief*.

[16] *Consumer Advocate & Protection Division v. Tennessee Regulatory Authority*, 2012 WL 1964593, at *14 (Tenn. Ct. App. 2012) (emphasis added).

[17] Tenn. Code Ann. § 65-5-101(a); Tenn. Code Ann. § 65-5-103(a).

[18] Tenn. Code Ann. § 65-5-101(a); Tenn. Code Ann. § 65-5-103(a) (emphasis added).

legislature to the TRA in Section 65-5-101 is not limited to the setting of base rates."[19] Just as there is nothing in the statute limiting the TRA's power to fix just and reasonable rates outside of a hearing for base rates (*i.e.*, a rate case), there is nothing in the statutes, rules, or case law that limits the responsibility to apply the related safeguards to such rate changes.

Nothing in the *Chattanooga Gas* case suggests public notice, hearing, or a review of costs for necessity, reasonableness, and prudency is not required. Indeed, the Court of Appeals did not have to decide that issue.[20] Even though the Court did not have to decide the issues, it pointed out "[t]he TRA considered the approximately $745,000 in litigation expenses incurred by the Gas Company in defending its asset management practices to be an unusual, extraordinary expense of the utility that was necessary, reasonable, and prudent."[21] Unlike the legal fees for flood damage sought for recovery in this case which either were or should have been considered in the 2011 rate case, Docket No. 11-000198,[22] it was undisputed in *Chattanooga Gas* that the asset management legal fees were not included in a previous rate case or any other docket.[23] Notice of a rate change was also not an issue; even though the legal fees at issue derived from an asset management docket and not a rate case, the amount to award for legal fees was determined during a rate case, which had public notice, hearing, and a review of the costs for necessity, reasonableness, and prudency.[24]

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[19] *Consumer Advocate & Protection Division v. Tennessee Regulatory Authority*, 2012 WL 1964593, at *14 (Tenn. Ct. App. 2012) ("[T]he power granted by the legislature to the TRA in Section 65-5-101 is not limited to the setting of base rates.").

[20] *Id.* at 21, n.44 (indicating the reasonableness of the litigation expenses was not an issue before the court).

[21] *Id.*

[22] *Initial Brief*, Docket No. 11-00065, Part II.B, pgs. 11-24; Part II.D, pgs. 33-34.

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

[24] *Id.* at *10 ("The Hearing Officer agreed with the Manufacturer's Association and the Consumer Advocate that the prudency of the costs incurred should be considered within a rate case and found that, because Rate Case 2 was ongoing, it was both practical and efficient to combine the Gas Company's request for litigation expense with the issues in that docket."). The Consumer Advocate did raise a notice issue for changing a rule (as opposed to a rate change under tariff, as asserted here). The Court of Appeals held that the reimbursement of litigation expenses

There is simply no support in the statutes or case law cited by the TRA Party Staff (or Berry's Chapel) that the statutory safeguards for rate changes are not required for authorizing cost recovery in this Settlement. The TRA's power to fix just and reasonable rates comes with the obligation to apply the related public safeguards of notice, hearing, and review of the efficiency of the services, which has been interpreted by the courts as ensuring costs recovered are "necessary, reasonable, and prudent."[25] The TRA routinely follows these important safeguard procedures in ratemaking proceedings other than rate cases setting base rates.[26]

The Consumer Advocate discusses how the review performed for the costs authorized for recovery in this Settlement is insufficient and does not meet the standard required by law in Part III.B of this Brief.

C. This Settlement cannot be approved without the Consumer Advocate's approval because it attempts to dispose of the Consumer Advocate's claims.

The TRA Party Staff argues the Consumer Advocate does not have any claims and, therefore, cannot preclude the Settlement by objecting to it. The TRA Party Staff bases its argument on the assertion that individuals cannot have claims in a TRA enforcement action. But that issue is not the correct issue, and it does not need to be decided in this case. Indeed, even if it were decided in this case, it would not resolve the overall question because the Consumer Advocate has claims independent of the TRA enforcement action.

The Consumer Advocate has claims. This Settlement inappropriately attempts to dispose of those claims. The Consumer Advocate is not a party to this Settlement. The standard states

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would be made before the asset management funds were processed through the PGA mechanism and, therefore, the PGA rules did required no change. *Id.* at 24.

[25] *See, e.g., id.* at 20.

[26] *See, e.g., Notice of Resumption of Hearing*, Docket No. 12-00051 (Oct. 5, 2012) (holding a public hearing only after Kingsport Power issued public notice in accordance with TRA Rule 1220-4-1-.05(2) and referencing the evidentiary hearing held); *TRA Data Request No. 1*, Docket No. 12-00051, pg. 2 (June 22,2012) (requesting, among other things, information regarding the changes to allocation factors as well as the information to support those allocations); *TRA Data Request No. 2*, Docket No. 12-200051, pg. 2 (Aug. 7, 2012) (requesting detailed explanations of expenses with generic names like "overhead").

that a settlement cannot be approved if it disposes of a non-settling party's claims.[27] Therefore, this Settlement must be denied because a Settlement cannot dispose of the claims of the consumers (a non-settling party) or any other private rights of action.

1. The Consumer Advocate has duties and claims independent of the enforcement action.

The TRA Party Staff's argument that the Consumer Advocate has no claims at issue is without support. As discussed in the Consumer Advocate's *Initial Brief*,[28] and acknowledged by TRA Party Staff,[29] the Consumer Advocate represents consumers in this Docket. Indeed, the Consumer Advocate has the statutory duty to represent the public interest of consumers.

It cannot reasonably be disputed that consumers have a claim in the money they paid pursuant to illegal charges by the Utility. Berry's Chapel took the consumers' money without having a lawful right to it. Thus, at minimum, the consumers have a right to restitution under unjust enrichment[30] or civil damages under conversion as well as other laws, rules, and regulations with a private right of action.[31] By saying that the Consumer Advocate has no claims, the TRA Party Staff is essentially saying that the consumers have no rights to their money even though the consumers were only legally obligated to pay $X, but they paid illegal charges far in excess of the tariff rate of $X to continue receiving utility services.[32]

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[27] Tenn. Op. Atty. Gen. No. 11-06 (Tenn. Ag.T.), 2011 WL 999217 (Jan. 2011)
[28] *Initial Brief*, Docket No. 11-00065, pg. 41-42 (July 29, 2013).
[29] *Initial Brief in Support of the Settlement Agreement*, Docket No. 11-00065, ¶ 13 (Aug. 12, 2013).
[30] The elements of an unjust enrichment claim are: 1) "[a] benefit conferred upon the defendant by the plaintiff"; 2) "appreciation by the defendant of such benefit"; and 3) "acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof." *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 525 (Tenn. 2005). This issue was first raised in the *Initial Brief*, Docket No. 11-00065, pg. 2, n.3 (July 29, 2013).
[31] "Conversion is an intentional tort, and a party seeking to make out a prima facie case of conversion must prove (1) the appropriation of another's property to one's own use and benefit, (2) by the intentional exercise of dominion over it, (3) in defiance of the true owner's rights." *H&M Enterprises, Inc. v. Murray*, 2002 WL 598556, at *3 (Tenn. Ct. App., 2002).
[32] The Consumer Advocate also rejects Berry's Chapel's argument that only claims based on "property interests" are valid. *See Initial Brief of Berry's Chapel*, Docket No. 11-00065, pg. 8, n.16 (Aug. 12, 2013). The Consumer Advocate has claims independent of ratepayer's property interests, including but not limited to protecting the public interest. Furthermore, the Consumer Advocate has the statutory authority under Tenn. Code Ann. § 65-4-118 to

If upheld, the TRA Party Staff's assertion leaves consumers stranded from relief at the TRA when a utility holds service hostage if they do not pay illegal charges. The law simply does not support the TRA Party Staff's assertion, and there is certainly no support that the legislature intended the laws to operate so unfairly against consumers.

2. The Consumer Advocate's duties and claims survive an enforcement action.

In its initial brief, the TRA Party Staff used the analogy of a robbery, comparing Berry's Chapel's illegal acts of the wrongful taking of the victim/consumers to the crime of robbery: "[t]o 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."[33] This robbery analogy, however, does not apply here for several reasons.

First, a victim seeking an increase in punishment is different than the Consumer Advocate's objection to the Settlement because the consumers will not be refunded 100% of wrongfully billed and collected illegal charges. Forcing the Utility to repay funds it was never legally allowed to possess in the first place is not punishment. To assert repayment is punishment would be to say that abiding by the law is punishment. Rather, repayment of the full amount of illegal proceeds is restitution a necessary component to any remedy intended to put customers in the position they should have been if the Utility had followed the tariffs.

Second, the effect of this Settlement creates new law, which is different than recommending a sentence for a robber in accordance with existing law. The TRA is in the unique position that if it does not enforce the tariff, it effectively changes the tariff. Essentially, the tariff is the equivalent of the criminal code in TRA Party Staff's analogy because the tariff and the criminal code are the laws broken. Here, the TRA Party Staff's authorization of cost

represent any and all consumer claims at the TRA (and any other administrative, legislative, or judicial body), including but not limited to a claim for a just and reasonable rate and a claim to a full refund.

[33] *Initial Brief in Support of the Settlement Agreement*, Docket No. 11-00065, ¶ 13 (Aug. 12, 2013).

recovery to Berry's Chapel is the equivalent of the prosecutor changing the criminal code applicable to the robber after the robbery is already committed, and after the robber is found guilty under the previous criminal code.

Third, even in a robbery, law enforcement officials return the stolen property to the victim. The return of property illegally taken is all the Consumer Advocate is asking for here.

3. There are many examples of civil claims surviving criminal trials or other enforcement adjudications.

A plea agreement, or any judgment in a criminal case for that matter, cannot infringe on the civil claims that a victim may have as a result of the crime. The repercussions of a crime often do result in a civil action, but the criminal court does not decide the civil action. One notorious example is O.J. Simpson's criminal trial for murder versus the following civil trial for civil damages resulting from the same behavior adjudicated in the criminal trial.[34] When Mr. Simpson was found not guilty of murder in criminal court, the civil claims for the injuries suffered by the victims and their families remained. Indeed, the victims' families won in civil court despite the not guilty verdict in the criminal case.[35]

Just as a prosecutor cannot absolve defendants of any of the victim's civil claims, neither can an administrative agency. For example, assume hypothetically that the dentist subject to the Consent Order supplied by the TRA Party Staff[36] committed malpractice and scarred a patient. The Department of Health may revoke or suspend the dentist's license as a result of the dentist's improper conduct and failure to fulfill the dentist's obligations under the licensure laws but it cannot address the patient's private malpractice claims. Applying the TRA Party Staff's reasoning that consumers have no claims in the illegally taken money in this Docket, the patient

[34] *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492 (Ct. App. 2001).
[35] *Id.*
[36] *Consent Order*, Case No. 2011021781 (Feb. 8, 2013).

would have no independent claim so long as the Department of Health enforced its licensure requirements against the dentist. But this is clearly not true. The Department of Health certainly could not dispose of the patient's civil claims of malpractice against the dentist merely by having a disciplinary hearing to revoke or suspend the dentist's license. The patient's malpractice claim would survive any enforcement action, and she would have the right to raise that claim for damages in any tribunal with the proper jurisdiction.

Likewise, the TRA Party Staff cannot absolve Berry's Chapel of the consumers' claims for damages for illegally taken monies.

4. The TRA Party Staff has no authority to dispose of the claims of individual consumers or the Consumer Advocate, even in an enforcement action.

The TRA's plenary authority is over the supervision of utilities, and nothing in the statute indicates the TRA has plenary authority over consumers or otherwise has the ability to abolish their claims in enforcement actions.[37] If anything, enforcement of the law, especially enforcement of civil laws like abiding by the tariff, should actually restore the victims of illegal behavior to the position the victim would have been in had the law not been broken.

As discussed in the Consumer Advocate's *Initial Brief*,[38] the law allows settlements between parties over the objection of parties so long as settlement does ***not*** dispose of a non-settling party's claims. This Settlement attempts to dispose of the Consumer Advocate's claims that the consumers have a property interest in and a right to receive in full the monies they paid pursuant to the Utility's illegal charges.[39] If the TRA's enforcement action does not make the

[37] *See* Tenn. Code Ann. § 65-4-104.
[38] *Initial Brief*, Docket No. 11-00065, pg. 41-44 (July 29, 2013).
[39] Berry's Chapel argues that consumers do not have a property interest in the rates. *Initial Brief of Berry's Chapel*, Docket No. 11-00065, pg. 8, n.16. The consumers' claims are not in the rates charged in accordance with the applicable tariffs. The consumers' claims are in the illegal bills and collections beyond what was permitted by the tariff. Since the tariff from the past cannot be changed without violating retroactive ratemaking, and any charges and collections varying from the tariff violates the filed rate doctrine, these charges are illegal. Here, Berry's Chapel and the TRA Party Staff make two conflicting arguments: (1) the consumers do not have a property interest in legal

consumers whole, the Consumer Advocate has every right to seek recovery to the consumers the monies illegally taken by Berry's Chapel either at the TRA in this Docket, a separate docket, or at any civil or chancery court. The Consumer Advocate has claims, and this Settlement cannot dispose of them.

D. This Settlement does not comply with the requirements of the law and, therefore, it should be rejected.

The TRA contends this Settlement complies with the requirements of the law because the TRA Party Staff considered the factors necessary when imposing "penalties". As previously discussed, repayment in full to consumers of the monies illegally taken by Berry's Chapel is not punishment. Thus, the factors to be considered for penalties do not apply to whether the full amount of illegally taken monies should be refunded. Those factors apply only to penalties and fines.

Repayment in full is required to bring Berry's Chapel in conformity with the tariff. Since this Settlement does not refund the illegally taken monies in full, it does not comply with the law (*i.e.* the tariffs that existed at the time of the illegal charges).

1. Berry's Chapel's financial condition was considered at the time of creating the tariffs.

TRA Party Staff's contention that it is aware that Berry's Chapel has had a history of financial difficulties has no relevance in determining whether to refund the full amount of illegal monies taken. The tariffs existing at the time of Berry's Chapel's illegal charges were conducted after hearings in which the Utility's financial condition (as well as many other factors) was fully

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rates, and (2) the Settlement does not increase rates. Anything charged in variance to the tariff is an illegal rate. It does not matter if the excessive charges allegedly "benefitted" the consumer. The original tariff contains all the authorized costs considered necessary, reasonable, and prudent to provide utility service. Either the consumers have a property interest in the illegal charges and monies collected in violation of the filed rate doctrine, ***or*** the Settlement changes the authorized rates to make such charges legal, thereby disallowing a property interest in the legal tariff but violating the statutory safeguards for rate increases and violating the prohibition against retroactive ratemaking by changing the effective rates of tariffs in the past. The Settlement Parties' arguments cannot both be accepted since they conflict, and under either argument, the Settlement does not comply with the law.

considered. Re-considering the financial condition of the company in an attempt to modify the effective rates from the legal tariff years after the tariffs went into effect is unfair to consumers and other utilities by giving Berry's Chapel a second hearing to re-litigate the same issues without giving the consumers the opportunity to participate. Moreover, as discussed further in Part III.D of this Brief, the law does not allow for such re-litigation. Allowing Berry's Chapel to have two bites at the apple while giving the consumers and other utilities only one bite does not comply with the law.

2. Berry's Chapel's "good faith" does not justify failing to enforce the tariff.

The TRA Party Staff's belief that Berry's Chapel acted in "good faith" merely because it "relied upon the advice of counsel" that it was unregulated is no reason to allow the Utility to keep illegally taken monies. Moreover, the TRA Party Staff appear to give some credence to the Utility's allegedly "voluntary" program to refund only approximately half of the monies illegally taken over 18 months without interest for the three years the money was wrongfully withheld from the consumers. This "voluntary" refund began just one month before the Settlement was submitted, and over three years since the illegal charges started.

Essentially, the TRA Party Staff is saying the Utility is somehow blameless or should otherwise be absolved from having to comply with the law because it followed an attorney's advice. This approach supports utilities becoming willfully blind to reasonable interpretations of law since it can assert the excuse of "it's not my fault I didn't follow the law; my attorney told me I could do it." Such a factor should not be considered when determining whether the tariff applicable to Berry's Chapel should be enforced in full.

The Consumer Advocate asserts a true good faith approach would have been for the Utility to ask the TRA for its interpretation of the law and whether the Utility was subject to

jurisdiction before billing customers with illegal charges. Indeed, a former director made the reasonable assessment that such behavior was "dubious" and the Court of Appeals saw immediately that such actions were performed to evade the law.[40] Reasonable people and companies do not just challenge the law by first breaking it.

But even when people and companies do break the law, even if unintentionally, they still must comply with it later. The practice of the TRA has been to enforce tariffs as they are as well as to ensure customers have recovered any and all illegal charges—regardless if they were unintentional errors. In Docket No. 11-00210, the Directors have recently denied a settlement that would have allowed the parties to have effective rates not allowed in the tariffs:

> The panel found that CGC's tariff does not allow for a waiver of penalties and charges for any customer mistakes, even mistakes that are unintentional. . . . And, it would not be in the public interest to set a precedent of waiving such penalties and fees. Thereafter, the majority of the panel voted to deny the *Proposed Settlement Agreement* finding that its terms are not consistent with CGC's existing tariffs and are not otherwise in the public interest.[41]

Another example is the nationwide system billing error by Atmos. Chairman Allison called Atmos to appear at the June 17, 2013 TRA Conference to explain the billing overcharges and the remedial steps taken. At the conference, Atmos explained that the billing errors started on May 5, 2013, and the company began to correct the errors almost immediately without TRA request.[42] During the discussion, Director Hill made sure to ask if all the monies had been recovered by the consumers.[43] Tariffs should not be modified or otherwise bent to accommodate alleged good faith in the face of illegal charges.

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[40] *Transcript of Authority Conference*, April 18, 2011, pg. 16. 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 increased such fees under the erroneous and dubious shelter of being a nonutility."

[41] *Order Denying Settlement Agreement*, Docket No. 11-00210, pg. 3 (Jan. 23, 2013).

[42] *Transcript of Proceedings*, pgs. 6-12 (June 17, 2013).

[43] *Id.* at 11-12.

To apply the law only to those companies following good advice significantly undermines the purpose of having laws and rules in the first place. The argument of allegedly receiving bad tax advice does not absolve taxpayers from paying their taxes. Nor does such an argument work for unethical business practices; Enron's argument that its financial statements were audited and received a "clean audit opinion" did not protect Enron's management from the Securities Exchange Commission's bringing 11 civil enforcement actions[44] and the U.S. Attorney's Office's 11 indictments.[45]

Companies will often be tempted to take the advice providing the most benefits. The TRA, the Consumer Advocate, and consumers cannot choose where utilities get their advice. The TRA supervises utilities, not their attorneys. If Berry's Chapel received questionable advice, that is an issue between the Utility and its attorney. The TRA can encourage utilities to seek good advice only by holding utilities responsible even when they act on bad advice.

3. The Utility's funding of $8,000 to its financial security requirement is not a "penalty."

As for "penalties", the TRA Party Staff contends the $8,000 Berry's Chapel is supposed to pay under the Settlement is a "penalty". The Consumer Advocate respectfully disagrees. First, the requirement for financial security is pursuant to TRA Rule 1220-4-13-.07(7). As previously mentioned, compliance with the law should not be punishment. Funding financial security is the Utility's obligation.[46] The amount of funding should be determined based on need, not determined as a punitive damage. Second, if the $8,000 payment from Berry's Chapel to fund a financial security requirement (which it is obligated to fund anyway) is considered a "penalty", then does that make the $12,000 being funded from the consumers' monies illegally

[44] *See, e.g., Int'l Institute for Securities Market Development*, 2005 Program, pgs. 8, 26-30 (Mar. 16, 2005), *available at* http://www.sec.gov/about/offices/oia/oia_enforce/overviewenfor.pdf.
[45] *See, e.g.*, Kurt Eichenwald, *U.S. Indicts 11 Former Enron Executives*, N.Y. TIMES (May 2, 2003), http://www.nytimes.com/2003/05/02/business/us-indicts-11-former-enron-executives.html?src=pm.
[46] *Direct Testimony of William H. Novak*, Docket No. 11-00065, pg. 8 (July 29, 2013) (citing TRA Rule 1220-4-13-.07(1).

taken a penalty for the customers? Surely, it must be even more of a punishment for consumers since they have no obligations under the TRA rules to fund financial security. Furthermore, it is the long-standing policy of this jurisdiction to disallow a utility's fines and penalties for rate-setting purposes. Consumer dollars, therefore, would in no event be a proper source for funding this payment, even if it is deemed a "penalty."

4. This Settlement does not comply with the law and, therefore, is not reasonable and not in the public interest.

The TRA Party Staff argues that this Settlement is reasonable, but it is objectively not reasonable. The Consumer Advocate re-asserts the reasons set forth in Part II of its *Initial Brief* as support for how this Settlement is not reasonable and not in the public interest because it violates the law and fundamental ratemaking principles, and it is against public policy.

Basically, the Settlement allows Berry's Chapel to benefit from breaking the law. That alone makes this Settlement unreasonable and against public policy.

But there is more. Tariffs have the effect of the law. They should be enforced. The tariffs that were effective during the period of the illegal charges were created after a hearing and the requisite review for rate changes. This Settlement is authorizing costs that effectively modify those lawful tariffs. And it does so without the requisite review to determine whether the costs are necessary, reasonable, and prudent. As Chairman Allison has correctly held before, "***it's easy to make a settlement when you're giving away somebody else's money*** . . . ."[47]

E. The TRA does not have the statutory authority to represent consumers.

In its discovery responses compelled by the Hearing Officer's order, the TRA Party Staff explicitly stated the TRA is "representing" consumers in this Settlement.[48] But the TRA cannot

[47] *Transcript of Proceedings, Nov. 8, 2012*, pg. 60 (quoting Chairman Allison regarding the Chattanooga Gas/Conoco Phillips Settlement proposed in Docket No. 11-00210) (emphasis added).
[48] *Party Staff's Third Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065, DR # 8 (Aug. 12, 2013).

represent consumers for several reasons. First, the TRA's mission is to "promote the public interest by balancing the interests of utilities and consumers."[49] The mission of balancing interests of two parties cannot be accomplished if the TRA is also representing one of the parties. In an enforcement action, such an imbalance would be the equivalent of a referee coaching one of the teams in the game it is officiating. It is simply unfair. If the TRA is truly obligated to balance the interests, then the consumers' interests cannot be served or represented fully by the TRA. Second, the TRA does not have any authority conferred by statute, and there is no statutory authority for the TRA to represent consumers' interests. As previously discussed, the TRA's plenary authority pursuant to Tenn. Code Ann. § 65-4-104 is over utilities, not consumers. 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 Tennessee's Administrative Procedures Act.[50]

For these reasons, the TRA cannot adequately or effectively represent consumers' interests in this Settlement and, therefore, consumers are not represented in this Settlement. Because this Settlement attempts to dispose of the Consumer Advocate's claims, and the Consumer Advocate is not a settling party, this Settlement cannot be approved.

III. SINCE BERRY'S CHAPEL HAS FAILED TO SHOW THIS SETTLEMENT COMPLIES WITH THE LAW AND IS REASONABLE AND IN THE PUBLIC INTEREST, IT SHOULD BE DENIED.

As a preliminary matter, the Consumer Advocate points out Berry's Chapel's argument that the only issue needed to be decided by the Directors is whether the Settlement is "reasonable

[49] *See, e.g., Order Granting in Part & Denying in Part Consumer Advocate's Motion to Compel Responses to Its First Discovery Request*, Docket No. 11-00065, pg. 8 (Aug. 15, 2013).

[50] 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 or release its authority, power and rights under any laws, regulations or rules not mentioned here. All options are expressly reserved by the Attorney General.

and in the public interest" mischaracterizes the Attorney General's Opinion to which Berry's Chapel references on page 8 of its brief. The Opinion is discussed in Part III.C of the Consumer Advocate's *Initial Brief*, but for ease of the reader, the parts missing from Berry's Chapel's citation of the standard is "***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.***"[51]

As for the substance of Berry's Chapel's brief, rather than reiterate the Consumer Advocate's position twice in the same brief, the Consumer Advocate incorporates by reference in this Part its replies to the TRA Party Staff in Part II of this Brief to also reply to any similar arguments made by Berry's Chapel. In addition, the Consumer Advocate addresses new arguments raised in Berry's Chapel's brief in this Part, maintaining that: (A) Berry's Chapel should be held accountable and required to return all the illegally received monies; (B) the record explicitly states the required review for a rate change was not performed; (C) the arguments by the TRA Party Staff that it can negotiate a rate change necessarily fail; (D) *res judicata* and collateral estoppel do apply; and (E) this proposed Settlement does violate the prohibition against retroactive ratemaking and collateral estoppel.

A. Berry's Chapel should be held accountable and required to return all illegally received monies to the appropriate wronged customer.

In its Statement of Facts, Berry's Chapel contends that some of the illegally taken monies "cannot be reliably traced to current customers."[52] The Consumer Advocate disagrees Berry's Chapel should not be held accountable to return funds in full to the wronged customers. First, it

[51] Tenn. Op. Atty. Gen. No. 11-06 (Tenn. Ag.T.), 2011 WL 999217 (Jan. 2011) (emphasis added); *Initial Brief*, Docket No. 11-00065, pg. 42, n.140 (July 29, 2013). In addition, Berry's Chapel incorrectly asserted September 9, 2013 is the hearing date. But the hearing date has yet to be scheduled. *Order Granting Joint Motion to Amend the Procedural Schedule*, Docket No. 11-00065, pg. 3 (July 18, 2013); *Order Setting Procedural Schedule to Completion*, Docket No. 11-00065, pg. 5 (July 1, 2013).

[52] *Initial Brief of Berry's Chapel*, Docket No. 11-00065, pg. 2 (Aug. 12, 2013).

is the responsibility of the Utility to maintain adequate accounting records.[53] Second, the Utility received $1,125 for accounting expenses solely related to odor control costs in Docket No. 08-00030,[54] $29,684 annually for accounting expenses in Docket No. 09-00034, and $24,944 annually for accounting expenses in Docket No. 11-00198.[55] Additionally, state unclaimed fund laws provide an avenue for Berry's Chapel to return funds when it has difficulty locating a consumer.[56]

If the Utility failed to keep sufficiently accurate and organized accounting records knowing the risk that it could be wrong in its contention that it was not regulated by the TRA, the consumers should not bear the cost.[57] Berry's Chapel took the calculated gamble that it was unregulated and increased rates illegally. Now that it lost that gamble, Berry's Chapel unfairly seeks to have consumers pay the price.

Moreover, a remedy of refunding illegally charged monies to only current customers is fundamentally flawed. If Berry's Chapel is seeking to return funds only to current customers, then wronged consumers who have moved or will move in the repayment period will never receive their refunds. Under this Settlement, a consumer who has moved or will move will not get a refund if she moves before the repayment period is over. Instead, the Utility would be able to keep those funds. The consumers whose money was illegally taken are entitled to receive a full refund, even if they have moved or are not otherwise current customers. A wronged

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[53] Tenn. Code Ann. § 65-4-111; § 65-5-103(2).
[54] *Order Approving Settlement Agreement*, Docket No. 08-00060, pg. 14 (Apr. 29, 2009).
[55] *Initial Brief*, Docket No. 11-00065, pgs. 18-19 (July 29, 2013) (citing the respective dockets). These accounting fees are over and above any regulatory expenses that may include accounting expenses associated with the rate case.
[56] *Presley v. City of Memphis*, 769 S.W.2d 221 (1988) (showing convention center scheduled to hold a concert by Elvis Presley was required to refund net ticket proceeds to ticketholders since Mr. Presley could not perform the concert due to an untimely death, and such unclaimed refunds to unfound ticketholders became Unclaimed Property maintained by the State).
[57] Berry's Chapel provides assurance that it has accounted for "every dollar" of the illegal charges. *Initial Brief of Berry's Chapel*, Docket No. 11-00065, pg. 6, n.11. The individual consumers should be refunded the amount of illegally taken monies he or she paid.

consumer should not be forced to continue service in order to not forfeit her rights to a refund of monies paid pursuant to illegal charges.

B. Berry's Chapel is entitled only to the opportunity to recover necessary, reasonable, and prudent expenses, which were already determined and recovered in the then-existing tariffs.

Berry's Chapel argues it is entitled to recover 100% of the costs it has submitted for recovery in this Settlement.[58] These costs have not been reviewed for necessity, reasonableness, or prudency. The only litmus test used in adding up the costs to determine recovery was whether there was an invoice and whether the TRA Party Staff believes that invoice was previously presented in one of the three prior ratemaking proceedings that considered these costs (Docket Nos. 08-00060, 09-00034, and 11-00198).

1. The law requires all costs recovered be necessary, reasonable, and prudent to ensure rates are just and reasonable and consumers are not charged excessive prices.

The Consumer Advocate laid out the Tennessee laws and their requirement that costs recovered from utilities be necessary, reasonable, and prudent in Part II.B of this Brief, and re-asserts those statements here.

In addition to the Tennessee law, the U.S. Supreme Court has long held that utilities are not entitled to 100% of their costs and that laws requiring "just and reasonable rates," like Tenn. Code Ann. § 65-5-101, *et seq.*, have the purpose of protecting ratepayers from "excessive rates."[59] In response to a utility's contention that the amount of certain expenses was "purely a question of managerial judgment," the U.S. Supreme Court declared in *Pennsylvania Water & Power Co.* such contention "overlooks the consideration that the charge is for a public service,

[58] *Initial Brief of Berry's Chapel*, Docket No. 11-00065, pg. 2 (Aug. 12, 2013).
[59] *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414, 418 (1952) (interpreting a federal statute that required rates be "just and reasonable").

and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for these or any purposes."[60]

2. The witness calculating the costs to be recovered and who is testifying in support of the Settlement admits she "did not look at these [costs] from a rate making mindset" and, therefore, such review is insufficient as the review is required to determine "just and reasonable" rates.

The costs allowed for recovery under the Settlement were not reviewed in the manner required under the statute. As previously discussed, both Tenn. Code Ann. § 65-5-101 and § 65-5-103 ***require*** the TRA to take into account the efficiency or lack thereof of the services furnished by the utility, and the courts have interpreted this requirement as ensuring that the costs are "necessary, reasonable, and prudent."

Ms. Underwood is the TRA Party Staff witness who compiled the costs for recovery in the Settlement. She indicates in her testimony that she did not review these costs with the understanding that this is a rate change:

> Q. Does your testimony address any change to the rates charged by the Company?
>
> A. No. The rates will stay the same. My testimony addresses the actual amount of money collected and expenses incurred by the Company. . . . I looked at these amounts to determine the surplus amount collected from BCUI's customers and to determine whether the Company's overcollection corresponded to an expenditure supporting utility operation that was never presented to the Authority. As such, I did not look at these amounts from a rate making mindset.[61]

As shown above and discussed in the Consumer Advocate's *Initial Brief*,[62] Ms. Underwood did not look at the necessity, reasonableness, or prudency of the costs. She merely looked to see if the invoice was never presented to the Authority. Nor did Berry's Chapel's

[60] *Acker v. United States*, 298 U.S. 426, 430-31 (1936).
[61] *Testimony and Exhibits of Tiffany Underwood, TRA Party Staff*, Docket No. 11-00065, pgs. 2-3 (May 31, 2013).
[62] *Initial Brief*, Docket No. 11-00065, pgs. 28-30.

witness Mr. Terry Buckner review these costs from the perspective of necessity, reasonableness, or prudency.[63]

Instead of using the necessity, reasonableness, and prudency standard for costs, the TRA Party Staff and Berry's Chapel used the much lower standard of whether the costs "benefitted" the customer. Although the Settlement contends the consumers were benefitted, no one contacted the consumers.[64] The Consumer Advocate points out several examples in its *Initial Brief* where the necessity, reasonableness, or prudency of the costs is highly questionable, as well as the problems with using the lower standard of merely "benefitting" consumer rather than ensuring the utility is efficiently providing service.[65]

Berry's Chapel articulates well in its brief that "ratemaking is an exercise in judgment, not arithmetic."[66] The Consumer Advocate agrees. The only review done in this Settlement, however, was compiling invoices claimed to not have been presented to the Authority and a check of the arithmetic rather than a judgment of whether the costs were necessary, reasonable, and prudent.

Berry's Chapel argues that the TRA can still find the overall Settlement reasonable and, therefore, determine rates are "just and reasonable." In addition, Berry's Chapel argues that Ms. Underwood and Mr. Buckner's statements that the costs are recoverable "is an implicit

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[63] TRA Party Staff and Berry's Chapel indicate that Mr. Buckner's agreement that all the costs are recoverable adds weight to such calculations. It is generally considered ineffective to rely on another party to identify errors or exercise judgment that would reduce their benefit or otherwise not be in the other party's best interest.

[64] *Party Staff's Second Responses to First Discovery Request of the Consumer Advocate and Protection Division to the Tennessee Regulatory Authority Party Staff*, Docket No. 11-00065, DR 6-7 (Aug. 12, 2013).

[65] *See, e.g., id.* at 30-34. Berry's Chapel's brief indicates that some of the language was previously presented to the Authority in a filing that was "struck." *Initial Brief of Berry's Chapel*, Docket No. 11-00065, pg. 7, n.45 (Aug. 12, 2013). The Utility's counsel's statement is wrong. The *Petition to Intervene* in Docket No. 13-00052 was denied without prejudice and the specific notation that the Consumer Advocate could petition to intervene when cost recovery was sought; nothing in the order suggests the Consumer Advocate's Position was struck. *See Order Approving Request for Deferred Accounting*, Docket No. 13-00052, pgs. 2-3 (June 25, 2013).

[66] *Initial Brief of Berry's Chapel*, Docket No. 11-00065, pg. 8, n.15 (Aug. 12, 2013).

acknowledgment that the witnesses found that the expenses are prudent, just and reasonable."[67] But an "implicit" acknowledgement of a review of the costs to determine if they were necessary, reasonable, and prudent is impossible when the witness who did the review explicitly states that she did not review the invoices with a "rate making mindset" and her only conditions for determining recoverability were the non-judgmental factors of whether the TRA had ever been presented with the invoices in previous dockets. Such explicit testimony far outweighs any implicit acknowledgement that may be attempted by the Settlement Parties.

3. This Settlement leads to excessive, illegal rates for consumers and encourages inefficient and excessive spending by utilities by allowing the Utility to recover all the expenses that exceeded the amount permitted for recovery in tariffs previously covering these costs.

As discussed in the Consumer Advocate's *Initial Brief*,[68] the costs to control odor (including sludge removal expenses) and legal fees associated with the flood damage were already considered or should have been considered for recovery in Docket Nos. 08-00060, 09-00034, and 11-00198. Moreover, the Consumer Advocate has pointed out several weaknesses in the evidence that indicates the legal fees for flood damage do not pertain to the flood damage, and much of the amount occurred prior to the order in the rate case determining flood damage costs. To support these assertions fully, the Consumer Advocate incorporates by reference Part II.B and Part II.D from its *Initial Brief*.

The tariffs that resulted from Docket Nos. 08-00060, 09-00034, and 11-00198 included the necessary, reasonable, and prudent costs for these types of expenditures. If Berry's Chapel had thought the rates were not just and reasonable, it could have filed a motion to reconsider or filed an appeal of the TRA Order for any one of these dockets. The Utility's opportunity to

[67] *Id.* at 7, n.13.
[68] *Initial Brief*, Docket No. 11-00065, Part II.B and Part II.D (July 29, 2013).

challenge and change these rates has come and gone. An enforcement proceeding two years after the illegal charges stopped is not the time to re-litigate what costs are recoverable.

Like the rates discussed by the U.S. Supreme Court in *Pennsylvania Water & Power Co.*, the rates charged here are for a public service. The factors considered in determining whether a cost would be recovered in this Settlement—whether there was an invoice and whether it had been considered in a previous docket—leaves the amount of the expenses up to Berry's Chapel's management's judgment rather than the judgment of the TRA as to whether the costs were necessary, reasonable, and prudent in fixing "just and reasonable" rates.

The process used in the proposed Settlement leaves consumers exposed to the very excessive prices the Tennessee laws are intended to prevent. Moreover, it encourages utilities to spend inefficiently and have higher expenses than what the TRA has already determined are necessary, reasonable, and prudent in existing tariffs. Lastly, this Settlement allows for utilities to compensate for their inefficient and excessive spending by passing the buck and charging illegal rates to consumers.

C. Berry's Chapel failed to show how the TRA Party Staff has the right to negotiate a settlement to change rates as a party.

Berry's Chapel provides a general explanation of the general process of contested cases in Tennessee's Administrative Procedures Act, Tenn. Code Ann. § 4-5-101, *et seq.* ("APA"), but this explanation is not specific to ratemaking proceedings. Berry's Chapel falsely suggests that the Consumer Advocate challenges the TRA's ability to assign staff as a party in a case; the Consumer Advocate has never challenged the TRA's ability to assign staff as a party in a case. Nor has the Consumer Advocate ever challenged the TRA's ability to set rates. The issue raised by the Consumer Advocate is much narrower than the general issue discussed by Berry's Chapel. The Consumer Advocate challenges the ability and fundamental fairness of the ***TRA Party Staff***

(as opposed to the TRA Directors and agency members subject to ex parte statutes) to determine rate changes.

The Consumer Advocate asserts Berry's Chapel has not cited any authority for the proposition that the TRA Party Staff has any rights, duties, or privileges to negotiate changes to rates ***as a party***. The TRA Party Staff has no independent statutory authority. The only authority for TRA Party Staff is under TRA Rule 1220-1-2-.21, Staff Participation as a Party, and such authority must be delegated to it by the TRA Directors. Moreover, the statutes require the TRA indicate the purpose of the show cause proceeding in its show cause orders.[69] As discussed in Part II.A of the Consumer Advocate's *Initial Brief*, the Directors' order for this Show Cause Docket does not include determining what costs should be recovered. The show cause orders are limited to two issues: "(1) [w]hether 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; [and] (2) [w]hat, if any, action should the Authority take against Berry's Chapel for violating statutes enforced by the TRA, ..." [70] The first issue is not even answered by this Settlement.

Since the TRA Party Staff has no independent statutory authority, the only authority it has as a party in a case is what is delegated to it by the Directors.

The rate-making function, including but not limited to any rate changes, is not delegable to TRA Party Staff. Under the Tennessee statutes, parties must have legal rights, duties, or privileges to litigate in contested cases.[71]

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[69] Tenn. Code Ann. § 65-2-106.

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

[71] Tenn. Code Ann. § 65-2-101(2) ; § 4-5-102(3). This concept is equivalent to the standing requirement to litigate in judicial courts. TRA Party Staff and Berry's Chapel acknowledge that a standing-type standard must be met to litigate an issue; their argument that the Consumer Advocate has no legal rights in enforcement actions is essentially based on the same standing-type concept.

The TRA does not have any rights or claims to the costs that the Utility seeks to be recovered. Indeed, if any of the TRA Directors or agency members had any rights or claims to the costs sought for recovery, they would be deemed to have an interest in those costs, in which case their impartiality would be compromised and they would be disqualified from participation.[72] Thus, the agency ***must not*** have interests in the cost recovery of utilities in order to set rates. If the TRA does not have any interests in cost recovery, it has no interests or rights to the cost recovery to delegate to TRA Party Staff.

As for whether the TRA has duties and privileges to be a party to a ratemaking proceeding, the TRA's statutory authority for changes to rates is to investigate whether the proposed rates are just and reasonable and to fix those rates as an impartial and objective investigator and decision-maker—not as an interested party. [73] As previously discussed, a decision-maker balancing the interests of the utilities and the interests of consumers cannot be an advocate for either position. Moreover, it contradicts all litigation tenets that one party would be balancing the interests of other parties. The balancing is left to the decision-maker, such as judges, arbitrators, or in this case, the Directors.

Such fairness and impartiality in investigating and fixing rate changes (a responsibility distinguishing the TRA from other agencies) should not be circumvented by allowing the TRA Party Staff to exceed the authority delegated in the show cause orders and negotiate cost recovery that changes effective rates for over two years. To allow TRA Party Staff to circumvent the requisite procedures designed to promote fairness by cloaking the rate change as an "enforcement" action in a show cause proceeding would undermine the purpose of the law.

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[72] Tenn. Code ann. § 4-5-302(a).
[73] Tenn. Code Ann. § 65-5-101; § 65-5-103.

Since the TRA Party Staff has provided no authority as to its statutory, delegated, or independent legal rights, duties or privileges under Tennessee law to the costs sought for recovery by Berry's Chapel, any testimony and legal arguments made by the TRA Party Staff regarding cost recovery should be disregarded since the TRA Party Staff.

D. *Res judicata* and collateral estoppel applies to TRA Final Orders and tariffs.

Berry's Chapel incorrectly states *res judicata* and collateral estoppel do not apply in this case. The Utility has misrepresented the leading case, the *United Cities Gas* case.[74] The Consumer Advocate has attached a copy of the case that includes the headnotes supporting the Consumer Advocate's opinion.[75]

To understand how the Tennessee Supreme Court applied *res judicata*, one must consider the lower courts' decisions in conjunction with the Court's opinion. The matter started with United Cities Gas purchasing a system from Franklin.[76] In the first rate case after the acquisition, United Cities Gas sought to include in rate base the full amount of the purchase price ($1.4 million).[77] After a hearing, the Commission held that $700,000 would be the value included in rate base.[78] The utility filed for a motion to reconsider, a hearing was held, and the Commission again decided that $700,000 was the value.[79] In the next rate case, the utility again

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[74] *United Cities Gas Company v. Tennessee Public Serv. Comm'n*, 88 P.U.R.4th 367, 369 (Tenn. Ct. App. 1987).
[75] Headnotes are comments about a case from attorneys working for Westlaw, one of the largest legal database service providers. These comments are intended to assist readers. It did not escape notice that Berry's Chapel provided the copies of cases containing headnotes for all the cases it submitted with its initial brief except for the *United Cities Gas* case. The headnote in *United Cities Gas* states that the Tennessee Supreme Court held that the "Public Service Commission's decision in petition for rate increase was final judgment, ***entitled to res judicata*** effect, ***until such time as utility was able to muster new evidence to warrant rate increase***." *United Cities Gas Company v. Tennessee Public Serv. Comm'n*, 88 P.U.R.4th 367 (Tenn. Ct. App. 1987). Although Westlaw headnotes are merely persuasive, they do go to show that reasonable people uninterested in this Docket have the same interpretation of *United Cities Gas* as the Consumer Advocate.
[76] *United Cities Gas Company v. Tennessee Public Serv. Comm'n*, 88 P.U.R.4th 367, 369 (Tenn. Ct. App. 1987).
[77] *Id.* The valuation of the system was at issue because the records were inadequate to support a $1.4 million value.
[78] *Id.*
[79] *Id.*

sought to raise the issue of the value.[80] The Commission again held the value of the system was $700,000.[81] The utility appealed the decision in the second rate case.[82]

On appeal, the Commission's position was *res judicata* barred the action.[83] After citing several Tennessee cases holding *res judicata* and collateral estoppel applied to administrative agencies, the appellate court agreed that "[t]here is authority nationwide to support the proposition that final decisions of state administrative agencies are *res judicata* when the agency action under review is judicial in nature."[84] The appellate court quoted the U.S. Supreme Court:

> Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.[85]

Nonetheless, the appellate court held that *res judicata* did not apply because it held the Commission's orders "are never truly 'final and conclusive'" since the Commission is always free to reverse course.[86] Moreover, even if the orders are considered final and conclusive, *res judicata* did not apply because "the Commission in setting rates does not act in a judicial capacity," and therefore not meeting the requirements of an adjudicative action under the U.S. Supreme Court test.[87]

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* There were other issues raised on appeal at the Court of Appeals, but this is the only relevant issue appealed to and considered by the Tennessee Supreme Court since it was a dispositive issue.
[84] *Id.* at 370. The cases cited for the application of collateral estoppel and *res judicata* to administrative cases were *Fourakre v. Perry*, 667 S.W.2d 483 (Tenn. App. 1983); *Purcell Enterprises v. Tennessee*, 631 S.W.2d 401 (Tenn. App. 1981); and *Polsky v. Atkins*, 270 S.W.2d 497 (Tenn. 1954).
[85] *United Cities Gas Company v. Tennessee Public Serv. Comm'n*, 88 P.U.R.4th 367, 370 (Tenn. Ct. App. 1987) (quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22).
[86] *Id.* at 371.
[87] *Id.*

The Tennessee Supreme Court reversed the appellate court and affirmed the Commission, specifically noting the Commission's order was final.[88] The Court reasoned that the appellate court "overlooked the fact that each of the orders of the commission contain all of the indicia of a final order, required by statute."[89] The Court also declared:

> The lower court took the approach that the Public Service Commission is free to reverse course if public policy demands it. Undoubtedly this is true, ***however it does not mean that a petitioner before the Commission for a rate increase is not bound by an order of the Commission until such time as new evidence or the public interest warrants a change of policy***.[90]

Moreover, the Court held that the utility "is bound by the ruling of the Commission until such time as it may be able to muster new evidence to warrant a rate increase. The Commission cannot arbitrarily establish a change of policy or change of rate."[91]

Changing a rate in an enforcement action that does not enforce the tariffs that were in effect at the time of illegal charges would be an arbitrary change of a rate. No new evidence has been presented in this Settlement that either was not already presented or could not have been presented in Docket Nos. 08-00060, 09-00034, or 11-00198. Indeed, since Berry's Chapel failed to produce invoices supporting over half of the $64,000 awarded as rate case expense from Docket No. 11-000198 (the case that also determined the flood damage fees), it cannot be verified that Berry's Chapel is not already recovering for its legal fees purportedly associated with flood damage.[92] Likewise, the Company has provided no invoices to support all the journal

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[88] *United Cities Gas Co. v. Tennessee Public Serv. Comm'n*, 789 S.W.2d 256, 259 (Tenn. 1990).
[89] *Id.*
[90] *Id.* This language is opposite of Berry's Chapel's recitation: "The Court explained that the agency is 'free to change its mind' ***even if there has been no change in the facts or the law as long as the agency's new decision is not arbitrary and is supported by substantial and material evidence***." *Initial Brief of Berry's Chapel*, Docket No. 11-00065, pg. 5, n.9 (Aug. 12, 2013). In contrast to Berry's Chapel statements, reading the Court's opinion in full, new evidence or new law would be needed in order to not have an arbitrary and capricious decision that is not supported by substantial evidence.
[91] *United Cities Gas Co. v. Tennessee Public Serv. Comm'n*, 789 S.W.2d 256, 259 (Tenn. 1990).
[92] 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). The tariff resulting from Docket No. 09-00034 includes $21,524 in annual regulatory expenses (excluding rate case expense) and $8,899 in annual legal expense; the tariff resulting from

entries in the sludge removal expense account to be able to verify that odor control costs sought for recovery in this Settlement have not already been included in rates.[93] And, even if there were invoices that were not presented, *res judicata* bars recovery of costs after the rate is set when the utility had the opportunity to raise such issues previously; Berry's Chapel had such opportunity.

Berry's Chapel's argument that "ratemaking is a legislative, not a judicial function" has no bearing on whether *res judicata* and collateral estoppel apply. Administrative agencies are a construct of the legislature and many perform purely legislative functions. Indeed, if the matter is judicial, the courts would hear the matter and there would be no need for the administrative agency. Even though administrative agencies serve the legislature, the U.S. Supreme Court holds that *res judicata* applies to final orders of administrative agencies acting in an adjudicative capacity. The statutes and case law are clear that the TRA acts in an adjudicative capacity for ratemaking:

> The statutes also contain similar definitions of an adjudicatory or contested case proceeding. Tenn.Code Ann. § 65–2–101(3) defines a contested case as "[a]ll proceedings before the commission in which the legal rights, duties, or privileges of specific parties are determined after a hearing before the commission." By the same token, Tenn.Code Ann. § 4–5–102(3) defines a contested case as "a proceeding ... in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing." Tenn.Code Ann. § 4–5–102(3) also specifically states that rate-making proceedings are contested cases, and Tenn.Code Ann. § 65–2–101(3) states that "the fixing of rates shall be deemed a contested case rather than a rule-making proceeding."[94]

Therefore, under the ruling of the U.S. Supreme Court, the finality doctrines of *res judicata* and collateral estoppel apply to the TRA's final orders from contested cases because the TRA is

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Docket No. 11-000198 (which included the issue of flood damage recovery) includes $ $64,000 of rate case expense, $19,937 of annual regulatory expense, and $12,695 in annual legal expense. *Initial Brief*, Docket No. 11-00065, pgs. 18-19, and pg. 34, n.123 (July 29, 2013) (citing dockets).

[93] *Initial Brief*, Docket No. 11-00065, Part II.B and Part II.D (July 29, 2013).

[94] *Tennessee Cable Television Ass'n v. Tenn. Public Serv. Comm'n*, 844 S.W.2d 151, 161 (Tenn. Ct. App. 1992). Tenn. Code Ann. § 65-2-101(3) is no § 65-2-101(2).

acting in an adjudicative capacity. Such an analysis is consistent with the fact that tariffs have the effect of law until changed on a prospective basis.[95]

E. Berry's Chapel's reasoning for how this Settlement complies with the prohibition against retroactive ratemaking or the filed rate doctrine does not apply here.

Berry's Chapel's arguments that the relief (*i.e.*, the refunds) are prospective and, therefore, not in prohibition of retroactive ratemaking misses the point and does not address the issue. The relief of refunds is not what is violating retroactive ratemaking and the filed rate doctrine. It is the fact that all monies received pursuant to illegal charges are not being refunded. If less than 100% of the monies illegally paid are refunded, then the victim/customers will have paid more for services than what was authorized in the then-effective rates. Any allowance in 2013 to charge something different for the service period of 2009 to 2011 is necessarily retroactive ratemaking rather than prospective ratemaking. Partial refunds going forward does not change the fact that the customers' rates in the past will necessarily change if less than 100% of monies illegally charged are refunded. For the same reasons, such an allowance in this Settlement violates the filed rate doctrine.

The case cited by Berry's Chapel, as it calls it "*Chattanooga Gas*", is also not on point because it has none of the same facts or issues that are present in this case. As discussed in Part II.B of this Brief, the Court of Appeals in *Chattanooga Gas* did not have to decide the issues of whether public notice, hearing, and determination that rates were necessary, reasonable, and prudent. Moreover, in the appellate case, the TRA was not acting as party staff deciding the rates as a party rather than in its decision-making role. The Court of Appeals also showed how the legal fees at issue in that case were not already considered in any previous dockets. And, finally, the rates affected by the legal fees in that case were going into a tariff effective going

[95] Tenn. Code Ann. § 65-5-103 requires rate changes to occur "thereafter" a hearing. *GBM Communications, Inc. v. United Mountain*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986) (cert. denied), states tariffs have effect of law.

forward—no party or the court was trying to change the effective rates of the past tariffs. Thus, any decision about retroactive ratemaking in *Chattanooga Gas* does not bear on the issues or facts raised in this Settlement.

IV. CONCLUSION

For the aforementioned reasons, the Consumer Advocate recommends the complete denial of this Settlement. It does not comply with the law, 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.

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 August 19th, 2013, upon:

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H

Supreme Court of Tennessee,
at Nashville.

UNITED CITIES GAS COMPANY, Appellee,
v.
TENNESSEE PUBLIC SERVICE COMMISSION,
Appellant.

No. 88-44-I.
April 23, 1990.

Gas utility appealed administrative denial of rate increase. The Equity Court, Davidson Conty, C. Allen High, Chancellor, remanded, and appeal was taken. The Supreme Court, O'Brien, J., held that Tennessee Public Service Commission's decision in petition for rate increase was final judgment, entitled to res judicata effect, until such time as utility was able to muster new evidence to warrant rate increase.

Reversed.

West Headnotes

Administrative Law and Procedure 15A ⚿501

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak501 k. Res Judicata. Most Cited Cases

Gas 190 ⚿14.3(4)

190 Gas
190k14 Charges
190k14.3 Administrative Regulation
190k14.3(4) k. Findings and Orders. Most Cited Cases

Tennessee Public Service Commission's decision in petition for rate increase by gas utility was final, entitled to res judicata effect, until such time as utility was able to muster new evidence to warrant rate increase.

***256** Henry Walker, Nashville, for appellant.

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OPINION

O'BRIEN, Justice.

These proceedings were initiated by a petition before the Tennessee Public Service Commission (Docket No. U–84–7333), for a rate increase by United Cities Gas Company, an investor owned utility, distributing gas in a number of Tennessee communities including Shelbyville, Columbia, Murfreesboro, Maryville, Alcoa, Morristown, Bristol, Union City, Franklin, and their environs. The Company is regulated by the Tennessee Public Service Commission pursuant to T.C.A. § 65–4–101, et seq.

In 1983 the Company purchased the City Gas System of Franklin, Tennessee for $1.4 million. In an order issued 30 November 1983 the Public Service Commission approved the sale with the express reservation that "any issue relating to future cost of service or inclusions in rate base shall be reserved and considered by the Commission in any future rate case filed by United Cities."

On 14 December 1984 the Company filed a peti-

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tion for a rate increase to produce additional annual revenue in excess of $5,000,000. In an extensive order based on comprehensive findings of fact and conclusions of law the Commission ruled that the Company was entitled to additional annual revenue of approximately $2,500,000. This reduced amount was based in part on the Commission's determination of the value of ***257** the Franklin City Gas System on the date of its purchase. They based this determination at "book value" which was defined as original cost less depreciation. Approximately three (3) pages of the order were devoted to the testimony of Robert Crenshaw who stated that in 1972 the Federal Revenue Sharing Act required the Tennessee Comptroller's Office to assume responsibility for the accounting and administering of municipal funds. Under guidelines laid down by the Comptroller's office he was hired by the City of Franklin to determine, among other things, the book value of the gas system. This entailed converting the accounting system to an accrual basis, arriving at a value for the fixed assets, either by their initial cost or by estimates, to establish the accumulated depreciation and fix the book value as of 1973. Book value was determined to be $700,000.

The Company filed a petition for reconsideration specifically requesting that it be allowed to recover from rate payers, pro-rated over a period of 8.75 years, the excess amount that the utility paid to buy the Franklin City Gas System over the original cost figure adopted by the Commission as the book value of the property at the time of its purchase by United Cities. The Commission denied the petition and reaffirmed their prior decision.

A petition for review was filed in the Chancery Court of Davidson County in accordance with the provisions of T.C.A. § 4–5–322. That court reviewed the record and the testimony presented before the Commission relative to the purchase of the Franklin City Gas System and found there was substantial and material evidence in support of the Commission decision to deny the rate increase. This judgment was appealed to the Court of Appeals and was dismissed on appellant's application on 29 October 1986. In the interval, on 21 August 1986 the Company filed a new petition with the Public Service Commission requesting another rate increase, based in part on the acquisition cost of the Franklin Gas Company. It was the stated purpose of the Company to persuade the Commission to change their method of establishing a rate base from the original cost approach and approve a rate based on the acquisition cost of newly acquired assets.

The 21 August 1986 petition (Docket No. U–86–7442), came on to be heard on 10 February 1987 before the Commission. One of the issues presented was the purchase of the Franklin Gas System. The Commission reviewed the prior proceedings and found that the issue was fully litigated both at the prior Commission hearing and in the Davidson County Chancery Court. The 10 June 1985 order and the 11 August 1985 order on the petition for reconsideration were both incorporated into the order rejecting the Company's application. The order reflected that no new evidence or arguments had been presented and both sides relied on the record developed in the previous hearing. It was concluded there was no reason for the Commission to reach a different result in the case. The Commission allowed a rate increase of approximately $2,500,000 based on other facets of the petition. This decision was taken to the Court of Appeals by the Company under the provisions of T.C.A. § 4–5–322, as amended by Public Acts 1986, Ch. 738, § 2.

The Court of Appeals posed the issues before that court to be (1) whether the matter was *res judicata;* (2) if not, whether the Commission's determination of the value of the Franklin Gas System was correct. On the issue of *res judicata* that court concluded that where the Public Service Commission was willing in its discretion, to make a *de novo* review of a matter already presented before it, the application of *res judicata* was wholly inappropriate and the Legislature

intended that the petitioner should be protected by a judicial review on the sufficiency of the Commission's decision. On the second issue the court concluded "that the Commission's refusal to allow United Cities to capitalize costs that had been expensed in order to increase the book value of the Franklin Gas System was supported in the record as a whole by substantial and material evidence." They affirmed that part of the Commission's order. They held that the Public Service Commission had failed to ***258** make any findings concerning the proper rate of depreciation for the Franklin Gas Company prior to 1970 and that the Commission's order did not comply with the mandate of T.C.A. § 4–5–314(c) and (d). They remanded the case to the Commission "for the inclusion in its order of the findings and conclusions that support the rate of depreciation that should be applied to the original cost of the Franklin Gas System."

The Court of Appeals recognized that final decisions of State administrative agencies are *res judicata* when the agency action under review is of a judicial nature, citing *United States v. Utah Construction and Mining Company*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), as seminal authority. They took the view that the Tennessee Public Service Commission failed to meet the criteria stated in that case on the basis that it has been declared an administrative board and not a court, and that its power to fix rates is administrative and not judicial. The basic reasoning of the court was that none of the orders of the Public Service Commission in this case were of a final or conclusive nature. They reached this conclusion, as stated in the opinion, on the premise that "Both sides agree that the Commission is not bound by its prior decisions; as the Commission's order of February 13, 1987 put it: 'while an administrative agency is not legally bound by its prior decisions, the Commission should give substantial weight to a recent order which addresses in detail the same facts and legal arguments presented here ...' "

In reference to this issue we find the Commission order to say a great deal more than the Court of Appeals seems to have found. In pertinent part the Commission order reads as follows:

> "As explained during the hearing, this issue was fully litigated—both at the Commission and in the Davidson County Chancery Court—during the Company's last rate proceeding in May, 1985. The Commission and the court both held that the stockholders of United Cities, not its rate payers, should pay for the Company's decision to buy the Franklin Gas System at twice its book value. 'The system is just passing from one owner to another—at a 100% profit,' the Commission wrote, 'and the rate payers are being asked to pay the bill.'
>
> The best reasons for reaffirming the agency's decision are found in the written decisions of the Commission and the court which discuss the controversy in detail. We incorporate here both the order of June 10, 1985, and the order upon reconsideration issued August 11, 1985, insofar as those orders addressed the Franklin issue.
>
> No new evidence or arguments have been presented; both sides have relied on the record developed in the previous hearing.... Therefore, there is no reason for this Commission to reach a different result in this case. While an administrative agency is not legally bound by its prior decisions, the Commission should give substantial weight to a recent order which addresses in detail the same facts and legal arguments presented here. Otherwise, there would be no end to litigation and no consistency in regulation. ...
>
> The Commission again rejects the Company's argument. ..."

The Court reasoned that "[t]he Public Service Commission heard United Cities argue the valuation of the Franklin System three times—the 1985 hearing,

the petition to rehear, and the 1986 hearing. The Commission could have changed its holding at any point, and could do so at any time if United Cities brings the matter before it again. In these circumstances the ruling of the Commission obviously can have no *res judicata* effect, since they are never truly final and conclusive. And even if this were not the case, the Commission in setting rates does not act in a judicial capacity, thus failing to meet the test in *Utah Construction*, supra." [FN1]

> FN1. The petition for a rate increase was filed on 21 August 1986, heard by the Commission on 21 January, 1987, was considered by the Commission at a public meeting on 10 February 1987, apparently the order was entered on 13 February 1987.

***259** The court overlooked the fact that each of the orders of the Commission contain all of the indicia of a final order, required by statute. The order of the Commission from which this appeal was taken shows on its opening page that the case was the result of a merger of United Cities Gas Company and Tennessee–Virginia Energy Corporation. A rate petition which had been filed by Tennessee–Virginia prior to the merger had been withdrawn. The record of the proceedings clearly shows that a rate increase in excess of $2,000,000 was granted for various reasons the Commission approved but that insofar as the Franklin Gas System was concerned the application was clearly rejected without the introduction of any evidence.

The lower court took the approach that the Public Service Commission is free to reverse course if public policy demands it. Undoubtedly this is true, however it does not mean that a petitioner before the Commission for a rate increase is not bound by an order of the Commission until such time as new evidence or the public interest warrants a change of policy. The Court takes a similar view of the Commission's reasoning that even if United Cities is not bound by previous Commission orders, it is precluded from violating the prior judgment of the chancery court. They theorize that the result of such a situation would be to allow the Commission to rehear a particular rate case *ad infinitum,* while limiting the regulated utility to only one appeal. This is the precise situation which exists. The Company is bound by the ruling of the Commission until such time as it may be able to muster new evidence to warrant a rate increase. The Commission cannot arbitrarily establish a change of policy or change of rate. It is bound by the provisions of the Administrative Procedures Act and subject to judicial review, in accordance with the strictures of Chapter 5, Title 4 of Tenn. Code Anno., prescribing Administrative Rules and Procedure.

We think the Court of Appeals reached a correct conclusion in stating that the Legislature, in passing the Administrative Procedure Act, intended to provide for judicial review of administrative orders whenever made, ... and a petitioner is entitled to a review of whether the determination meets the standards set out in T.C.A. § 4–5–322(h). When an administrative decision is appealed, the courts are merely determining whether that decision is supported by substantial and material evidence and if or not it exceeds constitutional or statutory limits. The administrative body is and must be free to change its mind and, if there is substantial and material evidence to justify the change, the courts have no reason to overturn the new holding. Those persons, as defined in T.C.A. § 4–5–102(9), who are aggrieved by such a final decision, are entitled to file a petition for review, if it be a decision of the Public Service Commission, to the Middle Division of the Court of Appeals who must conduct the review in accordance with T.C.A. § 4–5–322. See *Public Service Commission v. General Telephone Company, etc.*, 555 S.W.2d 395 (Tenn.1977).

We are of the opinion the Court of Appeals erred in finding that the Public Service Commission considered the evidence *de novo* in the Franklin Gas System case. The record does not support that conclusion. We

conclude that the Court erred in remanding the case for further compliance with T.C.A. § 4–5–314. See *Public Service Commission v. General Telephone Company, etc.*, supra; *CF Industries v. Tennessee Public Service Commission*, 599 S.W.2d 536 (Tenn.1980); *Powell Telephone Company v. Tennessee Public Service Commission*, 660 S.W.2d 44 (Tenn.1983).

The judgment of the Court of Appeals is reversed. The final order of the Public Service Commission is affirmed. The case is remanded to that agency for any further proceedings required. The costs are assessed against the appellee, United Cities Gas Company.

DROWOTA, C.J., and FONES, COOPER and HARBISON, JJ., concur.

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