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

Response of Berry's Chapel in Opposition to the Consumer Advocate's Motion

Berry's Chapel Utility, Inc. ("Berry's Chapel") objects to the motion of the Consumer Advocate to introduce into evidence the "Summary of Prior Orders" attached to the Advocate's seven-page Motion filed at 3:39 p.m., September 6, 2003. The Advocate argues that the Summary is admissible under Rule 1006 of the Tennessee Rules of Evidence. The Advocate also proposes to use a nearly identical document as a "demonstrative." It is not clear if she also plans to introduce the demonstrative as an exhibit. Berry's Chapel objects to the introduction of either document as evidence and also objects to the use of either document as a demonstrative.

Rule 1006 states:

> "The contents of voluminous writings recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals or duplicates shall be made available for examination or copying, or both, by other parties at reasonable times and places. The court may order that they be produced in court."

The "Advisory Commission Comments" to Rule 1006 state:

> "Summaries of the contents of voluminous documents have long been admissible in Tennessee. State ex rel Stewart v. Follis, 140 Tenn. 513, 521, 205 S.W. 444 (1918)."

1. As explained in Stewart v. Follis, supra, the purpose of rule 1006 is to make summaries of factual materials that are too voluminous to be examined individually. It is not the purpose of the rule to allow an exhibit that is merely an illustration of a lawyer's argument. Here, the "Summary" purports to be an exhibit of selected numbers taken from prior TRA orders. The Advocate argues these are undisputed facts. They are not. The Summary mixes together expenses from several different dockets in an effort to make it appear that all the expenses are comparable. At one time, the Advocate stated that the chart was created to support the Advocate's position that the invoices for flood recovery and odor control at issue in this settlement should not be paid because those expenses have already been addressed by the Authority in other dockets. This is simply wrong, as both Mr. Buckner and Ms. Underwood will testify. Another time, the Advocate stated that the purpose of the Summary was to illustrate the Advocate's arguments on res judicata, collateral estoppel, and retroactive ratemaking. Those issues have been briefed at length by both sides. Whether one agrees with any of these arguments or not, the Advocate has twice acknowledged that this Summary was created to illustrate the Advocate's arguments. It is not an exhibit of facts and certainly not an exhibit of undisputed facts. It therefore is not covered by the rule.

2. Even if this Summary were an exhibit showing facts, or what the Advocate believes are facts, Rule 1006 requires that the person who compiled the summary must personally testify and must be subject to cross-examination. In this case, the summary was

prepared by attorneys in the Advocate's Office. There is no supporting witness to testify in support of the summary exhibit or be cross-examined about it.

Although there are many cases on the rule, the one case cited in the Comments is Stewart v. Follis, 205 S.W. 44 (Tenn. 1918). That case holds that the summary document, must be supported by "a competent witness who has examined the papers with reference to the points sought to be established to testify to the result of such examination." (at p. 46, emphasis added.) If there is no supporting witness, the exhibit must be excluded. In that case, the summary exhibit was produced by several experts, not all of whom were available to testify, and it was unclear what parts of the report had been done by which witnesses. The Court concluded, "That being true, it leaves the whole matter fatally indefinite and the whole report must be excluded." Id., emphasis added. Other, more recent cases, also emphasize the importance of the opportunity to cross-examine the witness who compiled the summary. As the Tennessee Court of Appeals held in State v. Springs, 976 S.W. 2d 654, 657 (1997), Rule 1006 requires that a summary exhibit be "presented under oath" and that the other side be "afforded an opportunity to test their validity [of the computations in the summary] through cross examination." As another court explained, "Here defendants' attorneys conducted a thorough cross-examination of the witness responsible for preparing the chart and had an opportunity to demonstrate to the jury that the assumptions made from the chart were no more than mere assumptions." United States v. Means, 695 F.2d 811, 817 (5th. Cir., 1983) (1983); see also United States v. Richardson, 233 F.3d 1285, 1294 (11th Cir. 2000) (holding "where the defense has the opportunity to cross-examine a witness concerning the disputed issue . . . the likelihood of any error in admitting summary evidence diminishes.") and United States v. Norton, 867 F.2d 1354, 1362 (11th Cir. 1989), (holding that the "defendants" attorneys conducted a thorough cross-examination of the witness responsible

for preparing the chart and had an opportunity to demonstrate to the jury that the assumptions made from the chart were no more than mere assumptions.") The plain language of every one of these cases requires that the witness who compiled the summary take the stand to introduce the summary and face cross-examination.

3. Whether the proposed exhibit is an illustration of a legal argument or, as the Advocate believes, a fact exhibit, the time for filing briefs and evidence has passed. If the exhibit is an illustration of an argument, it could have been attached to one of the Advocate's pre-hearing briefs or, if one were permitted, the Advocate's post-hearing brief. If it were really a fact exhibit, it could and should have been attached to the testimony of the Advocate's witness. It was not. In sum, this is a lawyer-generated document that tries to compare costs in one docket with costs in another when they are not comparable, as cross-examination would show. But whether the summary is legal argument or a fact exhibit, the time for filing either has gone.

4. There is another reason to object to the exhibit. The Advocate sent an email to the Hearing Officer on September 5, 2013 saying "As discussed in its briefs, the Consumer Advocate contends that the costs have been recovered under prior tariffs and/or are precluded from recovery now under the legal arguments of res judicata, collateral estoppel, or retroactive ratemaking. Therefore, the Proposed Exhibit and Proposed Demonstrative are beneficial on cross." Whatever else may be said about the admissibility of the Summary, it is very clear that none of those issues is an appropriate topic for cross-examination.

Conclusion

The Advocate is free to cross-examine Mr. Buckner and Ms. Underwood about the expenses described in the Settlement Agreement and whether or not those expenses were addressed by the Authority in another docket. The Advocate has already made that argument

in her briefs. But the Advocate cannot introduce into evidence the "summary exhibit" or use it as a demonstrative in support of her argument. First, it is not a summary of facts as contemplated by the rule; second, if it were a fact summary, it cannot be admitted because the person who compiled it is not available to testify; and, third, whether it is a legal argument or a fact exhibit, it is too late to introduce it now. Finally, to the extent the Advocate intends to use the exhibit to cross-examine a witness about the Advocate's legal theories, such cross-examination is wholly improper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2013, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

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HENRY WALKER

A copy was also served on Shiva Bozarth at the TRA.