

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 13, 2013

IN RE:)	
)	
INVESTIGATION AS TO WHETHER A SHOW CAUSE)	DOCKET NO.
ORDER SHOULD BE ISSUED AGAINST BERRY'S)	11-00065
CHAPEL UTILITY, INC. AND/OR LYNWOOD)	
UTILITY CORPORATION FOR VIOLATION OF TRA)	
RULE AND TENNESSEE STATUTES, INCLUDING BUT)	
NOT LIMITED TO, TENN. CODE. ANN. SECTIONS 65-)	
4-112, 65-4-113, 65-4-201, AND 65-5-101)	

ORDER DENYING CONSUMER ADVOCATE'S MOTION TO ADMIT EXHIBITS

This matter is before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") upon the *Motion to Decide Admissibility of Exhibits* ("*Motion to Admit Exhibits*") filed by the Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee ("Consumer Advocate") on September 6, 2013. Also on September 6, 2013, responsive pleadings were filed by Berry's Chapel Utility, Inc. ("Berry's Chapel") and the Tennessee Regulatory Authority staff participating as a party ("Party Staff").¹ During a brief recess in the Hearing proceedings on September 9, 2013, each party was given an opportunity to present its position concerning the Consumer Advocate's motion.

¹ The parties also presented arguments on the Consumer Advocate's request to admit and use its proposed exhibits via email communications exchanged between the Consumer Advocate, Party Staff, Berry's Chapel, and the Hearing Officer. This string of email exchanged between the parties and Hearing Officer was filed in the docket file on September 9, 2013.

CONSUMER ADVOCATE'S *MOTION TO ADMIT EXHIBITS*

In its *Motion to Admit Exhibits*, the Consumer Advocate requests to present during the Hearing, scheduled to begin on September 9, 2013, two (2) exhibits purporting to summarize certain costs approved by the Authority in Docket Nos. 07-00007, 08-00060, 09-00034, and 11-00198/11-00180. Counsel for the Consumer Advocate prepared the two very similar and partially identical charts as evidence to be admitted in the record and for demonstrative purposes, either evidentiary or as a visual aid. Explaining that the charts will be used during cross-examination of the Party Staff's witness, Ms. Tiffany Underwood, in relation to her pre-filed testimony, wherein she indicated that she had reviewed the rate case filings of Berry's Chapel in Docket Nos. 07-0007, 09-00034, and 11-00198, and determined that the expenses authorized in the proposed settlement agreement have not been previously presented to the TRA for consideration. As the underlying information is not in the record of these proceedings, for judicial economy the Consumer Advocate stated that its use of the proposed exhibits is intended to save time by presenting the facts necessary to get right to the heart of the issues that the Consumer Advocate wishes to address, while avoiding the lengthy and tedious process of bringing each number into the record through separate foundational questions.

The Consumer Advocate asserts that its proposed exhibits constitute summaries of evidence that are admissible under the Tennessee Rules of Evidence ("TRE") Rule 1006.² Alternatively, the Consumer Advocate asserts that, as the Authority is not bound by the Rules of Evidence, while not conclusive evidence, because the numbers in its proposed exhibits come

² Rule 1006, Summaries, provides as follows:

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. *Tennessee Rules of Evidence, Rule 1006.*

from Authority Orders it should be considered competent and undisputed as to accuracy. Therefore, the Authority should admit the proposed exhibits as evidence and accord to them whatever weight the Authority deems appropriate.

RESPONSE & OBJECTIONS OF OPPOSING PARTIES

Both Berry's Chapel and Party Staff objected to the Consumer Advocate's proposed exhibits as evidence and/or their use as a demonstrative or visual aid.

Berry's Chapel

In its *Response of Berry's Chapel in Opposition to the Consumer Advocate's Motion*, Berry's Chapel contends that the proposed summaries are not exhibits of facts in the record nor are they undisputed. Berry Chapel states that the Consumer Advocate has admitted that it created the proposed exhibits for the purpose of supporting its position on expenses and illustrating its legal arguments, which is not an appropriate topic on cross-examination. In addition, Berry's Chapel asserts that if even the documents were exhibits showing facts, the caselaw supporting Rule 1006 clearly requires that the person who compiled the summary must testify and be subject to cross-examination.³ As the summary was prepared by counsel, there is not witness to testify and be subject to cross-examination. Further, as the proposed exhibits were not attached to witness testimony or to one of the Consumer Advocate's hearing briefs, the request to admit and use them during the Hearing constitutes an untimely attempt to introduce evidence that is not already in the record. Therefore, the documents are not covered by Rule 1006 and the Consumer Advocate's motion should be denied.

³ In its response, Berry's Chapel cites several cases for the holding that in order for a summary to be admitted under Rule 1006, a witness must testify in support of the summary exhibit and be subject to cross-examination about it. *Response of Berry's Chapel in Opposition to the Consumer Advocate's Motion*, pp. 2-3 (September 6, 2013), citing *Stewart v. Follis*, 205 S.W. 44 (Tenn 1918), *State v. Springs*, 976 S.W.2d 654, 657 (Tenn. Ct. App. 1997), *U.S. v. Means*, 695 F.2d 811, 817 (5th Cir. 1983), *U.S. v. Richardson*, 233 F.3d 1285, 1294 (11th Cir. 2000), and *U.S. v. Norton*, 867 F.2d 1354, 1362 (11th Cir. 1989).

Party Staff

In its *Motion in Limine*, Party Staff objects to the proposed exhibits being used for any purpose. First, the documents are not evidence in the record and are not supported by the Consumer Advocate's witness, or any other witness. Further, attaching a copy of the relevant portion of the treatise, *Tennessee Law of Evidence*, Party Staff asserts that to be admissible under TRE 1006, "the summary must consist of and be limited to facts or data that the testifying witness personally observed from an examination of the records..."⁴ As there is no competent witness to testify concerning the proposed exhibits, the documents "are nothing more than an interpretation of how sections of the Authority's prior orders should be understood. . . it is one side's view of the meaning of the orders."⁵ Therefore, Party Staff objects to the Consumer Advocate's use of the proposed exhibits.

FINDINGS & CONCLUSIONS

A summary document is admissible only if it accurately reflects summarized evidence. Here, the underlying facts and calculations that make up the Consumer Advocate's proposed exhibits are not evidence in the record in this matter. Further, the proposed exhibits are unsupported by any witness with personal knowledge of the document (as prepared) who may testify concerning the accuracy of its contents and compilation, and, thereafter, be subject to cross-examination. In the absence of a witness with personal knowledge of the document, a proper foundation for its admissibility cannot be laid. As such, the Hearing Officer finds that the proposed exhibits are improper and untimely attempts to submit evidence, analysis, or testimony into the record. Therefore, the Hearing Officer concludes that Rule 1006 of the Tennessee Rules

⁴ *Motion in Limine*, pp. 2-3 (September 6, 2013).

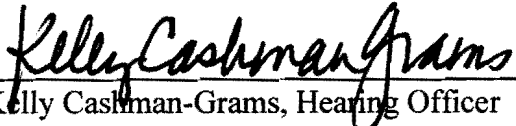
⁵ *Id.* at 2.

of Evidence does not apply or otherwise cover the documents that the Consumer Advocate requests be admitted into the record and used for demonstrative purposes.

While the Authority is not bound by the Rules of Evidence applicable in a court,⁶ as the presentation of the underlying facts contained in the proposed exhibits is disputed by the opposing parties and the proposed exhibits are not supported by a witness who is subject to cross examination, the Hearing Officer further finds that the documents at issue are untested and cannot be determined to be reasonably accurate or reliable. As such, the proposed exhibits will not be helpful or of use to the Authority in making its determinations in this matter. While the Consumer Advocate's intentions and efforts to streamline these proceedings are laudable, its request to admit its proposed exhibits as evidence in the record and to use as either demonstrative evidence or a visual aid must be denied.

IT IS THEREFORE ORDERED THAT:

The *Motion to Decide Admissibility of Exhibits* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee is DENIED.


Kelly Cashman-Grams, Hearing Officer

⁶ See Tenn. Code Ann. 65-2-109(1), which provides as follows:

The authority shall not be bound by the rules of evidence applicable in a court, but it may admit and give probative effect to any evidence which possess such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs; provided, that the authority shall give effect to the rules of privilege recognized by law; and provided further, that the authority may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence.