

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

December 09, 2015

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

**ORDER GRANTING PETITION TO INTERVENE, APPOINTING HEARING OFFICER
AND REJECTING SETTLEMENT AGREEMENT**

This matter came before Chairman James M. Allison, Vice Chairman Herbert H. Hilliard, and Director Kenneth C. Hill of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, during a regularly scheduled Authority Conference held on June 17, 2013 to consider an intervention request filed in this docket and the appointment of a Hearing Officer, and during a regularly scheduled Authority Conference held on November 25, 2013, to consider the proposed *Settlement Agreement* filed on May 31, 2013, by Berry's Chapel Utility, Inc. ("Berry's Chapel") and TRA Staff participating as a party ("TRA Party Staff").¹

¹ The following TRA Staff members were identified as participating as a party in this docket: Jerry Kettles, Tiffany Underwood, Zenobia Wade and Shiva Bozarth. See *Memorandum* (February 24, 2012) and *Memorandum* (March 15, 2012).

BACKGROUND

Berry's Chapel owns and operates a wastewater treatment system in Williamson County, Tennessee. On September 1, 2010, Berry's Chapel acquired the wastewater system from Lynwood Utility Corporation, Inc. and on November 1, 2010 increased rates without prior approval by the Authority. Berry's Chapel contended that, as a Tennessee non-profit corporation, under Tenn. Code Ann. § 65-4-101(6)(E) Berry's Chapel was a non-utility and exempt from the Authority's regulatory jurisdiction.

On January 10, 2011, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate" or "CAPD") filed a petition for a declaratory order in TRA Docket No. 11-00005 that Berry's Chapel Utility, Inc. is a public utility and should be regulated.² Berry's Chapel filed an answer on February 9, 2011. In addition to its denial of the substantive allegations in the Consumer Advocate's Petition, Berry's Chapel asserted that the TRA did not have the authority to issue a declaratory order because the TRA did not have subject matter jurisdiction to determine whether Berry's Chapel is a non-profit corporation under Tennessee law and, as such, could not determine whether Berry's Chapel is or is not a non-utility. The Consumer Advocate filed a reply to Berry's Chapel's answer on February 11, 2011. Briefs were filed by the parties, and oral arguments were scheduled before the panel for April 4, 2011.

On March 31, 2011, Berry's Chapel filed a motion requesting a continuance based on its filing of an amendment to its corporate charter to become a cooperative. On April 1, 2011, the Consumer Advocate filed a response opposing the motion, as well as a copy of proposed

² A comprehensive procedural history of TRA Docket No. 11-00005 is set forth in *In re: Consumer Advocate's Petition for a Declaratory Order that Berry's Chapel Utility, Inc., is a Public Utility Under Tennessee Law and Should be Regulated by the TRA*, Docket 11-00005, *Order Declaring Berry's Chapel Utility, Inc. to Be a Public Utility* (August 5, 2011). This order sets forth those filings and proceedings most relevant to this docket.

legislation being considered by the General Assembly that would amend the language in Tenn. Code Ann. § 65-4-101(6)(E). On April 4, 2011, the panel denied Berry's Chapel's motion for a continuance and proceeded to hear oral arguments as scheduled from the parties. After hearing the oral arguments, the panel set deliberations for April 18, 2011.

At the regularly scheduled April 18, 2011 Authority Conference, the panel in TRA Docket No. 11-00005 determined that Berry's Chapel did not meet the statutory definition of a non-utility pursuant to Tenn. Code Ann. § 65-4-101(6)(E) and, therefore, the utility was and always had been subject to the jurisdiction of TRA.³ Because the status of Berry's Chapel did not change, it was unauthorized to increase rates on November 1, 2010 without Authority approval. The panel immediately suspended the \$20 monthly increase that Berry's Chapel had previously assessed and collected from its customers without TRA approval.⁴ In addition, the panel voted to establish a separate docket to address the ramifications of their determination that Berry's Chapel was and had been a regulated utility, and set forth the following issues to be decided:

1. Whether Berry's Chapel is entitled to a hearing regarding the \$20 rate increase or whether a refund should be ordered back to November 1, 2010; and
2. What action the TRA should take against Berry's Chapel for violating state statutes including but not limited to:
 - (A) operating without a CCN pursuant to Tenn. Code Ann. § 65-4-201 since September 1, 2010;
 - (B) merging with Lynwood without TRA approval under Tenn. Code Ann. §§ 65-4-112 or 65-4-113; and

³ See *In re: Consumer Advocate's Petition for a Declaratory Order that Berry's Chapel Utility, Inc., is a Public Utility Under Tennessee Law and Should be Regulated by the TRA*, Docket No. 11-00005, *Order Declaring Berry's Chapel Utility, Inc. to Be a Public Utility*, pp. 19 -20 (August 5, 2011).

⁴ *Id.*

(C) illegally increasing rates without TRA approval pursuant to Tenn. Code Ann. § 65-5-101.⁵

As a result of that decision, this docket was opened to address the issues listed above. At the regularly scheduled Authority Conference held on August 1, 2011, the panel in this docket voted unanimously to appoint Director Sara Kyle as Hearing Officer to determine whether a Show Cause order should be issued against Berry's Chapel for violations of Tenn. Code Ann. §§ 65-4-201, 65-4-112, 65-4-113 and 65-5-101, and if a Show Cause order was issued, to prepare the matter for hearing before the panel.⁶ In the meantime, the General Assembly amended Tenn. Code Ann. § 65-4-101(6)(E), effective June 6, 2011, to clarify that a non-profit utility such as Berry's Chapel was subject to regulation by the Authority.⁷

Berry's Chapel appealed the Authority's declaratory order in TRA Docket No. 11-00005 to the Tennessee Court of Appeals. No further action was taken on the determination of whether to issue a Show Cause order in this docket pending the Court's decision; however, other activity in this and other related dockets continued. For instance, at the regularly scheduled Authority Conference held on February 27, 2012, Berry's Chapel appeared before the panel in this docket to give an update to the Authority on the status of customer complaints.⁸ Berry's Chapel also filed a request to recover costs to repair flood damage and to refund customer service fees on October 25, 2011 in TRA Docket No. 11-00180, and filed a rate case on November 15, 2011, in TRA Docket No. 11-00198.⁹

⁵ *Id.*

⁶ *Order Appointing a Hearing Officer* (September 28, 2011). The panel at that time consisted of Chairman Eddie Roberson, Director Sara Kyle and Director Mary W. Freeman.

⁷ *Settlement Agreement*, p. 1 (May 31, 2013).

⁸ Following the departure of Chairman Eddie Roberson, the panel consisted of Chairman Kenneth C. Hill, Director Sara Kyle and Director Mary W. Freeman.

⁹ These dockets were consolidated. *See In re: Petition of Berry's Chapel Utility, Inc. to Change and Increase Rates and Charges*, TRA Docket No. 11-00198 and *In re: Petition of Berry's Chapel Utility, Inc. to Recover Costs to Repair Flood Damage and to Refund Customer Service Fees*, TRA Docket No. 11-00180, *Final Order* (August 21, 2012).

On October 13, 2011, and of significance to the proposed *Settlement Agreement* later filed in this docket, Berry's Chapel filed in TRA Docket No. 11-00174 a request for approval of an alternate form of financial security pursuant to TRA Rules.¹⁰ TRA Rule 1220-4-13-.07(2) requires wastewater companies to maintain financial security equal to 100% of the utilities annual revenues. Berry's Chapel requested in its petition, however, that it be allowed, pursuant to TRA Rule 1220-4-13-.07(5), to post a financial security other than the type or amount permitted in TRA Rule 1220-4-13-.07(2). Specifically, Berry's Chapel requested approval of a \$20,000 irrevocable letter of credit in lieu of financial security for the full amount of annual revenues. The request for alternate financial security must be approved by the Authority upon a finding that the financial security is in the public interest.

Also while the appeal was pending, on April 12, 2012, the Consumer Advocate filed a *Petition to Intervene* in this docket. The Consumer Advocate asserted that, despite being a regulated utility, Berry's Chapel unilaterally altered its tariff and collected money to which it was not entitled. The CAPD requested intervention, noting that the disposition of the funds and their proper return to consumers who paid them were among the items within the scope of this docket, and that "only by participating in this proceeding can the Consumer Advocate work to insure that all unauthorized charges collected from consumers are returned."¹¹

In TRA Docket No. 12-00046, Berry's Chapel filed a petition on May 25, 2012, seeking approval of the transfer of Lynwood Utility Corporation, Inc.'s certificate of public convenience and necessity to Berry's Chapel effective September 1, 2010. At the regularly scheduled

¹⁰ *In re: Petition of Berry's Chapel Utility, Inc. to Approve Alternate Form of Financial Security Under Rule 1220-4-13-07*, Docket No. 11-00174, *Petition* (October 13, 2011).

¹¹ *Petition to Intervene*, pp. 2-3 (April 12, 2012).

Authority Conference held on June 7, 2012, the panel assigned to that docket voted unanimously to approve the transfer subject to certain conditions.¹²

On December 12, 2012, the Tennessee Court of Appeals issued its opinion, affirming the TRA's declaratory order in Docket No. 11-00005 and determining that Berry's Chapel was subject to the jurisdiction of the Authority.¹³ On January 3, 2013, the Consumer Advocate filed the *Notice of Court of Appeals' Decision Upholding Determination that Berry's Chapel is a Regulated Utility and Reiteration of Consumer Advocate's Request for a Refund*, in which the CAPD stated its request "that the unlawful charges made without TRA approval be immediately refunded without further delay."¹⁴

On March 28, 2013, Berry's Chapel filed a copy of a letter sent to its customers indicating that it was beginning to refund the \$20 monthly overcharge (up to a total of \$100 per customer) through a monthly credit on the customers' sewer bills over an 18-month period.¹⁵ In turn, the Consumer Advocate filed a copy of a letter to counsel for Berry's Chapel on April 1, 2013, stating that it would not oppose the amount of the refund, but would ask the TRA to shorten the time of the refunds from 18 months to no more than a year.¹⁶

Also of significance to the proposed *Settlement Agreement* later filed in this docket, on April 1, 2013, Berry's Chapel filed a petition in TRA Docket No. 13-00052 requesting approval to defer additional costs incurred as a result of the May 2010 flooding.¹⁷ Berry's Chapel stated

¹² *In re: Petition of Berry's Chapel Utility, Inc. to Transfer Authority Nunc Pro Tunc*, Docket No. 12-00046, *Order Approving Transfer of Authority Nunc Pro Tunc* (July 17, 2012). The panel in TRA Docket No. 12-00046 consisted of Chairman Kenneth C. Hill, Director Sara Kyle and Director Mary W. Freeman.

¹³ *See Notice of Court of Appeals' Decision Upholding Determination that Berry's Chapel is a Regulated Utility and Reiteration of Consumer Advocate's Request for a Refund*, Exhibit A (January 1, 2013).

¹⁴ *Id.* at 2.

¹⁵ Letter Dated March 22, 2013 from Tyler Ring, President of Berry's Chapel Utility, Inc. to Customers (March 23, 2013).

¹⁶ Letter Dated April 1, 2013 from Vance Broemel, Senior Counsel, CAPD, to Henry Walker (April 1, 2013).

¹⁷ *See In re: Petition of Berry's Chapel for Approval of Deferred Accounting*, Docket No. 13-00052, *Petition for Approval of Deferred Accounting* (April 1, 2013).

that the flood-related expenses previously approved by the Authority in TRA Docket No. 11-00180 did not include legal fees or subsequent legal work performed relating to the recovery of flood expenses.¹⁸ Berry's Chapel stated that as of December 31, 2012, it had received bills for \$18,111 in legal expenses related to the May 2010 flood. If deferral were approved, Berry's Chapel stated that it would seek recovery of these expenses at a later date. The panel assigned to Docket No. 13-00052 approved the deferral request at a regularly scheduled Authority Conference held on May 6, 2013.¹⁹

On May 31, 2013, Berry's Chapel and TRA Party Staff filed the *Settlement Agreement* in this docket, with supporting testimony, as discussed below.²⁰ On June 3, 2013, the Consumer Advocate renewed its request to intervene.²¹

JUNE 17, 2013 AUTHORITY CONFERENCE

At the regularly scheduled Authority Conference held on June 17, 2013, the panel considered the Consumer Advocate's *Petition to Intervene*. Tenn. Code Ann. § 4-5-310 sets forth the following criteria for granting petitions to intervene:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in

¹⁸ *Id.*

¹⁹ See *In re: Petition of Berry's Chapel for Approval of Deferred Accounting*, Docket No. 13-00052, *Order Approving Request for Deferred Accounting* (June 25, 2013).

²⁰ Prior to the filing of the proposed *Settlement Agreement*, TRA Party Staff and Berry's Chapel presented updates to the panel on the status of settlement negotiations. See Transcript of Authority Conference, pp. 5-6 (April 8, 2013) and Transcript of Proceedings, pp. 7-9 (May 6, 2013). Following the departures of Director Sara Kyle and Director Mary W. Freeman, the docket was reassigned to Chairman James M. Allison, Vice Chairman Herbert H. Hilliard and Director Kenneth C. Hill. See *Notice of Reassignment of Panels* (March 27, 2013).

²¹ *Request for Consideration of the Consumer Advocate's Petition to Intervene by the Authority* (June 3, 2013).

the proceeding or that the petitioner qualifies as an intervenor under any provision of the law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

(b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.

The panel noted that while it is not typical for the TRA to allow parties to intervene into the Authority's investigative proceedings, this particular matter is unique because: (1) the Consumer Advocate has been allowed to intervene in several dockets before the agency involving Berry's Chapel and has been involved with the issues related to those to be addressed in this docket, specifically through its *Petition for a Declaratory Order that Berry's Chapel Utility, Inc., is a Public Utility Under Tennessee Law and Should be Regulated by the TRA* in TRA Docket No. 11-00005, which led to the opening of this docket; and (2) the pending *Settlement Agreement* includes specific provisions that may ultimately affect consumer rates in which the Consumer Advocate has an interest on behalf of consumers. In addition, the panel observed that neither Berry's Chapel nor TRA Party Staff objected to the Consumer Advocate's request for intervention. Therefore, applying the criteria in Tenn. Code Ann. § 4-5-310, the panel voted unanimously to approve the Consumer Advocate's *Petition to Intervene*.

The panel further noted the departure from the Authority of Director Sara Kyle, who had previously served as Hearing Officer in this docket. To prepare this matter for a hearing, the panel voted unanimously to appoint General Counsel or her designee to serve as Hearing Officer for the remainder of this docket to handle any preliminary matters, including discovery issues, entering a protective order and preparing a procedural schedule.

PROPOSED SETTLEMENT AGREEMENT

On May 31, 2013, Berry's Chapel and TRA Party Staff filed the proposed *Settlement Agreement* in this docket, along with the supporting testimony of Ms. Tiffany Underwood, analyst for TRA Party Staff, and Mr. Robert T. "Terry" Buckner, regulatory accountant for Berry's Chapel. Pursuant to the proposed *Settlement Agreement*, Berry's Chapel acknowledges that operating as if it were unregulated was in violation of the law, and TRA Party Staff acknowledges that Berry's Chapel did so on advice of counsel and that Berry's Chapel believed at the time that the charges and fees it imposed were legally made.²² These fees included: a \$20 per month facilities charge applied to all residential customers; late payment fees collected from water customers of Mallory Valley Utility District; an increase in the minimum customer bill; and the continuation of an odor-control surcharge which had previously been approved by the TRA for a one-year period.²³

Under the terms of the proposed *Settlement Agreement*, Berry's Chapel will repay \$73,680 collected as a \$20 per month facilities charge owed to individually identified customers. The repayment will be made in equal monthly bill credits over a period of 18 months, which it voluntarily began in April 2013.²⁴ Berry's Chapel will also repay \$534.68 collected as late fees from identified customers of Mallory Valley Utility District and retained by Berry's Chapel. The repayment will be made to those customers within one month of ratification of the proposed *Settlement Agreement*.²⁵

The Authority previously approved the recovery of costs related to reducing an odor problem at Lynwood's (now Berry's Chapel's) facility over a twelve-month period in TRA

²² *Settlement Agreement*, ¶ 10 (May 31, 2013).

²³ *Id.* at ¶ 9.

²⁴ *Id.* at ¶¶ 21, 14.

²⁵ *Id.* at ¶¶ 22, 15.

Docket No. 08-00060.²⁶ Berry's Chapel continued to collect this surcharge after the twelve-month period expired without Authority approval, resulting in an over-collection of \$49,885.68. Under the proposed *Settlement Agreement*, because of a lack of customer data, the additional collections cannot be refunded to individual customers but should be used to benefit the customers collectively.²⁷ In addition, from December 2010 to December 2011, Berry's Chapel raised its minimum bill without TRA approval, resulting in an over-collection of \$10,177.31. Because of a lack of customer data, the additional collections cannot be refunded to individual customers but should be used to benefit the customers collectively.²⁸ Due to a billing error by the City of Franklin, some Berry's Chapel customers who received water service from the City of Franklin overpaid \$11,843. Although Berry's Chapel was not aware of these overcharges and did not cause them, Berry's Chapel benefitted from the overcharges. Because of a lack of customer data, the additional collections cannot be refunded to individual customers but should be used to benefit the customers collectively.²⁹ Under the proposed *Settlement Agreement*, based on these over-collections the total amount that must be compensated the customers collectively is \$71,905.99.³⁰

According to the proposed *Settlement Agreement*, Berry's Chapel has spent \$40,074.92 for odor control expenses that have not been collected from customers in any prior case.³¹ Berry's Chapel also expended \$19,781.25 for May 2010 flood expenses that have not been collected from customers in any prior case. The Authority approved deferral treatment of these

²⁶ See *In re: Petition of Lynwood Utility Corporation for Approval of a Cost Recovery Mechanism for Deferred Odor Elimination Costs*, Docket No. 08-00060, *Order Approving Settlement Agreement*, p. 3 (April 29, 2009).

²⁷ *Settlement Agreement*, ¶ 16 (May 31, 2013).

²⁸ *Id.* at ¶ 17.

²⁹ *Id.* at ¶ 18.

³⁰ *Id.* at ¶ 19.

³¹ *Id.* at ¶ 11.

expenditures in TRA Docket No. 13-00052.³² According to the proposed *Settlement Agreement*, these expenditures totaling \$59,856.17 benefited the customers of Berry's Chapel and should be credited against any repayments to customers.³³ The difference between the over-collection amount to be compensated to customers collectively (\$71,905.99) and Berry's Chapel's expenditures to benefit customers that have not been awarded to Berry's Chapel (\$59,856.17) is \$12,049.82.

The proposed *Settlement Agreement* would resolve Berry's Chapel's request for an alternate form of financial security filed in TRA Docket No. 11-00174. Under the terms of the proposed *Settlement Agreement*, Berry's Chapel will pay the \$12,049.82 plus an additional \$7,950.18 for a total of \$20,000, which will be placed into an escrow account for the customers' benefit. The escrow fund is intended to comply with the requirements of TRA Rule 1220-4-13-.07(7). The additional \$7,950.18 would be provided by Berry's Chapel in payments of not less than \$250 per month over 30 months from the ratification of the proposed *Settlement Agreement*. These funds would be segregated and no funds may be expended without written approval from the Authority. Any interest paid by the bank will be reserved in the account and not used to benefit Berry's Chapel. The funds would only be used for emergency purposes and may not be utilized for non-routine maintenance or routine capital expenditures. These funds are available for use by the TRA in the event that the TRA assumes control of Berry's Chapel or a receiver is appointed at the request of the TRA. Berry's Chapel will ensure that the TRA has access to the account, records for the account and may not interfere with the TRA's access to funds in the event that the TRA determines after a hearing that the TRA must assume control of Berry's

³² *Id.* at ¶ 12.

³³ *Id.* at ¶ 13.

Chapel or appoint a receiver. Berry's Chapel will ensure that the account requires the signature of a member of the Board of Directors to access the funds from this account.³⁴

Berry's Chapel will provide the TRA a list of all customers including the physical address where utilities are provided as well as the mailing address where bills are sent and the identity of the water system providing water service to the customer. Berry's Chapel agrees to update this information with any changes quarterly. This information will be filed as confidential and an electronic version of the information is acceptable. Berry's Chapel will provide the TRA with all the contact information in its possession for each water utility that services its customers.³⁵

Ratification of the proposed *Settlement Agreement* would result in Berry's Chapel waiving any request for recovery of flood expenses identified in TRA Docket No. 13-00052, but would not preclude Berry's Chapel from recovering additional flood-related expenses at a later date.³⁶

Under the proposed *Settlement Agreement*, any loan or financial encumbrance that Berry's Chapel has incurred which has not previously been approved by the Authority must be presented to the TRA for approval pursuant to Tenn. Code Ann. §65-4-109 prior to any attempt to utilize Berry's Chapel's funds to pay the loan or financial encumbrance. Pursuant to the proposed *Settlement Agreement*, the Authority would take no position on any such notes until such time as they are presented for approval and inclusion in rates and acknowledges that Berry's Chapel believed itself to be an unregulated entity when any such notes were made.³⁷

³⁴ *Id.* at ¶ 23.

³⁵ *Id.*

³⁶ *Id.* at ¶ 24.

³⁷ *Id.* at ¶ 25.

Finally, the proposed *Settlement Agreement* provides that, in the event that the TRA does not approve the proposed *Settlement Agreement* in its entirety as a final settlement of all issues in TRA Docket Nos. 11-00065 and 11-00174, then the proposed *Settlement Agreement* shall terminate and the parties shall not be bound by any position set forth in the proposed *Settlement Agreement*. In the event the TRA modifies all or any portion of the proposed *Settlement Agreement*, or imposes additional conditions or requirements upon the parties, each party shall have the right within ten days of the TRA's decision modifying the proposed *Settlement Agreement* to withdraw from the agreement by filing a written withdrawal from the proposed *Settlement Agreement*. If the parties withdraw from the proposed *Settlement Agreement*, it shall be considered void and have no binding effect, and the parties thereto will not be bound by the positions taken in the proposed *Settlement Agreement*.³⁸

POSITIONS OF THE PARTIES

The positions of the parties on the proposed *Settlement Agreement* and related issues are fully set forth in their respective filings and the evidentiary record. The following is a brief summary of those positions as set forth in the parties' testimony and arguments.

Initial Brief of the Consumer Advocate

The Consumer Advocate recognizes that Berry's Chapel is a non-profit wastewater utility and agrees that the total amount of unauthorized charges by Berry's Chapel is \$146,121. However, the CAPD objects to the proposed *Settlement Agreement* because it only refunds \$74,219 to customers and allows the remaining over-collection to be applied to additional expenses of \$59,856 and the establishment of an escrow in the amount of \$12,050.³⁹

³⁸ *Id.* at ¶¶ 26, 27.

³⁹ *Initial Brief*, p. 6 (July 29, 2013). An additional \$7,950 would be provided by Berry's Chapel in payments of not less than \$250 per month over 30 months. *Settlement Agreement*, ¶ 23 (May 31, 2013).

The Consumer Advocate provides six arguments supporting its objection to the settlement:

- 1) TRA Party Staff is limited to the intended purpose of this docket which is to determine if a hearing is necessary and if Berry's Chapel should be penalized for its violations of law. Neither of these issues is addressed in the proposed *Settlement Agreement*. Further, the associated costs have not been scrutinized in a hearing to determine their just and reasonableness thereby jeopardizing "fundamental fairness of consumers' due process".⁴⁰ Therefore, TRA Party Staff has no authority to settle this case⁴¹;
- 2) The recovery outlined in the proposed *Settlement Agreement* is barred by *res judicata* and collateral estoppel which bars re-litigating claims from a previous suit. The costs for odor control, flood damage and legal fees have been considered and decided in TRA Docket Nos. 08-00060, 09-00034 and 11-00198. Berry's Chapel had the opportunity in previous rate cases to present and request recovery of these costs. Law dictates that these claims must come to an end and Berry's Chapel should not be allowed to keep illegally obtained funds to recover costs that have already been considered by the Authority⁴²;
- 3) Returning less than 100% of illegal charges effectively results in a rate increase to customers, which is in violation of the filed rate doctrine and applies retroactive ratemaking. In theory, approval of the proposed *Settlement Agreement* would be allowing Berry's Chapel to charge rates different from those approved in TRA

⁴⁰ *Id.* at 11.

⁴¹ *Id.*

⁴² *Id.* at 11-25.

Docket Nos. 07-00007, 08-00060, 09-00034 and 11-00198.⁴³ The monies in question in this docket have already been charged to customers rather than rates going forward. This is a direct violation of statutes the Authority must follow in setting rates. The proposed *Settlement Agreement* allows Berry's Chapel to change the rates previously established by the Authority, which is a direct violation of the filed rate doctrine and retroactive ratemaking⁴⁴;

- 4) Since costs have not been sufficiently reviewed in order to determine reasonableness and prudence; recovery of these cost does not follow ratemaking principles and is therefore in violation of due process. Neither the proposed *Settlement Agreement* nor testimony support that customers benefited from these costs or were necessary to provide service. No review of the costs has occurred and the allocations incorporated to separate attorney time between cases is not supported by the evidence in this case. No support or review brings to question the ability of Berry's Chapel to recover the same cost twice.⁴⁵ The law requires that Berry's Chapel prove these costs are just and reasonable for the provision of service⁴⁶;
- 5) The proposed *Settlement Agreement* allows Berry's Chapel to breach the previous settlement approved in TRA Docket No. 08-00060. The settlement approved in TRA Docket No. 08-00060 allowed Berry's Chapel to recover approximately \$31,000 for odor control costs from customers through a surcharge for one year. After that time there was to be an accounting to determine any under or over collection. Additionally, Berry's Chapel was to obtain approval from the Authority prior to

⁴³ *Id.* at 27.

⁴⁴ *Id.* at 25-34.

⁴⁵ *Id.* at 33.

⁴⁶ *Id.* at 28-34.

incurring any further odor control costs. The proposed *Settlement Agreement* in this docket allows Berry's Chapel to keep monies obtained from continuing the surcharge beyond one year and recovering odor control costs in excess of the \$31,000 when there is no authorization for Berry's Chapel to continue this surcharge beyond the one year established in TRA Docket No. 08-00060⁴⁷; and

- 6) The proposed *Settlement Agreement* allows Berry's Chapel to illegally charge customers and benefit from violating the law. This settlement allows Berry's Chapel to keep monies that were illegally charged for two years and recover 100% of requested costs without support for their necessity, absent consumer representation and in violation of previous Authority orders. Lastly, the proposed *Settlement Agreement* encourages companies to seek recovery of legal fees that were previously disallowed. Berry's Chapel was denied recovery of legal fees associated with flood damage in TRA Docket No. 11-00198, yet the only flood expenses to be recovered pursuant to this proposed *Settlement Agreement* are for legal fees. For these reasons approval of the proposed *Settlement Agreement* is against public policy and is not in the public interest.⁴⁸

The Consumer Advocate further argues that "this Settlement *cannot* resolve the Attorney General's claims since the Consumer Advocate is not a settling party."⁴⁹ TRA Party Staff has evaded answering the question of who is representing consumers. Further, TRA Party Staff cannot represent any person or entity other than the agency, the agency can only represent itself and an agency cannot appeal its own decisions. Berry's Chapel is precluded by Rules of Professional Conduct from representing consumers. This, therefore, only leaves the Consumer

⁴⁷ *Id.* at 34-37.

⁴⁸ *Id.* at 37-39.

⁴⁹ *Id.* at 40.

Advocate as a consumer representative and the settlement in this case without consent of the CAPD violates consumers' rights and leaves consumers' claims in place.⁵⁰

The Consumer Advocate recommends that 100% of the unauthorized charges with interest and penalties be refunded to customers⁵¹ and a complete denial of the proposed *Settlement Agreement*.⁵²

Initial Brief in Support of the Settlement Agreement of TRA Party Staff

TRA Party Staff asserts that the proposed *Settlement Agreement* recognizes that Berry's Chapel has violated the law and resolves these violations. Further, this docket is an enforcement action which the proposed *Settlement Agreement* resolves and in which the TRA can take actions that affect utility rates.⁵³

According to TRA Party Staff, the Consumer Advocate may represent consumers by objecting to the proposed *Settlement Agreement* in this case, "but it cannot preclude resolution simply by objecting as they have no claims at issue."⁵⁴ Pursuant to existing law, the proposed *Settlement Agreement* as presented resolves the issues surrounding Berry's Chapel's illegal actions.⁵⁵

This docket is an enforcement docket, in which the TRA Party Staff was directed to determine if a hearing was necessary to address the illegal collection of monies by Berry's Chapel. TRA Party Staff asserts it has fulfilled this directive, evaluated all evidence and the proposed *Settlement Agreement* resolves the issues.⁵⁶

⁵⁰ *Id.* at 41-42.

⁵¹ William H. Novak, Pre-filed Direct Testimony, p. 5 (July 29, 2013).

⁵² *Initial Brief*, p. 45 (July 29, 2013).

⁵³ *Initial Brief in Support of the Settlement Agreement*, pp. 2-3 (August 12, 2013).

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ *Id.*

In fulfillment of the law, the TRA must consider all factors when deciding a case and imposing penalties. When considering a settlement with Berry's Chapel, TRA Party Staff considered the size of the company, its reliance upon advice of counsel during the time of unauthorized charges and Berry's Chapel's willingness to cooperate with the Authority on resolution of the issues. For these reasons, TRA Party Staff asserts its actions and the proposed *Settlement Agreement* are in full compliance with the requirements of the law.⁵⁷

Initial Brief of Berry's Chapel

Berry's Chapel counters the above six arguments set forth by the Consumer Advocate as follows:

- 1) Under current statutes and multiple court rulings, an agency separating Staff between advocacy and advisory is authorized and required. As a representative of public interest, TRA Party Staff investigates, presents testimony and negotiates with other parties.⁵⁸ The Authority makes the final determination if the TRA Party Staff's recommendation "is reasonable and in the public interest"⁵⁹;
- 2) Functions of the TRA are legislative, not judicial. Therefore, the doctrines of *res judicata* and collateral estoppel do not apply⁶⁰;
- 3) The proposed *Settlement Agreement* applies on a prospective basis with all money being refunded, placed in escrow or used to the benefit of ratepayers. Therefore, the proposed *Settlement Agreement* does not constitute retroactive ratemaking and it does not violate the filed rate doctrine⁶¹; and

⁵⁷ *Id.* at 4-5.

⁵⁸ *Initial Brief of Berry's Chapel*, pp. 3-4 (August 12, 2013).

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* at 5.

⁶¹ *Id.* at 5-6.

4,5,6) Courts have found that the Authority has the power to adjust rates outside of a rate proceeding and parties have testified that they have examined the expenses and found it appropriate to recover them from customers. Further, all parties can present evidence in support of or in opposition to the proposed *Settlement Agreement* and its compliance with public interest at the Hearing.⁶²

Berry's Chapel asserts that the Authority can approve the proposed *Settlement Agreement* without the consent of the Consumer Advocate, based upon a formal Opinion of the Attorney General, issued in 2011, holding that an agency may approve a settlement between the agency and a regulated party "over the objection of an intervenor if the agency determines that the settlement is reasonable and the public interest is protected."⁶³

Consumer Advocate's Reply Brief

According to the Consumer Advocate, approval of the proposed *Settlement Agreement* goes well beyond an enforcement action by allowing cost recovery through changing the consumers' rates for 2009 to 2011. Instead of enforcing the law, the proposed *Settlement Agreement* changes the law by changing the rates authorized by Berry's Chapel's tariffs, which exceeds the scope of an enforcement action.⁶⁴ The CAPD argues that the only authority granted to TRA Party Staff is to recommend a penalty, not to determine whether a utility must comply with the law. The proposed *Settlement Agreement* as presented should be denied because it attempts to modify previous tariffs and otherwise circumvent the safeguards set by statute, TRA rules, and case law regarding rate increases by cloaking the rate increase as a TRA "enforcement action."⁶⁵

⁶² *Id.* at 6-7.

⁶³ *Id.* at 8.

⁶⁴ *Consumer Advocate's Reply Brief*, pp. 3-4 (August 19, 2013).

⁶⁵ *Id.* at 4-5.

The Consumer Advocate asserts this case is different than the Chattanooga Gas case⁶⁶ referenced by Berry's Chapel, in which a utility was permitted to increase rates outside of rate case.⁶⁷ According to the CAPD, "it was undisputed in Chattanooga Gas that the asset management legal fees were not included in a previous rate case or any other docket."⁶⁸ However, the legal fees for flood damage sought for recovery in this case either were or should have been considered in Berry's Chapel's 2011 rate case, TRA Docket No. 11-00198. The TRA's power to fix just and reasonable rates also requires the Authority to provide notice and a hearing and take into consideration the service provided by the utility. No evidence has been presented to support that statutory public safeguards are not required for this case.⁶⁹

The CAPD asserts it has duties and claims outside of the enforcement action. The Consumer Advocate also notes that TRA Party Staff recognized the CAPD represents consumer interests in this docket.⁷⁰ Neither TRA Party Staff nor the Authority have statutory or legal authority to ignore enforcement of previous orders of the Authority, refunding 100% of money collected illegally and punishing the perpetrator of the illegal act.⁷¹

Further, neither TRA Party Staff nor the Authority can abolish the claims of consumers, even in an enforcement action. The law allows settlements between parties as long as the settlement addresses the claims of all parties. This settlement does not address the claims of consumers as presented by the CAPD.⁷²

The arguments that repayment to consumers is punishment, that the financial condition of the company was considered when reaching the settlement and that the company was acting in

⁶⁶ *Consumer Advocate & Protection Division v. Tennessee Regulatory Authority*, 2012 WL 1964593 (Tenn. Ct. App. 2012).

⁶⁷ *Initial Brief of Berry's Chapel*, p. 7 (August 12, 2013).

⁶⁸ *Consumer Advocate's Reply Brief*, p. 7 (August 19, 2013).

⁶⁹ *Id.* at 5-8.

⁷⁰ *Id.* at 9.

⁷¹ *Id.* at 8-11.

⁷² *Id.* at 12.

good faith when following the advice of legal counsel do not justify the approval of the proposed *Settlement Agreement*. Repayment only brings Berry's Chapel in compliance with its tariff. The Company's financial condition was considered when the tariffed rates were established and acting upon advice of counsel does not allow the illegal action of collecting non-tariffed rates. Additionally, having the utility fund \$8,000 of its financial security is not a penalty; it is having the utility comply with the law.⁷³

Berry's Chapel should not be allowed to only refund monies to current customers. They illegally collected this money and should therefore be required to identify the customer and make the refund, even if they have moved or no longer receive service.⁷⁴

The CAPD again makes the argument that the costs in this docket have not been properly reviewed as required by the law and therefore cannot be considered necessary, reasonable or prudent. These costs have or should have been considered in TRA Docket Nos. 08-00060, 09-00034 and 11-00198 and tariffs were established pursuant to these dockets to recover the costs. Berry's Chapel could have asked for reconsideration or an appeal of any of these dockets if it felt the tariffs did not recover the appropriate costs.⁷⁵

The Consumer Advocate states that the Show Cause Docket Order limits consideration to two issues. One being whether Berry's Chapel is entitled to a hearing regarding the \$20 fee increase and the other being what action should be taken against Berry's Chapel for violating the statutes. The TRA Party Staff went beyond the scope of the docket and negotiated changes to rates. TRA Party Staff has no statutory authority to go beyond what is delegated.⁷⁶

⁷³ *Id.* at 13-17.

⁷⁴ *Id.* at 19-20.

⁷⁵ *Id.* at 22-24.

⁷⁶ *Id.* at 25-26.

It has not been determined that the legal fees associated with the flood damage and the journal entries recording sludge removal expense have not been previously considered by the Authority. And even if they have not, Berry's Chapel is barred from seeking recovery now by *res judicata* and collateral estoppel. Berry's Chapel has misinterpreted the application of *res judicata* and collateral estoppel in this case. Based on U.S. Supreme Court rulings, *res judicata* and collateral estoppel are applicable to the TRA's final orders and tariffs because the Authority "is acting in an adjudicative capacity."⁷⁷

The Consumer Advocate also states that Berry's Chapel misses the point on retroactive ratemaking or the filed rate doctrine. According to the CAPD, "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."⁷⁸

Reply Brief of the Staff and Berry's Chapel

Berry's Chapel and TRA Party Staff agree with the Consumer Advocate that it is appropriate to publish notice of the hearing to consider the proposed *Settlement Agreement*. Therefore, Berry's Chapel stated that it will publish notice consistent with TRA rules once the hearing date has been confirmed.⁷⁹

Based upon existing law, Berry's Chapel and TRA Party Staff assert that neither the Consumer Advocate nor individual customers have the right to file a private cause of action

⁷⁷ *Id.* at 28-32.

⁷⁸ *Id.* at 32.

⁷⁹ *Reply Brief of the Staff and Berry's Chapel*, p. 1 (August 21, 2013).

regarding this matter.⁸⁰ Berry's Chapel and TRA Party Staff assert that the TRA is not a court but rather is a legislative body. As a legislative body, it is empowered to carry out legislative, executive and judicial functions, and may represent ratepayers while at the same time considering the interest of the utilities.⁸¹

SEPTEMBER 9, 2013 AND OCTOBER 21, 2013 PUBLIC HEARING

A Hearing on the proposed *Settlement Agreement* was held on September 9, 2013, for which public notice had been issued on August 30, 2013, and was continued to October 21, 2013, for which public notice had been issued on October 4, 2013. Participating in the Hearing were the following parties and their respective counsel:

Berry's Chapel Utility, Inc. – **Henry Walker, Esq.**, Bradley Arant Boult Cummings LLP, Roundabout Plaza, 1600 Division St., Suite 700, Nashville, TN 37203.

Consumer Advocate and Protection Division - **Vance Broemel, Esq.** and **Charlena Aumiller, Esq.**, Office of the Attorney General, 425 425 5th Ave. N, John Sevier Building, P.O. Box 20207, Nashville, TN 37202.

TRA Staff Participating as a Party – **Shiva Bozarth, Esq.**, Tennessee Regulatory Authority, 460 James Robertson Parkway, Nashville, TN 37243.

Mr. Robert T. "Terry" Buckner appeared as a witness on behalf of Berry's Chapel, ratified his pre-filed testimony and was subject to cross-examination. Ms. Tiffany Underwood appeared as a witness on behalf of the TRA Party Staff, ratified her pre-filed testimony and was subject to cross-examination. Mr. William H. "Hal" Novak appeared as a witness on behalf of the Consumer Advocate. By agreement of the parties, Mr. Novak's pre-filed testimony was entered into the record without cross-examination by Berry's Chapel or TRA Party Staff. Mr. Novak was sworn as a witness and available at the Hearing for questions from the panel.

⁸⁰ *Id.* at 2.

⁸¹ *Id.* at 3.

Mr. Charles Kildgore, a customer of Berry's Chapel, presented comments at the Hearing. No other person sought recognition to comment at the Hearing.

FINDINGS AND CONCLUSIONS

At the regularly scheduled November 25, 2013 Authority Conference, the panel considered the proposed *Settlement Agreement*. The panel first noted that the Authority was faced with a difficult situation, in which a utility has committed violations, yet it has shown a willingness to come into regulatory compliance, and by all accounts is facing financial difficulties. The panel found that the proposed *Settlement Agreement* demonstrated a good-faith attempt to take into account all of those factors. However, the panel then noted that this is an investigation and Show Cause docket, and that the General Assembly has given the TRA the duty and responsibility to enforce the laws under its jurisdiction. The legislature has empowered the TRA to issue and hear a Show Cause order and authorized the Authority to determine appropriate penalties for violations of the statutes within its purview.

This panel noted that the Directors assigned to TRA Docket No. 11-00005 opened this docket to address the ramifications from its declaration that Berry's Chapel is a public utility subject to the TRA's jurisdiction. The Directors assigned to TRA Docket No. 11-00005 listed issues to be considered, which included whether Berry's Chapel was entitled to a hearing regarding the illegal \$20 fee increase and potential actions to be taken against Berry's Chapel for various alleged violations of state law. However, the panel found that the proposed *Settlement Agreement* contains some provisions that are outside the scope of this investigation and Show Cause docket as set forth by the Directors assigned to TRA Docket No. 11-00005.

First, the recovery of odor costs does not fall within the specified boundaries of this investigation and Show Cause docket. The issue does not relate to a statutory or rule violation but, rather, is an attempt by Berry's Chapel to increase consumer rates for costs incurred to alleviate Berry's Chapel's odor control problems. Likewise, the recovery of flood costs is also outside the scope of this investigation and Show Cause docket, and any potential recovery sought should also be petitioned separately by Berry's Chapel, as it has done on several occasions for recovery of such extraordinary costs.

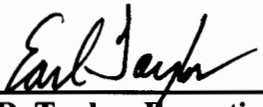
In addition, this panel found that creating an escrow account to be funded by consumers is not an acceptable alternative to financial security in lieu of the required bond or letter of credit pursuant to TRA Rule TRA Rule 1220-4-13-.07. Although the proposal for an alternative security was included in the proposed *Settlement Agreement*, neither Berry's Chapel nor TRA Party Staff produced sufficient substantial evidence or expert testimony that this alternative security is in the public interest. For these reasons, the panel voted unanimously to deny the proposed *Settlement Agreement*. This panel further directed TRA Party staff to limit this investigation and Show Cause docket to the alleged violations and illegal activities by Berry's Chapel, including the \$20 charge that Berry's Chapel has begun refunding, as well as the failure to have a financial security in place. The panel noted that the rejection of the proposed *Settlement Agreement* is not intended to preclude consideration of any future proposed settlement agreements that are limited to these issues. Finally, the panel instructed Berry's Chapel that if the utility requests the Authority to consider changing consumer rates, it must do so outside of this investigation and Show Cause docket.

IT IS THEREFORE ORDERED THAT:

1. The *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of Attorney General is granted.
2. The Authority's General Counsel or her designee is appointed to serve as Hearing Officer for the remainder of this docket to handle any preliminary hearing matters, including discovery issues, entering a protective order and preparing a procedural schedule.
3. The *Settlement Agreement* filed by Berry's Chapel Utility, Inc. and TRA Staff acting as a Party is rejected for the reasons stated herein.

Vice Chairman Herbert H. Hilliard and Director Kenneth C. Hill concur. Chairman James M. Allison concurred with the motion.

ATTEST:



Earl R. Taylor, Executive Director