

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 1, 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 SETTING PROCEDURAL SCHEDULE TO COMPLETION

This matter came before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") during a pre-hearing conference with the Tennessee Regulatory Authority staff participating as a party ("Party Staff"), Berry's Chapel Utility, Inc. ("Berry's Chapel"), and the Consumer Advocate and Protection Division of the Office of the Attorney General of the State of Tennessee ("Consumer Advocate") (together, the "Parties") held on June 26, 2013, to finalize certain preliminary procedural matters and prepare the docket for a hearing before the panel.

RELEVANT BACKGROUND

During a regularly scheduled Authority Conference on April 18, 2011, the voting panel of Directors in Docket No. 11-00005 determined that Berry's Chapel, formerly known as Lynwood Utility Corporation, Inc., did not meet the statutory definition of "non-utility" set forth in Tenn. Code Ann. § 65-4-101(6)(E) and, therefore, found that the utility was subject to the

regulatory authority and jurisdiction of the TRA.¹ In addition, the panel immediately suspended a \$20 monthly rate increase that the utility had assessed and been collecting from its customers without the Authority's approval.² Further, as a result of its ruling, the panel ordered that a separate docket be established to address the following issues:

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
 - (C) For illegally increasing rates without TRA approval pursuant to Tenn. Code Ann. § 65-5-101.³

Thereafter, the instant docket, Docket No. 11-00065, was opened to investigate and consider the issues noted above. During a regularly scheduled Authority Conference held on August 1, 2011, the voting panel of Directors in Docket No. 11-00065 voted unanimously to appoint former Director Kyle⁴ to act as Hearing Officer in order to determine 1) whether a Show Cause Order should be issued against Berry's Chapel Utility, Inc., and 2) whether the Authority should sanction the utility for violating Tenn. Code Ann. §§ 65-4-201, 65-4-112 or 65-4-113, and

¹ *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*, TRA Docket No. 11-00005, *Order Declaring Berry's Chapel Utility, Inc. to be a Public Utility* (August 5, 2011); see also Authority Conference Transcript, pp. 12-17 (April 18, 2011).

² *Id.*

³ *Id.*

⁴ On March 13, 2013, Director Kyle tendered her resignation from the TRA, which was effective immediately following the conclusion of the Authority Conference held on that day.

65-5-101.⁵ Further, in the event that a Show Cause Order was issued, former Director Kyle was tasked with preparing the matter for a hearing before the panel.⁶

On May 31, 2013, a Settlement Agreement was filed in the docket file by Party Staff and Berry's Chapel. Although filed in Docket No. 11-00065, the Settlement Agreement includes and specifically addresses matters at issue in other dockets involving Berry's Chapel that are currently pending before the agency.⁷ On June 12, 2013, the Consumer Advocate filed a letter opposing the terms of the Settlement Agreement and urging the Authority to reject such agreement as not being in the public interest. Thereafter, during the regularly scheduled Authority Conference held on June 17, 2013, the panel granted the Consumer Advocate's *Petition to Intervene*, which had been filed on April 12, 2012, and appointed General Counsel or her designee as Hearing Officer to handle preliminary procedural matters in preparation for a hearing before the panel.

JUNE 26, 2013 PRE-HEARING CONFERENCE

With the agreement of the Parties and in accordance with the public notice issued on June 24, 2013, a pre-hearing conference was convened at approximately 2:30 p.m. CDT on June 26, 2013, in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee. The Parties were represented as follows:

For Party Staff:

Shiva Bozarth, Esq., Tennessee Regulatory Authority, 460 James Robertson Parkway, Nashville, Tennessee 37243;

⁵ *Order Appointing Hearing Officer* (September 28, 2011).

⁶ *Id.*; In addition, for much of the time that the Show Cause docket (11-00065) has been open, an appeal of the Authority's *Order Declaring Berry's Chapel Utility, Inc. to be a Public Utility* (August 5, 2011), brought by Berry's Chapel, was pending in the Tennessee Court of Appeals. On December 21, 2012, the Court of Appeals issued an Opinion affirming the decision of the TRA, which held that Berry's Chapel, as a public utility defined in Tenn. Code Ann. § 65-4-101(6)(E) (2010), was subject to the TRA's jurisdiction. See *Berry's Chapel Utility, Inc. v. Tennessee Regulatory Authority*, 2012 WL 6697288 (Tenn. Ct. App. 2012).

⁷ The terms of the Settlement Agreement include the resolution of matters at issues in Docket No. 11-00174, *In re Petition of Berry's Chapel Utility, Inc. to Approve Alternative Form of Financial Security under Rule 1220-4-13-.07*, and Docket No. 13-00052, *In re Petition of Berry's Chapel for Approval of Deferred Accounting*.

For Berry's Chapel:

Henry Walker, Esq., Bradley, Arant, Boult, Cummings, LLP, Roundabout Plaza
1600 Division Street, Suite 700, Nashville, TN 37203;

For the Consumer Advocate:

Vance Broemel, Esq., Ryan McGehee, Esq., and, *via telephone*, **Charlena Aumiller, Esq.**, Office of the Attorney General, Consumer Advocate and Protection Division, 425 5th Ave. N, John Sevier Building, P.O. Box 20207, Nashville, TN 37243.

In light of the recent filings made in the docket file, specifically, the Settlement Agreement filed by Party Staff and Berry's Chapel and the letter opposing the Settlement Agreement filed by the Consumer Advocate, the Hearing Officer upon convening the pre-hearing conference inquired as to what additional proof or argument the Parties might wish to include in the record before the matter was presented to the panel for consideration. In response, the Consumer Advocate stated that its opposition to the Settlement Agreement effectively prevents resolution of the issues raised in the proceeding, irrespective of the outcome of the panel's vote after deliberation on the Settlement Agreement during a future Authority Conference. As the Parties disagree on the scope of the application of the Settlement Agreement in this docket, the Consumer Advocate asserted that the impact or effect of its opposition to the Settlement Agreement should be briefed and presented for panel consideration before additional investigation or evidence is offered as to the merits of the Settlement Agreement itself. In addition, the Consumer Advocate stated that it might wish to retain an expert witness and conduct factual discovery concerning the Settlement Agreement before the matter proceeded for hearing.

Party Staff noted that the Settlement Agreement had been filed in the docket file for several weeks, and contended that despite the Consumer Advocate's participation in the settlement discussions that preceded such agreement, the Consumer Advocate had not previously indicated a desire or intent to obtain a witness or make additional filings in the record.

Accordingly, Party Staff requested the setting of a date certain on which the Consumer Advocate would be required to identify any witness it intends to present and would make such witness available for deposition. Following additional discussion, the Consumer Advocate requested a brief recess in order to confer with Party Staff and Berry's Chapel as to a procedural timeline to bring the issues to the panel for final decision. The Hearing Officer agreed and a brief recess was taken.

Upon reconvening the pre-hearing conference, the Parties announced that they were able to agree on the following procedural schedule for finalizing the record in this matter:

PROCEDURAL SCHEDULE

Due Date	Filing/Action*
July 24, 2013	Consumer Advocate's Initial Brief (legal argument) & Pre-filed Testimony (factual proof) (if any) setting forth: 1) The reasons for its opposition to the terms of the Settlement Agreement; and, 2) The effect on the issues and/or docket proceedings of its refusal to join or consent to the Settlement Agreement.
August 14, 2013	Party Staff & Berry's Chapel Response(s)
August 21, 2013	Consumer Advocate's Reply
TBD	Public Hearing (Target date: September 9, 2013 Authority Conference)

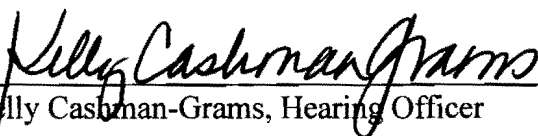
*All filings are *due no later than 2:00 p.m. CDT* on the designated due date.

In conclusion, Berry's Chapel requested that a public hearing before the panel be scheduled during the September 2013 Authority Conference, or alternatively, as soon as possible following completion of the procedural schedule.

Upon consideration, the Hearing Officer found the schedule proposed by the parties to be reasonable and adopted it, except as to the hearing date, as set forth above. As is the Authority's usual practice, while every effort will be made to accommodate the Parties' request for a hearing in this matter during the Authority Conference scheduled on September 9, 2013, the finalization and setting of hearings before the Authority are subject to the discretion of the voting panel. Therefore, while the preference of the Parties is noted, the date for the hearing is not included in the Procedural Schedule at this time. The date for the hearing will be announced separately, upon confirmation thereof by the voting panel.

IT IS THEREFORE ORDERED THAT:

The Procedural Schedule set forth herein above is hereby established in full force and effect.


Kelly Cashman-Grams, Hearing Officer