

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**March 27, 2012**

**IN RE:**

**BERRY'S CHAPEL UTILITY, INC. TO  
CHANGE AND INCREASE RATES AND  
CHARGES**

)  
)  
)  
)  
)

**DOCKET NO.  
11-00198**

---

**ORDER GRANTING IN PART AND DEFERRING IN PART  
THE JOINT MOTION OF THE PARTIES TO EXTEND PROCEDURAL SCHEDULE  
AND DESIGNATE TRA STAFF MEMBERS AS A PARTY**

---

This matter is before the Hearing Officer upon a *Joint Motion of Berry's Chapel and Consumer Advocate to Extend Procedural Schedule by Thirty Days and Designate TRA Staff Members as a Party* ("Joint Motion") filed by the parties in this docket, Berry's Chapel Utility, Inc. ("Berry's Chapel" or the "Company") and the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), with the Tennessee Regulatory Authority ("TRA" or the "Authority") on March 12, 2012.

**REQUEST FOR 30-DAY EXTENSION TO PROCEDURAL SCHEDULE**

In the *Joint Motion*, the parties state that additional time is needed in order to work on discovery issues, and therefore request that the Procedurals Schedule be extended an additional thirty days to accommodate continuing discovery. To avoid prejudice to the parties and impacting the deliberations of the Authority, Berry's Chapel states further that it agrees to extend by thirty days the statutory deadline for final resolution of the rate case. The six-month statutory deadline referenced in the *Joint Motion*, which is found in Tenn. Code Ann. §65-5-103(b)(1), permits the utility at the expiration of six months from the filing date of its petition to, upon

written notification to the Authority, place its proposed rates into effect, under bond and conditioned upon refund, in the event that the rate case has not yet been resolved. Therefore, finding the request of the parties not to be unreasonable, the Hearing Officer agrees that the procedural schedule should be extended by thirty days.

#### **REQUEST FOR DESIGNATION OF TRA STAFF AS A PARTY**

In addition, the parties request in the *Joint Motion* that the Hearing Officer designate TRA staff members to participate as a party in this docket. While the parties cite no authority for their request, the parties state that such designation should be granted because certain members of the TRA staff are participating as a party in the show cause proceeding against Berry's Chapel, Docket No. 11-00065, and are already precluded from advising the Directors in this docket. Those staff members, according to the parties, could be similarly designated a party here without an increase in the burden upon the Authority. Further, the parties assert that TRA staff members will contribute to the negotiations between the parties, making settlement more likely, and to a fuller presentation of the facts at hearing.

During the regularly scheduled Authority Conference held on December 12, 2011, the Authority panel appointed the Authority's General Counsel, or her designee, as Hearing Officer for the purpose of preparing this matter for hearing before the panel. The Hearing Officer's delegation of authority encompasses preliminary matters, "including, but not limited to, entering a protective order, setting a procedural schedule to completion, and ruling on petitions to intervene and discovery issues."<sup>1</sup> Further, TRA Rule 1220-1-2-.22(2) provides that the Authority or the Hearing Officer, on its own motion or the motion of any party, may, among

---

<sup>1</sup> *Order Suspending Tariff for Sixty (60) Days, Convening a Contested Case Proceeding and Appointing a Hearing Officer* (January 6, 2012).

other things, join parties to the proceeding in order to further the just, efficient and economical disposition of cases consistent with the statutory policies governing the Authority.

Nevertheless, the Hearing Officer notes that TRA staff members have not requested to intervene in this docket and are not considered an interested or essential party, as those terms are commonly used and understood in Authority and legal proceedings. On the contrary, in response to an inquiry concerning the scope of TRA staff's participatory role in this docket, made during a Status Conference held on January 26, 2012, Mr. David Foster, Chief of Utilities for the Authority, stated on the record, "Staff will be advisory – serving in an advisory role, solely, in this docket."<sup>2</sup>

TRA Rule 1220-1-2-.21 sets out the parameters for staff participation as party, as opposed to staff's advisory participation, as follows:

**Staff Participation as a Party**

- (1) In any show cause proceeding, designated staff members, represented by the general counsel or other counsel employed by the Authority, shall participate as a party.
- (2) In any contested case commenced by the Authority, designated staff members, represented by the general counsel or other counsel employed by the Authority, may participate as a party.
- (3) In any other contested case proceeding, designated staff members, represented by the general counsel or other counsel employed by the Authority, may participate as a party.
- (4) Staff members who participate as a party shall be bound to follow the same requirements as any other party.
- (5) As soon as practicable after the commencement of any proceeding in which the staff will participate as a party, the Chair of the Authority shall identify those staff members to all interested parties and staff so as to prevent ex parte communications.

Under the above rule, TRA staff's participation as a party is mandatory in show cause proceedings. In all other contested case proceedings, the rule provides that TRA staff members

---

<sup>2</sup> Transcript of Status Conference (January 26, 2012).

may participate as a party. In those instances, TRA staff's participation is discretionary. As such, TRA staff members may elect to participate as a party or petition to intervene. The Chair of the Authority is charged with identifying staff members that will participate as a party so that ex parte communications may be avoided.

The Hearing Officer agrees that the action of joining of an interested or essential party to an agency proceeding might be exercised by a Hearing Officer consistent with a general pre-hearing delegation of authority and TRA Rule 1220-1-2-.22(2). Nevertheless, TRA staff is neither considered a party in interest to these proceeding, nor requested participation in this docket. Instead, TRA staff has specifically informed the parties that it would be participating in this docket *solely* in an advisory role. The TRA's staff is a limited and valuable resource of the Authority, and TRA Rule 1220-1-2-.21 makes clear that in contested case proceedings like the one in this docket, TRA Staff's participation as a party is discretionary.

In the event that TRA staff members are not required and do not elect to participate as a party, the Hearing Officer is without authority to require such participation. In such instances, the discretion to identify or designate TRA staff members to participate as a party lies with the Authority Chair, specifically. Therefore, the Hearing Officer declines to rule on the request of the parties to designate TRA staff members to participate as a party in this docket and, in accord with the rules of the Authority, respectfully defers such designation to the discretion of the Chair of the Authority.

**BE IT THEREFORE ORDERED THAT:**

1. The request of the parties to extend by thirty days the Procedural Schedule according to the terms set forth in the *Joint Motion of Berry's Chapel and Consumer Advocate to*

*Extend Procedural Schedule by Thirty Days and Designate TRA Staff Members as a Party* is granted.

2. The request of the parties in the *Joint Motion of Berry's Chapel and Consumer Advocate to Extend Procedural Schedule by Thirty Days and Designate TRA Staff Members as a Party* that the Hearing Officer designate certain TRA Staff members to participate as a party in this docket is declined. The Hearing Officer defers any such designation to the discretion of the Chair of the Authority as provided in TRA Rule 1220-1-2-.21.

  
Kelly Cashman-Grams, Hearing Officer