

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

July 17, 2012

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*

This matter came before Chairman Kenneth C. Hill, Director Sara Kyle and Director Mary W. Freeman of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on June 7, 2012 for consideration of the *Petition to Transfer Authority Nunc Pro Tunc* ("*Petition*") filed on May 25, 2012.

Petition

Berry's Chapel Utility, Inc. ("Berry's Chapel") filed its *Petition* seeking TRA approval to transfer the Certificate of Public Convenience And Necessity ("CCN") formerly held by Lynwood Utility Corporation ("Lynwood") to Berry's Chapel *nunc pro tunc*. In the *Petition*, the Company requests an effective date for the transfer of September 1, 2010, which is the date Lynwood merged into Berry's Chapel and Berry's Chapel took over the operation of Lynwood's sewer treatment and collection system.

According to the *Petition*, Lynwood ceased to exist following the merger on September 1, 2010.¹ On September 17, 2010, Berry's Chapel notified the Authority of the merger and also

¹ See *Petition*, p. 1 (May 25, 2012).

explained that Berry's Chapel, as a nonprofit corporation, was a "nonutility" under Tennessee law and was not subject to the jurisdiction of the Authority.² Subsequently, the Tennessee General Assembly amended the Authority's jurisdiction to include Berry's Chapel as a regulated public utility effective June 6, 2011.³

The *Petition* asserts that the transfer transaction will serve the public interest by ensuring the continuity of services. According to the *Petition*, Berry's Chapel has owned and operated Lynwood's collection and treatment facility since September 1, 2010, and holds a Tennessee Department of Environment and Conservation ("TDEC") permit to operate the system. Berry's Chapel has filed a petition for a rate increase, which is now pending before the Authority in TRA Docket No. 11-00198. The *Petition* states Berry's Chapel is committed to maintaining a management team that will ensure its operations and is willing to include such conditions and restrictions in the certificate which the Authority finds necessary to accomplish that goal.

On June 4, 2012, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed a *Petition to Intervene* in this docket on behalf of the public interest.⁴ The Consumer Advocate states that "[a]ssuming that Berry's Chapel has the qualifications for a CCN and to operate a public utility, the Consumer Advocate does not oppose the transfer of authority. However, the Consumer Advocate does oppose a transfer of authority granted on a *nunc pro tunc* basis."⁵ The Consumer Advocate also proposes various conditions to approval, in addition to others that the Authority "deems fit."⁶ These conditions include: that the Authority is not offering an endorsing opinion on the validity of the promissory notes of \$2.4 million payable

² The Authority subsequently held that Berry's Chapel is a public utility subject to its regulatory jurisdiction and authority. 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* (August 5, 2011). Berry's Chapel has appealed that decision to the Tennessee Court of Appeals in Case No. M2011-02116-COA-R12-CV.

³ *Petition*, p. 2 (May 25, 2012).

⁴ *Petition to Intervene*, p. 1 (June 4, 2012).

⁵ *Id.* at 2-3.

⁶ *Id.* at 3.

from Berry's Chapel to John and Tyler Ring as a result of the merger of Berry's Chapel and Lynwood; that Berry's Chapel pledge to control recent increases in administrative costs from affiliates owned and/or operated by John Ring and Tyler Ring; that Berry's Chapel pledge to abide by all TRA orders, rules, and regulations, including the terms of the settlement agreement approved by the Authority in Docket No. 08-00060 and to immediately cease charging customers the odor control surcharge, the legal authority for which expired at the end of April 2010; and that Berry's Chapel provide dollar for dollar refunds and/or credits to those individual consumers who paid the unauthorized \$20 monthly surcharge which the Authority ruled was unauthorized in Docket 11-00005.⁷

Certain TRA Staff was designated to act as a party in this docket and began negotiations with Berry's Chapel to reach an agreement on conditions to be imposed on the Company for transferring Lynwood's CCN to Berry's Chapel. On June 5, 2012, Berry's Chapel and TRA Party Staff filed an *Agreement Regarding the Necessary Conditions on the Transfer of Certificate of Convenience and Necessity* ("Conditions Agreement"). The first part of the *Conditions Agreement* sets forth the basis for the agreement and points out that because of the pending appeal of the Authority's Order in Docket No. 11-00005, certain matters "are not appropriate for determination by the Authority at this time".⁸ The *Conditions Agreement* states that the items not appropriate for determination include "the appropriateness of any indebtedness incurred by BCUI".⁹ In addition, although Berry's Chapel is requesting to have Lynwood's CCN transferred retroactively to September 1, 2010, the Company expressly preserves its right to continue its appeal of the Authority's Order and thereby continue to maintain that it was not a public utility until June 6, 2011.¹⁰

⁷ *Id.* at 3-4.

⁸ *Conditions Agreement*, ¶ 6 (June 5, 2012).

⁹ In the *Conditions Agreement*, Berry's Chapel is referred to as "BCUI".

¹⁰ *Conditions Agreement*, ¶ 9 (June 5, 2012).

The proposed conditions on the transfer, agreed to by TRA Party Staff and Berry's Chapel are as follows:

1. To ensure that BCUI's Board of Directors will continually possess the technical and managerial expertise necessary to maintain utility operations, BCUI shall develop a continuity plan comprising of a "management contract" for facility management, managerial, and accounting services that ensures the long term stability of utility operations.

a. Within thirty days of the Authority's transfer of the CCN, BCUI will provide the Authority a draft copy of a management contract with a firm that will provide facility management, managerial and accounting services that ensure the long term stability of utility operations.

b. The contract shall be for a term of three years and shall provide for transparent accounting that complies with the generally accepted standards of regulatory accounting. Subject to the review by the Authority, whose employees shall review the contract and provide BCUI with any necessary changes within thirty days of the receipt of the draft contract.

c. BCUI and its contract partner will execute the contract within fifteen days of receiving the Authority's changes.

d. The Authority's review will be solely to ensure that sufficient managerial, technical, and financial qualifications will be maintained for the term of the contract.

2. Within thirty days of their occurrence, BCUI will file a summary of its Annual Meetings and Board of Directors meetings. Additionally, BCUI will file the minutes of its Annual Meetings upon ratification.

3. Prior to filing any petition to change rates or tariff, BCUI will give not less than thirty days notice to its customers.

4. After entering the management contract, BCUI will refrain from entering any construction, maintenance, service or other contracts without requesting bids from multiple suppliers except in circumstances requiring emergent action. In emergent situations, BCUI will not enter into long term arrangements that extend past the period of emergency.

5. BCUI will submit to billing audits every three months beginning ninety days after the transfer of the CCN, said audits to be conducted by the Authority. The Authority will audit that percentage of the billing records it deems necessary. After four such audits, there will be two additional audits at six month intervals and then an annual audit for two additional years. BCUI expressly permits the billing information to be shared with the Consumer Advocate.

6. BCUI will provide a detailed description of their process for handling complaints within ninety days of the entry of this order. This description will reflect any changes from entering into the management contract.

7. BCUI shall give not less than thirty days notice to the Authority prior to all Annual Meetings.

8. BCUI will pay its annual inspection fees within one hundred twenty days of the transfer of the CCN.

9. BCUI will file its annual report within ninety days of the transfer of the CCN.¹¹

Findings and Conclusions

Tenn. Code Ann. § 65-4-113 requires a public utility to obtain TRA approval to transfer its authority to provide utility services. Tenn. Code Ann. § 65-4-113(a) reads as follows:

No public utility, as defined in § 65-4-101, shall transfer all or any part of its authority to provide utility services, derived from its certificate of public convenience and necessity issued by the authority, to any individual, partnership, corporation or other entity without first obtaining the approval of the authority.

¹¹ *Conditions Agreement*, ¶¶ 11-19 (June 5, 2012).

Tenn. Code Ann. § 65-4-113(b) provides standards by which the TRA shall consider an application for transfer of authority and provides, in pertinent part, as follows:

Upon petition for approval of the transfer of authority to provide utility services, the authority shall take into consideration all relevant factors, including, but not limited to, the suitability, the financial responsibility, and capability of the proposed transferee to perform efficiently the utility services to be transferred and the benefit to the consuming public to be gained from the transfer. The authority shall approve the transfer after consideration of all relevant factors and upon finding that such transfer furthers the public interest.

At a regularly scheduled Authority Conference held on June 7, 2012, the panel considered the Consumer Advocate's *Petition to Intervene*, the proposed *Conditions Agreement*, and Berry's Chapel's *Petition*. The panel found that while the Consumer Advocate has properly intervened in this docket to protect the public interest and should be granted intervention applying the standards set forth in Tenn. Code Ann. § 4-5-310(a), the remainder of the *Petition to Intervene*, including the Consumer Advocate's opposition to the transfer effective date of September 1, 2010, and its conditions on the transfer, should be denied.

The panel further agreed with TRA Party Staff and Berry's Chapel, as stated in their joint *Conditions Agreement* that because of the pending appeal of the Authority's Order in Docket No. 11-00005, certain matters "are not appropriate for determination by the Authority at this time". The *Conditions Agreement* states that the items not appropriate for determination include "the appropriateness of any indebtedness incurred by BCUI." The panel found that these items included the conditions suggested by the Consumer Advocate regarding the promissory notes from Berry's Chapel to John and Tyler Ring and the refund of the \$20 per month charge. Further, the condition requiring Berry's Chapel to pledge to control increases in administrative costs will be addressed by the condition to have a management contract as proposed by TRA Party Staff and Berry's Chapel in the *Conditions Agreement*. In addition, the Consumer Advocate's suggested condition that the odor control surcharge be immediately terminated will be resolved when Berry's Chapel

files a tariff following the rate case decision in TRA Docket No. 11-00198.¹² The panel also reasoned that since Lynwood ceased to exist after the merger with Berry's Chapel on September 1, 2010, the only way to effectuate a transfer of the CCN from Lynwood to Berry's Chapel is to make it effective as of that date.

After considering the *Conditions Agreement*, the panel found that the conditions proposed by Berry's Chapel and TRA Party Staff regarding a continuity plan, including a management contract, will strengthen the management of the Company, and thereby ensure the strength of the technical and financial condition of Berry's Chapel, so as to enhance the suitability and capability of Berry's Chapel to perform efficiently and meet its service obligations. In addition, the conditions regarding filing an annual report and paying the TRA inspection fees will bring Berry's Chapel in compliance with statutes and Authority rules.

Based on the administrative record and findings, the panel determined that the transfer furthers the public interest and voted unanimously to: 1) take administrative notice of the record in TRA Docket No. 11-00005, including the Order and all filings in the docket, and the record in TRA Docket No. 11-00198; 2) grant the Consumer Advocate's request for intervention, but deny the remainder of the request for conditions set forth in the Consumer Advocate's *Petition to Intervene*; 3) accept the conditions agreed to by TRA Party Staff and Berry's Chapel, as set forth in the *Conditions Agreement* filed on June 5, 2012; and 4) approve Berry's Chapel's *Petition nunc pro tunc* pursuant to Tenn. Code Ann. § 65-4-113, subject to the *Conditions Agreement*.

¹² The appropriateness of the refund of the \$20 surcharge and other matters are also the subject of a TRA investigation and will be determined in another docket. See *In re: Investigation as to Whether a Show Cause Order Should Issue Against Berry's Chapel Utility, Inc. and/or Lynwood Utility Corporation for Violation of TRA Rules 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*, Docket No 11-00065.

The panel also noted for the record that nothing in its decision is intended to alter the Authority's decision in TRA Docket No. 11-00005, and further noted that Berry's Chapel's objections to that decision remain pending in the Tennessee Court of Appeals.

IT IS THEREFORE ORDERED THAT:

1. The *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General is granted in part and denied in part.
2. The *Agreement Regarding the Necessary Conditions on the Transfer of Certificate of Convenience and Necessity* entered into between Berry's Chapel Utility, Inc. and TRA Party Staff on June 5, 2012 is approved.
3. The transfer of authority as described in the *Petition to Transfer Authority Nunc Pro Tunc* and discussed herein is approved pursuant to Tenn. Code Ann. § 65-4-113 and subject to the terms of the *Agreement Regarding the Necessary Conditions on the Transfer of Certificate of Convenience and Necessity*.


Kenneth C. Hill, Director


Sara Kyle, Director

Mary W. Freeman, Director¹³

¹³ Director Mary W. Freeman voted in agreement with the other Directors but resigned her position with the Authority prior to the issuance of this Order.