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Mr. Henry Walker, Esq.
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Re: TRA Docket 12-00046 - *Petition of Berry's Chapel Utility, Inc. to Transfer Authority Nunc Pro Tunc*

Dear Henry,

The Office of the Attorney General, Consumer Advocate and Protection Division ("Consumer Advocate") has reviewed the management contract submitted by Berry's Chapel Utility, Inc. ("BCU") in this docket as required by the Tennessee Regulatory Authority ("Authority") and herein respectfully submits its comments for the record. The management contract between BCU and Utility Consultants of TN, Inc. ("UCT", "Consultant") raises several significant concerns for the ratepayers of Tennessee. Given the seriousness of these concerns, the Consumer Advocate explicitly reserves the right to challenge the validity of the contract.

The Consumer Advocate does not question the Authority's review of the contract from the perspective of managerial, technical and financial qualifications as provided in Condition 1(d) of the *Order Approving Transfer of Authority Nunc Pro Tunc* ("Order") issued in this docket on July 17, 2012. However, several aspects of the management contract are troubling. These concerns focus upon the validity of the contract and the impact of several provisions of the contract in future rate case proceedings.

VALIDITY OF THE CONTRACT

First, there are questions about the validity of the contract. The alleged respective 'authorizing' agents for BCU and the Consultant are the same person, Mr. Tyler Ring. Mr. Ring is the President of both BCU and UCT. This is not an arm's length transaction.

FIDUCIARY DUTIES OF NON-PROFIT BOARDS

1) Board's Duty to Avoid or Cleanse Conflicts of Interest Transactions

Formerly, Mr. Ring was co-owner of the utility known as Lynwood prior to its conversion to BCU, a non-profit organization. Mr. Ring and his father, Mr. John Ring, are members of the Board of Directors of BCU. Transactions with a corporation in which a director or officer of the corporation has a direct or indirect interest is statutorily defined as a conflict of interest. Tenn. Code Ann. § 48-58-302. A conflict of interest transaction cannot be authorized, approved or ratified unless it receives a majority of votes from **informed** directors that have **no direct or indirect interest** in the transaction. *Summers v. Cherokee*, 112 S.W. 3d 486, 504-505 (Tenn. Ct. App. 2002) (cert.denied) (Emphasis added.). Conflict of interest transactions are subject to close scrutiny and potentially voidable. *Id.* Thus, the validity of the contract is currently questionable, and we urge the TRA to review the contract closely.

2) Board's Duty to Advance Goals of Non-Profit and Its Assets

Directors and officers of non-profit organizations in Tennessee have a special duty to advance the non-profits charitable goals and protect its assets. *Id.* Several provisions in the management contract at issue raise concerns this duty is not being met. Among these are provisions concerning compensation for UCT, the definition of duties for UCT and the financial obligations the contract imposes on BCU for the benefit of UCT.

CONSULTANT/EMPLOYEE

Basically, the contract provides for a base salary plus additional compensation merely for performing the services anyone in a President position at a utility would be required to perform on a daily basis. Under the contract, the day-to-day management of BCU is compensated with a set monthly payment of \$4,500.00. Although the Consultants are responsible for day-to-day management, Paragraph 2(e) suggests that these Consultants are not responsible for the work of those they are paid to supervise. This does not seem like a management approach that would benefit the utility.

The contract's definition of "additional services" provides even more compensation for duties that appear to be the same as the day-to-day duties. The president of a waste-water utility would be expected to be involved in rate case proceedings, matters with the Tennessee Department of Environment and Conservation or litigation in courts. Under the contract, however, these "additional services" entitle Mr. Ring to a rate of \$75.00 an hour for his participation as a consultant in such matters, independent of his on-going role as president of BCU.

Even more compelling, the President receives only base salary for construction contracts less than \$10,000, but the Consultants receive the additional \$75 and \$45 for construction contracts greater than \$10,000. The total amount of a project has no bearing on the amount of construction performed in a given day. Thus, it does not seem like the value of a construction contract should be the basis for whether the Consultants should receive additional compensation.

Paragraph 11 establishes that the Consultant is an independent contractor and that BCU is not an employer. However, several provisions of the contract require BCU to provide benefits to the Consultant usually reserved for employees. Indeed, the avoidance of certain expenses and benefits is the reason independent consulting contracts are so appealing to companies. For example, Paragraph 5(e) requires BCU to reimburse the Consultant for administrative fees and “expense of operation”, essentially requiring BCU to fund the cost of doing business for UCT. Other areas of concern with the provisions of the management contract include the following:

- Paragraph 5(c) requires BCU to reimburse the Consultant for use of personal vehicles and any other out of pocket expenses.
- Paragraph 7(b) and (c) provides the Consultant with civil immunity from any negligent or willful conduct whether caused or allegedly caused by the Consultant.
- Paragraph 7(e) requires BCU to include the cost of the Consultant’s workers’ compensation and employer’s liability insurance, including premiums.
- Paragraph 7(f) requires BCU to pay insurance or cover the costs of insurance premiums for the Consultant.

Such terms are not indicative of a relationship with an independent contractor. Rather, they reflect the outcome of a transaction that was apparently “negotiated” by the same person serving two roles—the president of the utility paying the consultant and the consultant. There is no apparent arm’s length negotiation nor does there appear to be any review by the board. There is no information provided as to whether the board review would even meet the minimum requirements to provide a disinterested and independent review of the transaction, as required by the fiduciary duties that apply to non-profits.

In addition to it not being indicative of an independent contractor relationship, it is quite alarming to imagine that ratepayers would be required to pay for negligent or willful conduct of a consultant.

LENGTH OF CONTRACT

BCU has indicated in this proceeding and others before the Authority of its intent to shift to a membership driven cooperative composed of consumers served by BCU in the near future. The three-year term of the contract ensures that if the composition of BCU’s board of directors shifts to elected members, BCU will have the benefit of Mr. Ring’s experience managing BCU. The Order concluded a management contract will allow BCU to possess technical and

managerial expertise to maintain operations. However, a new elected Board of Directors presumably composed of consumers will also be saddled with the terms of a management contract in which it had no hand in negotiating.

ADMINISTRATIVE COSTS & ACCOUNTING

On June 6, 2012, the Consumer Advocate filed a petition to intervene in this docket, asserting, among other conditions for the transfer of a CCN to BCU, that BCU be required to pledge to control increases in administrative costs. The Order in this docket states that a pledge to control administrative costs will be addressed in a management contract proposed by the TRA Party Staff and BCU.¹ Moreover, the Order requires that the contract provide for transparent accounting that complies with generally accepted standards of regulatory accounting.² At this time, however, the management contract does not appear to address either of these issues.

CONCLUSION

While the Consumer Advocate can appreciate the rationale of the Authority's decision to require a management contract in anticipation of BCU moving to an elected Board of Directors and functioning as a membership cooperative, the costs resulting from the management contract proposed by BCU will likely be scrutinized in future rate proceedings, specifically to determine the prudence and reasonableness between test period and attrition year projections of management and any other consulting expenses under this management contract.

Sincerely,



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CC: TRA Docket 12-00046

¹ Order, p. 6.

² *Id.*, p. 4.