

**IN THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**IN RE:**

**COMPLAINT AND PETITION OF THE  
CONSUMER ADVOCATE TO SUSPEND  
TARIFF NO. 2012-0374 PENDING  
MODIFICATION AND THE  
PROVISION OF REFUNDS DUE TO  
CONSUMERS**

**DOCKET NO. 13- 00027  
TARIFF NO. 2012-0374**

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**COMPLAINT AND PETITION TO INTERVENE**

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Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), pursuant to Tenn. Code Ann. § 65-4-118, respectfully petitions the Tennessee Regulatory Authority ("TRA" or "Authority") to grant the Consumer Advocate's Complaint and intervention on behalf of the public interest, because consumers may be adversely affected by the tariff of Berry's Chapel Utility, Inc., f/k/a Lynwood Utility Corporation's ("BCU") authorizing the utility to terminate the water service of consumers. For cause, Petitioner would show as follows:

1. The Consumer Advocate is authorized by Tenn. Code Ann. § 65-4-118 to represent the interests of Tennessee consumers of public utility services by initiating and intervening as a party in proceedings before the Authority in accordance with the Uniform Administrative Procedures Act and Authority rules.

2. BCU is a public utility regulated by the Authority and provides wastewater service to consumers located in Williamson County, Tennessee. Approximately 800 residential

consumers and two non-residential consumers, Walnut Grove Elementary School and Berry's Chapel Church of Christ, receive waste water service from Berry's Chapel/Lynwood.

3. On December 7, 2012, BCU filed in the Authority a proposed tariff, Tariff No. 2012-0374. Tariff 2012-0374 allows BCU to install on a customer's property a shut-off valve on the customer's water line allowing BCU to interrupt the water service of the City of Franklin or HB&T Utility District for failure to pay BCU for waste-water service. The tariff further authorizes BCU to charge the customer for an undefined cost of installing the water shut-off valve.

4. Tariff No. 2012-0374 was filed in Authority Docket 11-00198. On January 3, 2013, the Consumer Advocate filed the *Motion to Suspend Proposed Tariff Pending Modification and the Provision of Refunds Due to Consumers* ("Motion") (copy attached as Exhibit 1). The *Motion* raised issues with the tariff and the substantial refunds to which consumers are entitled from BCU. On January 7, 2013, BCU filed a response to the Consumer Advocate's *Motion* (copy attached as Exhibit 2).

5. Tariff 2012-0374 went into effect on January 6, 2013. No action has been taken on Consumer Advocate's *Motion*. The Authority has informed the parties that Tariff 2012-0374 was inadvertently filed in Authority Docket 11-00198 and that the scope of the docket does not appear to include issues surrounding changes to BCU's tariffs.<sup>1</sup> Herein, the Consumer Advocate requests the opening of an Authority Docket to suspend Tariff No. 2012-0374 pending modification of the tariff and the provision of refunds to consumers.

6. The Consumer Advocate submits there are several outstanding regulatory matters which have not been addressed and which affect the interest of consumers and the basic tenets of utility regulation. Those consumers that paid the illegal \$20 monthly rate increase/surcharge

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<sup>1</sup> *Letter to the Parties from TRA Legal Counsel*, Docket 11-00198, January 24, 2013.

which the Authority concluded in Docket 11-00005 should not have been charged, have not received the refunds to which they are entitled. In addition, the Consumer Advocate alleges consumers are entitled to additional refunds as a result of additional unauthorized charges instituted by BCU.<sup>2</sup>

7. The Consumer Advocate respectfully submits that prior to allowing BCU the ability to unilaterally terminate a household's water service; consumers should begin receiving refunds from BCU. Consumers have waited for almost two years for refunds of unauthorized charges from BCU. On April 18, 2011, the Authority concluded in Docket 11-00005 that BCU was a regulated public utility and was therefore prohibited from assessing unauthorized charges on consumers. Since that time, BCU has been issued a Certificate of Convenience and Necessity, received a general rate increases, and allowed to recover flood damage expenses while engaging in an unsuccessful appeal of the Authority's decision in Docket 11-00005. However, consumers have not yet received refunds from BCU's unauthorized charges to which they are entitled. The Consumer Advocate respectfully submits that BCU should not be allowed to shut-off the water service of any household until consumers have received or are in the process of receiving refunds.

8. BCU must be able to demonstrate to the Authority it has accurate accounting information on past due balances of those households the company intends to shut-off water service for. The Consumer Advocate has concerns BCU may cut-off water service of consumer households based on inaccurate past due balances or past due balances that include charges not authorized by the Authority.

9. Furthermore, providing BCU can provide sufficient legal basis for the right to install a cut-off valve on a consumer's property, Tariff No. 2012-0374 should be modified to

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<sup>2</sup> Ex. 1, p. 3; Docket 11-00198, Direct Testimony of Mr. Hal Novak, pp. 11-15, April 23, 2012.

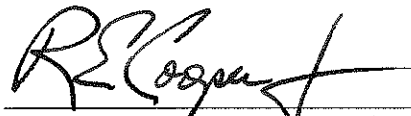
provide adequate notice to consumers of BCU's intention to install a cut-off valve on a household's water line to allow the household to make arrangements to pay an outstanding balance or to dispute the outstanding balance before the Authority pursuant to the Authority's rules and regulations.<sup>3</sup>

10. In the event BCU is allowed to install a cut-off valve for water service on a consumer's property, Tariff No. 2012-0374 should be modified to provide a specific and just and reasonable charge associated with installing a cut-off valve on a household's waterline. As the terms of the tariff require a household to pay for this charge, it should be a known and specific cost and not arbitrarily assigned by BCU.

11. Only by initiating and participating in this proceeding can the Consumer Advocate work adequately to protect the interests of consumers.

WHEREFORE, Petitioner respectfully asks the Authority to grant the Complaint and Petition to Intervene, to open a contested docket and to suspend Tariff No. 2012-0374 pending modification and the provision of refunds to consumers.

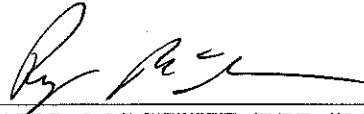
RESPECTFULLY SUBMITTED,



ROBERT E. COOPER, JR. (BPR #010934)  
Attorney General and Reporter  
State of Tennessee

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<sup>3</sup> TRA Rule 1220-4-13-.14 provides for consumer notice in service termination matters and grants a consumer the right to a contested case hearing.



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RYAN L. MCGEHEE (BPR #25559)  
Assistant Attorney General  
Office of the Attorney General  
Consumer Advocate and Protection Division  
P.O. Box 20207  
Nashville, Tennessee 37202-0207  
(615) 532-5512

Dated: JAN. 31<sup>st</sup>, 2013.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

Mr. Henry Walker, Esq.  
Bradley Arant Boult Cummings LLP  
1600 Division Street, Suite 700  
PO Box 340025  
Nashville, Tennessee 37203

This the 31<sup>st</sup> day of JANUARY, 2013.



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Ryan L. McGehee

**IN THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

**IN RE:**

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

**DOCKET NO. 11-00198**

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**MOTION OF THE CONSUMER ADVOCATE TO SUSPEND PROPOSED TARIFF  
PENDING MODIFICATION AND THE PROVISION OF REFUNDS DUE TO  
CONSUMERS**

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The Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), respectfully requests the Tennessee Regulatory Authority ("TRA" or "Authority"), to suspend the tariff amendments proposed by Berry's Chapel Utility, Inc., f/k/a Lynwood Utility Corporation's ("BCU") on December 7, 2012, in this docket.<sup>1</sup> For cause, the Consumer Advocate submits the tariff provisions proposed by BCU, specifically those related to collections from consumers, are not in the public interest. Furthermore, customers of BCU are entitled to substantial refunds from BCU and have been waiting for reimbursement for quite some time; it would be inappropriate, therefore, to allow BCU special provisions for collections, including shutting off water service before it refunds all monies owed. Finally, BCU remains in violation of a TRA order and continues to charge an unauthorized surcharge.

**BCU's Proposed Tariff**

The proposed tariff filed by BCU would authorize BCU to install on a customer's property a shut-off valve on the customer's water line allowing BCU to interrupt the water

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<sup>1</sup> Although filed in Docket 11-000198, in which the Consumer Advocate is a party, BCU did not provide a service copy to the Consumer Advocate.

service of the City of Franklin or HB&T Utility District. The tariff would further authorize BCU to charge the customer for an undefined cost of installing the water shut-off valve. The concept of the TRA authorizing a wastewater utility the ability to enter a customer's property, install a shutoff valve on the water line, as opposed to the sewage line, and then charge the consumer an undefined cost is an extreme measure. Nor does it appear designed to improve relationships with already displeased customers.

While the rules and regulations of the TRA authorize a wastewater provider to install a cutoff valve on a customer's water line, the proposed tariff does not comply with the Authority's rules. The proposed tariff makes no mention of adequate notice of when a shut-off would occur nor does it inform consumers of their right to contest a shut-off. Tenn.Comp. R. & Regs. 1220-4-13-.14 (1). It is also unknown whether BCU's customers have signed a "Subscription Service Contract" authorizing the installation of shut-off valves. Tenn.Comp. R. & Regs. 1220-4-13-.14 (2). Furthermore, the record is bare as to whether BCU has permission from the non-regulated water service providers, the City of Franklin and HBTS Utility District, to cut off the water service for failure of customers to pay their waste water bills. Tenn.Comp. R. & Regs. 1220-4-13-.14 (2)(b). Finally, the proposed tariff requires customers to pay an undefined cost for the installation of the water shutoff valve. The Authority's rules are silent on this issue and the Consumer Advocate is unaware of any TRA approved tariff that would authorize a public utility to impose an undefined charge on captive customers.

Shutting off a customer's water service is a drastic proposition and not an issue to be taken lightly. Those households experiencing financial difficulties in these challenging economic circumstances should be provided adequate notice and allowed to repay outstanding balances on a budget plan. Finally, there is the issue of accuracy in the amount of outstanding

debt. Based on discussions with BCU and the TRA Staff members serving as a party in this proceeding, BCU cannot identify what customers paid the \$20 monthly surcharge illegally imposed in December of 2010 through April of 2011.<sup>2</sup> Not all customers paid the unauthorized surcharge. The Consumer Advocate is concerned customers may have their water service disrupted due to accounting errors of BCU. BCU is entitled only to charge customers rates for service the TRA has authorized.

### **BCU's Customers Are Entitled to Substantial Refunds**

While some customers may have outstanding balances owed to BCU, BCU owes its customers substantial refunds as well. In testimony before the Authority in this proceeding, the Consumer Advocate submitted BCU owes consumers in excess of \$160,000 in refunds as of April, 2012:<sup>3</sup>

- An over collection of \$13,901 from charging an unauthorized late fee to 18 customers without approval by the TRA;
- An over collection of \$84,350 from an unauthorized billing increase of \$20 and \$30 per month for residential and non-residential customers respectively from December 2010 through April 2011 without approval by the TRA;
- An over collection of \$5,030 from an unauthorized increase in the minimum bill from \$15 to \$25 beginning in December 2010 without approval by the TRA;
- An over collection of \$45,397 as of April of this year from refusal to cease the \$0.38 per 1,000 gallons odorization surcharge approved by the TRA in Docket 08-00060 for a twelve month period. While this surcharge has had no legal basis for almost three years, it remains in effect today.

In addition, the Consumer Advocate discovered an over collection of \$11,843 from a \$0.68 per 1,000 gallons surcharge incorrectly implemented by one of the Company's billing agents.

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<sup>2</sup> See TRA Docket 11-00005.

<sup>3</sup> Direct Testimony of Hal Novak, pp. 11-15, April 23, 2012.

While the Consumer Advocate brought these matters to the forefront in the rate case proceeding in this docket months ago, there has been no determination by the Authority on these issues. The Consumer Advocate realizes BCU appealed the Authority's decision in Docket 11-00005 determining BCU was still within the jurisdiction of the Authority from September 1, 2010 to June 6, 2011.<sup>4</sup> However, the Court of Appeals affirmed the TRA's decision in Docket 11-00005 in an opinion issued on December 21, 2012. A copy of the opinion is attached. Thus, the refund of the illegal \$20.00 monthly surcharge collected by BCU should now be a priority.

#### **BCU Continues to Charge an Unauthorized Surcharge**

BCU has been in breach of the TRA's order in Docket 08-000060 since April of 2010. In Docket 08-00060, BCU filed a petition for recovery of odor control costs following consumer complaints in a 2007 rate case. The Consumer Advocate reviewed BCU's proposed costs of \$45,252.05. In a settlement with the Consumer Advocate, BCU agreed to exclude some costs for recovery and to collect a total of \$30,973.02 over a twelve month period, beginning in April of 2009. The terms of the TRA Order, the settlement agreement with the Consumer Advocate approved by the Authority and the terms of the tariff clearly state the surcharge would end within a twelve month period unless there was an under or over-collection of the \$30,973.02 expense authorized. However, the surcharge remains in place resulting in a massive over-collection in which consumers are entitled refunds. By the terms of the TRA's order, the settlement agreement with the Consumer Advocate, and the terms of BCU's tariff, the odor control surcharge has no legal basis.

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<sup>4</sup> The Consumer Advocate must note that in 2011, BCU informed the Authority, the Staff and the Consumer Advocate that it did not intend to pursue its appeal to the Court of Appeals. *See* Letter of November 4, 2011, in Docket 08-00060. However, after several extensions dragging out the process for months were granted, the appeal and BCU's sizeable investment in legal fees continued.

RESPECTFULLY SUBMITTED,



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RYAN L. MCGEHEE  
Office of the Attorney General  
Consumer Advocate and Protection Division  
P.O. Box 20207  
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(615) 532-5512

Dated: January 3, 2013.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail upon:

Mr. Henry Walker, Esq.  
Bradley Arant Boult Cummings LLP  
1600 Division Street, Suite 700  
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Jean Stone, Esq.  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243

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

This the 3<sup>rd</sup> day of January, 2013.

  
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RYAN L. MCGEHEE

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
December 13, 2012 Session

**BERRY'S CHAPEL UTILITY, INC. v. TENNESSEE REGULATORY  
AUTHORITY**

Appeal from the Tennessee Regulatory Authority  
No. 1100005 Mary W. Freeman, Chairman

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No. M2011-02116-COA-R12-CV

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**FILED**

DEC 21 2012

Clerk of the Courts

This is a direct appeal by newly incorporated Berry's Chapel Utility, Inc., from a declaratory order by the Tennessee Regulatory Authority. The dispute hinges on whether the TRA had jurisdiction over Berry's Chapel pursuant to Tennessee Code Annotated § 65-4-101(6)(E) (2010). The TRA held that Berry's Chapel was a public utility as defined in Tennessee Code Annotated § 65-4-101(6)(E) (2010), thus, it was subject to the jurisdiction of the TRA. Berry's Chapel asserts it was a non-profit and, thus, it was a non-utility by statutory definition and not subject to the TRA's jurisdiction. We affirm the decision of the TRA.

**Tenn. R. App. P. 12 Direct Review of Administrative Proceedings by the Court of  
Appeals; Judgment of the Tennessee Regulatory Authority Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Henry M. Walker, Donald Lee Scholes, and Heather Howell Wright, Nashville, Tennessee, for the appellant, Berry's Chapel Utility, Inc.

Jonathan N. Wike, Richard Collier, and Shiva K. Bozarth, Nashville, Tennessee, for the appellee, Tennessee Regulatory Authority.

Robert E. Cooper, Attorney General and Reporter, William E. Young, Solicitor General, and Vance L. Broemel, Senior Counsel, Nashville, Tennessee, for the appellee, the Consumer Advocate and Protection Division of the Office of the Attorney General of Tennessee.

## OPINION

For many years, Lynwood Utility Inc., a for-profit corporation that operated subject to the jurisdiction of the Tennessee Regulatory Authority, provided sewer services to approximately 800 customers in the Cottonwood residential community near Franklin, Tennessee. On July 16, 2010, some of the shareholders and officers of Lynwood Utility incorporated a new business entity, Berry's Chapel Utility, Inc. and filed a Charter with the Secretary of State of Tennessee. The Charter stated that Berry's Chapel was a non-profit mutual benefit corporation.<sup>1</sup>

On September 1, 2010, Lynwood Utility Inc., merged into Berry's Chapel; only Berry's Chapel survived the merger. Thereafter, Berry's Chapel sent a letter to the TRA informing it of the merger and that Berry's Chapel would be providing sewer services to Lynwood's former customers. The letter to the TRA also stated that Berry's Chapel was not subject to the jurisdiction of the TRA because Berry's Chapel qualified as a non-utility under Tennessee Code Annotated § 65-4-101(6)(E) (2010). At the time, Tennessee Code Annotated § 65-4-101(6)(E) contained an exception to the definition of public utilities for "[a]ny cooperative organization, association or corporation not organized or doing business for profit."<sup>2</sup>

Soon thereafter, and without seeking approval from any entity or agency, Berry's Chapel informed all of its customers that the sewer rates would increase by \$20 per month effective November 1, 2010. After learning of the unilateral rate increase by Berry's Chapel, the Consumer Advocate Division of the Tennessee Attorney General's Office filed a Petition for Declaratory Order with the TRA seeking a declaratory order that Berry's Chapel was a public utility because it did not qualify as a "non-utility" under the definition of non-utility

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<sup>1</sup>The record on appeal indicates that Berry's Chapel has not yet obtained non-profit status from the Internal Revenue Service.

<sup>2</sup>Effective June 6, 2011, the subsection was amended to read:

Any cooperative organization not organized or doing business for profit, cooperative association not organized or doing business for profit, or cooperative corporation not organized or doing business for profit. For purposes of this subdivision (6)(A)(v), "cooperative" shall mean only those nonprofit cooperative entities organized under or otherwise subject to the Rural Electric and Community Services Cooperative Act, compiled in chapter 25, part 2 of this title, or the Telephone Cooperative Act, compiled in chapter 29 of this title;

2011 Tenn. Pub. Acts ch. 430, § 3.

in Tennessee Code Annotated § 65-4-101(6)(E) (2010).<sup>3</sup> Berry's Chapel filed an answer; thereafter, the parties filed briefs in support of their respective positions. Oral arguments were held before a panel on April 4, 2011.

On August 5, 2011, the TRA issued its Order. First, the TRA ruled that "[i]nherent and necessary in the power to adequately regulate public utilities is the long accepted ability of the TRA to interpret the statutory definition of a public utility and that of a non-utility"; therefore, the TRA held it was within its jurisdiction to determine whether Berry's Chapel was a public utility or a non-utility. The TRA then found that Berry's Chapel was a public utility subject to TRA regulation. The TRA reasoned that for Berry's Chapel to qualify as a non-utility it would have to be a not-for-profit "cooperative." Further, the TRA held that Berry's Chapel was not a cooperative because no "member structure" had been established and Berry's Chapel did not have members. Based upon these holdings, the TRA ordered that Berry's Chapel suspend assessing the \$20 rate increase. Berry's Chapel then filed a direct appeal to this court.

#### ANALYSIS

This is a direct appeal from a declaratory order issued by the Tennessee Regulatory Authority.<sup>4</sup> The dispute hinges on whether Berry's Chapel is subject to the jurisdiction of the TRA. Berry's Chapel asserts that it was a non-utility, as that term was defined in the 2010 version of Tennessee Code Annotated § 65-4-101(6) (2010), because the statute then in effect defined non-utilities to include non-profit corporations and Berry's Chapel was incorporated in July of 2010 as a non-profit corporation.

The operative subsection in effect prior to June 6, 2011, states that a "public utility" shall not include: "Any cooperative organization, association or corporation not organized or doing business for profit." Tenn. Code Ann. § 65-4-101(6)(E) (2010). The parties read this very short sentence to have differing meanings. Berry's Chapel insists section (6)(E) exempts corporations not organized or doing business for profit. The Attorney General and the TRA read it to only exempt *cooperative corporations* not organized or doing business for profit.

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<sup>3</sup>In the Petition, the Attorney General's Office also sought an order that Berry's Chapel refund to its customers the \$20 per month rate increase that was implemented on November 1, 2010. The TRA did not rule on the refund request; instead, it opened a new docket to subsequently determine whether the customers of Berry's Chapel were entitled to a refund of the increased sewer rates paid after November 1, 2010. The refunds are not at issue in this appeal.

<sup>4</sup>Unlike most administrative agency appeals, this case did not go before the Chancery Court; the appeal is directly to this court.

The parties differing assertions are due, in part, on the fact the word *cooperative* only appears before the word *organization* and not before the words *association* and *corporation*. Had the sentence read “[a]ny cooperative organization not organized or doing business for profit, cooperative association not organized or doing business for profit, or cooperative corporation not organized or doing business for profit,” there would be no room for construction of the meaning of the statute, but it did not, at least not before June 6, 2011.

A.

The issue before us involves the interpretation of a statute, the construction of which is a question of law. *Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W.3d 799, 802 (Tenn. 2000). The standard of review for questions of law is de novo. *Id.*

The primary rule of statutory construction is “to ascertain and give effect to the intention and purpose of the legislature.” *Carson Creek Vacation Resorts, Inc. v. Department of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993); see also *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002). Our duty is to seek a reasonable construction “in light of the purposes, objectives, and spirit of the statute based on good sound reasoning.” *Scott v. Ashland Healthcare Center, Inc.*, 49 S.W.3d 281, 286 (Tenn. 2001) (quoting *State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995)). To determine legislative intent, we must look to the plain and ordinary meaning of the language in the statute. *Gleaves*, 15 S.W.3d at 802. We must also examine any provision within the context of the entire statute and in light of its over-arching purpose and the goals it serves. See *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000); *T.R. Mills Contractors, Inc. v. WRH Enters., LLC*, 93 S.W.3d 861, 867 (Tenn. Ct. App. 2002). The statute should be read “without any forced or subtle construction which would extend or limit its meaning.” *National Gas Distribs., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991).

B.

Berry’s Chapel insists it qualifies as a non-utility under the 2010 statute because it is a non-profit corporation. The Attorney General and the TRA insist this is an erroneous reading of the 2010 statute because the modifying term *cooperative* applies to all three types of business organizations referenced in the sentence: organizations, associations, and corporations. The parties differing assertions are due to the location of the comma and the fact the word *cooperative* only appears immediately before the word *organization* but not immediately before the words *association* and *corporation*. We, however, do not find it necessary to diagram the sentence to ascertain the General Assembly’s intent; instead, the meaning of the exclusion can be found by applying the rules of statutory construction, specifically the rule of *in pari materia*, which provides that statutes in “*pari materia*,” being

those relating to the same subject or having a common purpose, "are to be construed together, and the construction of one such statute, if doubtful, may be aided by considering the words and legislative intent indicated by the language of another statute." *Wilson v. Johnson Cnty.*, 879 S.W.2d 807, 809-10 (Tenn. 1994). Thus, we shall review the definition of public utilities and the listed exclusions to that definition to ascertain the General Assembly's intent as it pertains to the exclusions in subsection (6)(E) for non-profit corporations.

Tennessee Code Annotated § 65-4-101(6) (2010) defines "public utilities." The statute also specifies a listing of utilities identified as "non-utilities," which shall not be construed as public utilities. *Id.* The relevant sections read as follows:

"Public utility" means every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof. "Public utility" as defined in this section shall not be construed to include the following nonutilities:

(A) Any corporation owned by or any agency or instrumentality of the United States;

(B) Any county, municipal corporation or other subdivision of the state of Tennessee;

(C) Any corporation owned by or any agency or instrumentality of the state;

(D) Any corporation or joint stock company more than fifty percent (50%) of the voting stock or shares of which is owned by the United States, the state of Tennessee or by any nonutility referred to in subdivisions (a)(1), (2), and (3);

(E) Any cooperative organization, association or corporation not organized or doing business for profit;

(F) Any individual, partnership, copartnership, association,

corporation or joint stock company offering domestic public cellular radio telephone service authorized by the federal communications commission; provided, that the real and personal property of such domestic public cellular radio telephone entities shall be assessed by the comptroller of the treasury pursuant to §§ 67-5-801(a)(1), 67-5-901(a)(1), and § 67-5-1301(a)(2); provided, however, that until at least two (2) entities, each independent of the other, are authorized by the federal communications commission to offer domestic public cellular radio telephone service in the same cellular geographical area within the state, the customer rates only of a company offering domestic public cellular radio telephone service shall be subject to review by the Tennessee regulatory authority pursuant to §§ 65-5-101 – 65-5-104. Upon existence in a cellular geographical area of the conditions set forth in the preceding sentence, domestic public cellular radio telephone service in such area, for all purposes, shall automatically cease to be treated as a public utility under this title. The Tennessee regulatory authority's authority over domestic public cellular radio telephone service is expressly limited to the above extent and the authority shall have no authority over resellers of domestic public cellular radio telephone service. For the purpose of this subdivision (6)(F), "authorized" means six (6) months after granting of the construction permit by the federal communications commission to the second entity or when the second entity begins offering service in the same cellular geographical area, whichever should first occur. This subdivision (6)(F) does not affect, modify or lessen the regulatory authority's authority over public utilities that are subject to regulation pursuant to chapter 5 of this title;

(G) Any county, municipal corporation or other subdivision of a state bordering Tennessee, but only to the extent that such county, municipal corporation or other subdivision distributes natural gas to retail customers within the municipal boundaries and/or urban growth boundaries of a Tennessee city or town adjoining such bordering state;

(H) Any of the foregoing nonutilities acting jointly or in combination or through a joint agency or instrumentality; and

(I) For purposes of §§ 65-5-101 and 65-5-103, "public utility" shall not include interexchange carriers. "Interexchange carriers" means companies, other than incumbent local exchange telephone companies, owning facilities in the state which consist of network elements and switches, or other communication transmission equipment used to carry voice, data, image, and video traffic across the local access and transport area (LATA) boundaries within Tennessee.

Tenn. Code Ann. § 65-4-101(6)(A)-(I) (2010).

By construing the statutory subsection at issue here *in pari materia* with the other statutory subsections relating to the same subject or having a common purpose, *see Wilson*, 879 S.W.2d at 809-10, it becomes readily apparent that the General Assembly excluded entities from the definition of public utility that have one thing in common, independent oversight of the business entity. For example, subsection (A) of Tennessee Code Annotated § 65-4-101(6) excludes corporations "owned by or any agency or instrumentality of the United States;" subsection (B) excludes "county, municipal corporation or other subdivision of the state of Tennessee;" subsection (C) excludes corporations "owned by or any agency or instrumentality of the state;" and subsection (D) excludes any corporation or joint stock company of which more than 50% of the voting shares are owned by the United States, the state of Tennessee, or by any nonutility referred to in subdivisions (a)(1), (2), and (3). Thus, all of the foregoing examples have independent oversight, being oversight that is either by a county, state, or federal government agency.

The foregoing notwithstanding, Berry's Chapel would have us construe the next subsection, (6)(E), to subject the captive customers of the non-profit corporate utility to the unbridled authority of the directors and officers of the corporation. The primary basis for this assertion is the fact that the General Assembly did not include the word *cooperative* immediately before *corporation*, only before organization. We find no merit to this argument.

The courts are to "give effect to every word, phrase, clause and sentence" of a statute to carry out the legislative intent. *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975); *In re Estate of Dobbins*, 987 S.W.2d 30, 34 (Tenn. Ct. App. 1998). Reading subsection (6)(E) *in pari materia* with the rest of the entire section, it is readily apparent that a not-for-profit corporation would have to be a cooperative to comport with the oversight afforded under subsections (A)-(D) of Tennessee Code Annotated § 65-4-101(6). This is due to the fact a

cooperative is a legal entity owned and democratically controlled by its members.<sup>5</sup> For example, the purpose of telephone cooperatives, which are also "non-utilities," are identified in the statute as follows:

Cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of furnishing telephone service in rural areas to the widest practical number of users of such service; provided, that there shall be no duplication of service where reasonably adequate telephone service is available. Corporations organized under this chapter and corporations which become subject to this chapter in the manner provided in this chapter are referred to in this chapter as "cooperatives," and shall be deemed to be not-for-profit corporations.

Tenn. Code Ann. § 65-29-102. Under the statutory scheme governing telephone cooperatives, we see that "members" of a cooperative are restricted to its customers and the members perform essential acts. For example:

(a) No person who is not an incorporator shall become a member of a cooperative unless such person shall agree to use telephone service furnished by the cooperative when such telephone service shall be available through its facilities. The bylaws of a cooperative may provide that any person, including an incorporator, shall cease to be a member thereof if such person shall fail or refuse to use telephone service made available by the cooperative within a specified time after having become a member. Membership in the cooperative shall not be transferable, except as may be provided in the bylaws. The bylaws may prescribe additional qualifications and limitations in respect of membership.

Tenn. Code Ann. § 65-29-109(a).

The telephone cooperative statutory scheme further provides:

Each member shall be entitled to one (1) vote on each matter submitted to a vote at a meeting. Voting shall be in person, but, if the bylaws so provide, may

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<sup>5</sup>"A cooperative is a business or organization owned by and operated for the benefit of those using its services. . . . Typically, an elected board of directors and officers run the cooperative while regular members have voting power to control the direction of the cooperative." U. S. Small Business Administration, <http://www.sba.gov/content/cooperative> (last visited Dec. 20, 2012).

also be by proxy or by mail, or both. If the bylaws provide for voting by proxy or by mail, they shall also prescribe the conditions under which proxy or mail voting shall be exercised. No person shall vote as proxy for more than one (1) member at any meeting of the members, and/or election.

Tenn. Code Ann. § 65-29-109(g).

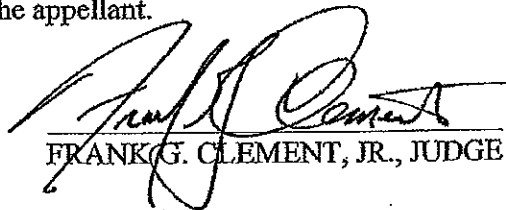
Further, pursuant to the statutory scheme for telephone cooperatives, the business and affairs of the cooperatives are managed by a board of directors who are elected by the members and each director shall be a member of the cooperative. *See* Tenn. Code Ann. § 65-29-111(a).

For the foregoing reasons, we have determined that it was the clear intent of the General Assembly for the 2010 exclusion in Tennessee Code Annotated § 65-4-101(6)(E) to pertain to *cooperative* corporations that are non-profits, not to a non-profit corporation that is not a cooperative. This reading of Tenn. Code Ann. § 65-4-101(6)(E) makes it consistent with the nature of the other exclusions in subsection (6), which involve organizations already having oversight.

We have determined that Berry's Chapel did not fall within the exceptions found in Tenn. Code Ann. § 65-4-101(6)(E), that it was subject to the jurisdiction of the TRA and, therefore, we affirm the 2011 Declaratory Order issued by the TRA.<sup>6</sup>

#### IN CONCLUSION

The judgment of the Tennessee Regulatory Authority is affirmed, and this matter is remanded with costs of appeal assessed against the appellant.

  
FRANK G. CLEMENT, JR., JUDGE

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<sup>6</sup>Berry's Chapel raised two other issues; one of which challenged the TRA's authority to make the determination that Berry's Chapel was subject to its jurisdiction. Our ruling is dispositive of that issue and the other issue; thus, it is not necessary that we address either issue.

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:

TARIFF FILING OF BERRY'S  
CHAPEL UTILITY, INC.

)  
) Tariff No. 2012-0374  
)  
)

**RESPONSE OF BERRY'S CHAPEL TO CONSUMER ADVOCATE**

Berry's Chapel Utility, Inc. ("Berry's Chapel") submits this response to the "Motion of the Consumer Advocate to Suspend Proposed Tariff."<sup>1</sup> Berry's Chapel filed this tariff on December 7, 2012. It became effective on January 6, 2013. The new tariff simplifies and clarifies the old tariff of Lynnwood Utility Corporation. Consistent with the tariffs of other wastewater utilities, the new tariff also authorizes Berry's Chapel to terminate water service to enforce the collection of sewer charges.

Approximately half of the customers of Berry's Chapel (those who receive water service from the City of Franklin) are already subject to the loss of water service if they fail to pay their sewer bill. Under the proposed tariff, Berry's Chapel will be able to terminate water service to its other customers following proper notice as provided in the utility's tariffs. In order to terminate water service, Berry's Chapel may install a water shut off valve on the customer's side of the

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<sup>1</sup> The Consumer Advocate filed the Motion in Docket 11-00198, which was the company's rate case filing. The tariff, however, was not filed in that docket. This tariff was filed with the TRA's docket clerk instead of being filed directly with the TRA's Utilities Division. Although the tariff did not have any docket number on it and was not intended to be filed in any docket, the TRA docket clerk assigned it the docket number of the rate case and typed the rate case docket number on the front of the filing. This led the Consumer Advocate to conclude understandably but erroneously, that the tariff had been filed as part of the rate case.

At this time, this is no more than a tariff filing, not a contested case proceeding. The utility asks that the TRA correct its records to reflect this. Berry's Chapel suggests that the Motion of the Consumer Advocate should more properly be treated as a complaint and a request to open a contested case.

water meter. The customer will be charged for the cost of the valve. Based on the experience of other wastewater utilities, Berry's Chapel anticipates that this remedy will rarely, if ever, be needed to enforce collection. In the absence of such a remedy, however, there is no safe, cost-effective way to collect sewer bills.<sup>2</sup>

Attached are copies of similar tariff provisions of four other wastewater utilities. One, Aqua Green, requires the customer to pay \$100 for the shut-off valve. Another, Tennessee Wastewater, implies that the customer is responsible for the cost of the shut-off valve (customer "authorizes TWSI to purchase and install a cut off valve") but does not specify a price. A third, DSH, does not say explicitly whether the customer pays for the valve but says the customer must pay "all reasonably incurred costs of collection." Of course, as with any customer charge, the cost of installing a shut-off valve must be "just and reasonable" and non-discriminatory as required by state law.

The proposed tariff, which was reviewed by the TRA staff prior to filing, is therefore consistent with the tariffs of other wastewater providers. The shut-off process is a rarely used, but necessary, means of collecting sewer charges. The cost of the valve should be charged to the customer responsible, not to the other customers on the system.

The Consumer Advocate is concerned that Berry's Chapel may not have accurate information about which customers are owed refunds as a result of a recent decision of the Tennessee Court of Appeals and, therefore, that Berry's Chapel may inadvertently use the shut-off process to collect more than a customer owes. Since its earlier discussions with the Consumer Advocate, the utility has, in fact, now determined exactly which customers are owed

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<sup>2</sup> As the TRA determined when it first approved this approach several years ago, shutting off sewer service without shutting off water service creates a potential health hazard. Therefore, following discussions between the TRA and wastewater carriers, it was decided that sewer companies should be allowed to shut off a customer's water instead of shutting off the sewer service.

refunds and the amount of that refund. The utility is working with the TRA Staff and the Consumer Advocate to determine how those refunds will be made and to insure that no customer will be subject to termination unless the customer's unpaid balance is larger than the amount of any refunds.

The Consumer Advocate also raises other concerns which are not germane to this tariff and, in some cases, are based on outdated information.<sup>3</sup> Those issues are also being addressed with the Staff and the Consumer Advocate but have no legal bearing on whether this proposed tariff is necessary and reasonable.

The Consumer Advocate's "Motion" (or Complaint) should be denied.

Respectfully submitted,

BRADLEY ARANT BOULT CUMMINGS LLP

By: 

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<sup>3</sup> For example, the utility has not collected the odorization surcharge since July, 2012. That issue is the subject of Docket 08-00060.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 7<sup>th</sup> day of July, 2013, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

Ryan McGehee  
Office of the Attorney General  
Consumer Advocate and Protection Division  
P.O. Box 20207  
Nashville, TN 37202-0207

  
HENRY WALKER

**Wastewater Utility Service**

**RULES AND REGULATIONS (CONTINUED)**

**Utility Facilities on Private Property:**

The Company shall own and maintain all STEG and STEP Tanks, control systems, and service lines required to provide sewer service on the Customer's premises. The Customer shall execute an agreement granting an easement to the Company for maintenance of the sewer system. The building, plumbing, and Stub-out Line shall be maintained by the Customer.

**Service Disconnection:**

Service under any application may be discontinued due to the following:

1. Non-payment of bill;
2. Misrepresentation;
3. Adding to the property or fixtures without notice to the Company;
4. Tampering with any service pipe, tank, control system, filter, or any other facilities of the Company;
5. Violation of any Company rules and regulations; and
6. Disconnecting or reconnecting service by a party other than a duly authorized agent of the Company without the Company's express consent.

In the occurrence of any of the foregoing, the Company reserves the right to install a shut-off valve between utility water service and the Customer until remedial measures are taken to the Company's satisfaction.

**Non-payment Penalties:**

A non-payment penalty of 5% of the monthly charges will be owed if the bill is paid after the due date shown on the bill. If payment is not received within 15 days after being due, written notice will be sent to the Customer by U.S. Certified Mail. If payment is not received within 30 days after being due, sewer service will be discontinued from the Customer's property pursuant to the terms of the Sewer Subscription Agreement executed by the Customer and the Company with no additional notice. No service shall be reconnected if discontinued for non-payment until all charges have been paid, including, without limitation, disconnection fees and reconnection fees. The disconnection fee is \$10.00 and the reconnection fee is \$15.00.

**Returned Checks or Instruments:**

The Company will charge the Customer a \$20.00 fee for all checks or instruments returned by the bank.

**Issued: July 15, 2007**

**Effective: August 15, 2008**

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WASTEWATER UTILITY SERVICE

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Utility Facilities on Private Property

The Company shall maintain all septic pump and septic gravity tanks, control systems and service lines required to provide sewer services on the Customer's premises. The Customer must execute an agreement that acknowledges the Company to have a perpetual easement in, over, under and upon the specified land of Customer as shown on the property plat, with the right to operate and repair all components of the sewer system on the Customer's property, including but not limited to the septic tank and septic pump tank systems. The Customer must grant the Company permission to enter upon Customer's property for any reason connected with the provision or removal of sewer service or collection therefore. The Customer must agree to allow the Company to install an approved cut off valve between the house and water supply and grant the Company exclusive rights to use such valve to cut off water in order to safely stop wastewater flow. The Customer understands there will be a charge of \$100.00 for installation of this valve. The Customer's Building Plumbing and Building Outfall Line shall be maintained by the Customer.

# ATTACHMENT #1

TENNESSEE  
Wastewater

## SEWER SUBSCRIPTION CONTRACT

DATE: \_\_\_\_\_

PRINTED NAME \_\_\_\_\_

ADDRESS OF PROPERTY \_\_\_\_\_

LOT # \_\_\_\_\_

MAILING ADDRESS \_\_\_\_\_

TELEPHONE NUMBER \_\_\_\_\_

EMAIL ADDRESS \_\_\_\_\_

I hereby make application to Tennessee Wastewater Systems, Inc. ("TWS") for sewer service at the address of property stated above. In consideration of the undertaking on the part of TWS to furnish sewer service, I understand, covenant and agree as follows:

1. I understand that the components of a sewer system have been installed on the property referred to above, which is owned or occupied by me, and which is to be connected with a wastewater disposal system owned and/or maintained by TWS. I warrant that any connection to and/or subsequent use to this system by the components on my property shall be in accordance with the Rules, Regulations and Plans of TWS. Regarding my usage of the system components on my property, which are owned by me, I covenant to follow the guidelines set forth in the USER MANUAL (Do's and Don'ts for an Effluent Collection System). Should I violate these Rules and/or abuse or damage my components, I understand that I must bear the expense to repair or replace the same in accordance with the Plans of TWS.
2. I acknowledge TWS, its successors and assigns have a perpetual easement in, over, under and upon the above specified land as shown on the property plat, with the right to operate and repair all components of the sewer system on my property, including but not limited to the interceptor tank and the Interceptor Pump or Interceptor Gravity Tank systems. I further grant TWS permission to enter upon my property for any reason connected with the provision or removal of sewer service or collection therefore.
3. For all other plumbing and structures on the property, including the outfall line to the interceptor tank, I agree that I am responsible for all operation and repair thereof.
4. I hereby authorize TWS to purchase and install a cutoff valve on my side of my water meter and grant TWS exclusive right to use such valve in accordance with its Rules and Regulations. However, the use of this valve does not in any way relieve me of my obligation to pay for water service to the service provider.
5. I understand and agree to pay a security deposit of \$60.00, to promptly pay for service at the then current schedule of rates and fees and agree to abide by and be subject to TWS's billing and cutoff procedures. Should I not pay in accordance with TWS's Rules, I agree to pay all costs of collection, including attorney fees.
6. I accept the current Rules and Regulations and the Rates and Fees Schedule and agree to abide by any amendments to such Schedules.
7. I agree that this Agreement shall remain in effect for as long as I own, reside upon or rent the above-described property. When such circumstances no longer exist, I agree to provide notice to TWS at least thirty (30) days in advance of my vacating the property.

SUBSCRIBER'S SIGNATURE \_\_\_\_\_

## **SECTION 2 RULES AND REGULATIONS**

### **Governing the sewage collection and treatment systems of DSH & Associates (DSH)**

#### **Statement of Purpose**

The general purpose of these rules and regulations is:

1. To establish procedures for furnishing sewage collection and treatment services on a uniform basis to customers within the Company's service area.
2. To provide standards and procedures for:
3. Acceptable sewage characteristics
4. Protection of the integrity of the water tight system
5. Engineering design standards
6. Construction standards and inspection requirements
7. Quality of materials

#### **Authorization of Rules and Regulations**

DSH & Associates, LLC is a corporation organized and engaged in business as a public utility in the State of Tennessee. The Company is regulated Under a Certificate of Convenience and Necessity issued the Tennessee Public Service Commission (PSC) July 1, 2011, under Docket No. 11-00020 and subsequent certificates issued by the PSC and the TRA.

#### **Effect of Rules and Regulations**

All provisions of these rules and regulations shall be incorporated in each contract with each sewage system customer of the Company

#### **Utility Facilities on Private Property**

The Company shall maintain all septic pump and septic gravity tanks, control systems and service lines required to provide sewer services on the Customer's premises. The Customer must execute an agreement that acknowledges the Company to have a perpetual easement in, over, under and upon the specified land of Customer as shown on the property plat, with the right to operate and repair all components of the sewer system on the Customer's property, including but not limited to the septic tank and septic pump tank systems. The Customer must grant the Company permission to enter upon Customer's property for any reason connected with the provision or removal of sewer service or collection therefore. The Customer must agree to allow the Company to install an approved cut off valve between the house and water supply and grant the Company exclusive rights to use such valve to cut off water in order to safely stop wastewater flow. The Customer's Building and Plumbing outfall line shall be maintained by the Customer.

#### **Discontinuance of Service**

Service under any application may by dis-continued for the following reason:

1. Non-payment of bill as hereinafter set forth below
2. For misrepresentation of application
3. For adding to the property without notice of the Company
4. For tampering any service pipe, tank, control system, filter or any other facilities of the Company in any way whatsoever.
5. For violation of any rules of the Company.
6. For disconnecting or reconnecting service by any party, other than a duly authorized agent of the Company without the consent of the Company.

#### **Non-Payment Penalties**

The Customer agrees to promptly pay for service at the then current schedule or rates and fees and agrees to abide by and be subject to the Company's billing and cutoff procedures. Should the Customer not pay in accordance with the Company's rules, the Customer agrees to pay all reasonably incurred cost of collection of delinquent fees including attorney fees.

The non-payment penalty will be \$25 per billing cycle. If payment is not received within fifteen days after the due date, a 2<sup>nd</sup>