

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

IN RE:)	
)	
PETITION OF BERRY'S CHAPEL UTILITY, INC. FOR APPROVAL OF DEFERRED ACCOUNTING)))))	DOCKET NO. 13-00052

POSITION OF THE CONSUMER ADVOCATE

The Consumer Advocate and Protection Division of the Attorney General and Reporter of the State of Tennessee ("Consumer Advocate") respectfully opposes the recovery of the legal fees claimed by Berry's Chapel Utility, Inc. ("BCU", "Company") in this matter. The Consumer Advocate acknowledges a request for deferred accounting treatment is in and of itself not authorization to recover expenses from Tennessee consumers.¹ However, the Consumer Advocate has concerns based on the information it has been provided by BCU and the fundamental basis underlying the relief the Company seeks.

The request by BCU is an attempt to expand the scope of the Tennessee Regulatory Authority's ("Authority", "TRA") *Final Order* in Docket 11-00198. As such, it is nothing more than an untimely motion to reconsider.² Moreover, the legal expenses for which BCU seeks recovery clearly include charges for various matters, including the rate case in Docket 11-00198 and the show-cause proceeding in Docket 11-00065. Recovery of such fees from customers constitutes retroactive rate-making and is not in the public interest. The allocation methodology BCU has indicated it has used to justify the legal expenses submitted here for deferred accounting treatment has no reasonable basis. Finally, in the context of BCU's petition, the

¹ Docket 12-00020, *Order Granting Request for Deferred Accounting*, May 22, 2012, p. 2; Docket 10-00185, *Order Granting Request for Deferred Accounting*, November 10, 2010, p. 2.

² Parties are allowed up to 15 days from the issuance of a Final Order to file a motion to reconsider. TRA Rule & Regulation 1220-1-2.20.

Authority should consider what incentives it sends to public utilities to control regulatory and legal costs.

I. The Order of the Authority in Docket 11-00198 Does Not Authorize Recovery of the Relief Sought by BCU

The flood damage expense recovery sought by BCU was consolidated with BCU's rate case in Docket 11-00198.³ In setting BCU's rates, the Authority determined the Company was entitled to \$90,345.00 in flood damages of the requested \$190,327.00 sought by BCU. The Hearing Panel agreed with the Consumer Advocate's recommendations that the remaining costs were "inappropriate and unreasonable."⁴ Included in the Consumer Advocate's recommendations was the exclusion of \$48,766.42 in estimated future repairs and an additional \$9,753.28 in costs based on a 20% capitalized overhead charge assigned to the estimate. The Consumer Advocate opposed recovery of these projections because (1) the cost had not yet been incurred in the two years after the flood, (2) the estimate was obtained from affiliated Tennessee Contractors Inc. without the benefit of outside bidding, and (3) because charging 20% overhead costs based on an expense that has not occurred is unreasonable and arbitrary.⁵

The Authority's decision excluded these estimated future costs. However, the Hearing Panel left the matter open for potential recovery of future repairs and expenses actually incurred if they were specifically related to the flood. Chairman Hill led the deliberations of the matter, the conclusions of which were unanimously adopted by the Hearing Panel:

I move that \$90,345 in flood costs be approved at this time. Should additional charges be incurred in the *future* that are *specifically related to the flood in May, 2010*, the company may petition the Authority for possible recovery.⁶ (emphasis added).

³ Docket 11-00198; Docket 11-00180, *Order Consolidating Dockets and Amending Procedural Schedule*, May 7, 2012.

⁴ Docket 11-00198, *Final Order*, August 21, 2012, p. 16.

⁵ Docket 11-00198, *Direct Testimony of Dave Peters*, April 23, 2012, p. 18-19.

⁶ Transcript of Authority Conference, June 8, 2012, p. 17-18.

The TRA's *Final Order* utilized the Hearing Panel's conclusions on the flood damage issue near verbatim.

The panel noted that if additional expenses are incurred by Berry's Chapel in the *future*, which are *specifically related to the flood of May, 2010*, the Company may petition the Authority for possible recovery.⁷ (emphasis added)

The Authority's Final Order and the comments of the Hearing Panel clearly indicate the Authority would consider recovery of expenses incurred in the future for repairs specifically related to the flood damage. In essence, the Authority has already granted quasi-deferred accounting treatment for the expenses incurred for repairs since the rate case. However, the relief sought here has no connection to repairs or expenses incurred after the hearing. The bulk of those legal expenses sought for recovery were incurred prior to the Authority's decision, thus they are not "future costs." Moreover, the legal fees submitted here include charges for matters that have no connection to the flood of May 1, 2010.

There is nothing within the record which would indicate the Authority authorized the recovery of extraneous legal expenses. One must note the Authority already excluded legal fees from the recovery of flood damage expenses.⁸ The costs submitted by BCU in this docket are composed entirely of legal fees. The fees were incurred for various matters, much of which bear no relationship of any degree to the flood damage and all were incurred *before* the Authority rendered its decision. These are not expenses incurred for repairs to BCU's facilities that are related to the damage caused by the flood. Surely, it was not the intent of the Hearing Panel to bless the potential recovery of legal fees in a future docket which were incurred in Docket 11-00198.

⁷ Docket 11-00198, *Final Order*, August 21, 2012 p. 17.

⁸ Docket 11-00198, *Final Order*, August 21, 2012, p. 16.

II. BCU's Request for Recovery of Legal Fees Is Untimely

BCU's request for deferred accounting for recovery of flood damage legal fees is untimely and inappropriate. The time to seek recovery of such charges, assuming they were justified, was during the rate case proceeding. All matters must have some semblance of finality. The doctrine of *res judicata* is based on the principle and public policy that the same parties should not be required to litigate anew a matter which should have already been determined and settled in former litigation. *Purcell Enterprises, Inc. v. State of Tennessee*, 631 S.W. 2d 401, 407 (Tenn.Ct.App.1981) (cert.denied). In the simplest of terms, this doctrine of law is centered on preventing matters that have already been resolved in a prior proceeding or that could have been raised in a prior proceeding and were not from being re-litigated. Otherwise, matters could be raised *ad infinitum* long after a case is decided. The doctrine of *res judicata* applies to final orders of the TRA. *United Cities Gas Co. v. Tennessee Pub. Service Comm.*, 789 S.W. 2d 256, 258-259 (Tenn.1990). BCU's request opens the door for consideration of the determinations of the *Final Order* in Docket 11-00198 that the Company should have raised when the flood damage issue was heard by the Authority.

The flood occurred on May 1, 2010. BCU's request for flood damages was filed on October 25, 2011, and ultimately was determined on June 8, 2012. From the time of the filing of its petition to the ultimate decision rendered by the TRA, BCU made no request for legal fees associated with the legal expense of seeking flood damage recovery. Now, three years after the flood and almost a year after the matter has been heard by the Authority, BCU seeks deferred accounting treatment of \$18,111.00. The TRA authorized BCU to petition the Authority for potential recovery of "additional charges incurred in the future, which are specifically related" to the flood of May 1, 2010. However, BCU is not submitting additional charges incurred for

repairs necessitated by the flood. Nor can it be argued the bulk of the legal charges BCU has submitted occurred in the “future” after the Authority rendered its decision. Rather, the bulk of the legal bills the Consumer Advocate has been provided with were incurred prior to the TRA’s decision in Docket 11-00198.

As such, the request for deferred accounting treatment here is nothing more than a late filed motion to reconsider the Authority’s decision in the rate case. There is simply no legal basis for it.

III. The Legal Fees Submitted Include Expenses From BCU’s Last Rate Case and Dockets Unrelated to Flood Damage

The legal fees BCU is seeking recovery for include charges for matters with no connection with the flood. The fees submitted to the TRA Staff and the Consumer Advocate include charges for the rate case, the show-cause docket, and in one instance, for BCU’s pursuit of its appeal of the Authority’s order in Docket 11-00005 to the Court of Appeals.

One of the most obvious examples is the cost of the rate case hearing. The legal bills submitted include charges for the rate case hearing, billing 4.5 hours and totaling an estimated \$1,800.00 in charges.⁹ The rate case hearing took place on May 31 and June 7, 2012, and lasted approximately five hours.¹⁰ The cost of the rate case hearing is not attributable to the flood of May, 2010. The bulk of the hearing focused on the general rate increase proposed by BCU. Of the two hundred and sixteen pages of transcript from both hearing days, the flood damage issue was discussed for less than thirty pages.

Other examples of rate case expense included in the Company’s request for recovery for flood damages include 3.5 hours of charges on May 8 and 21-22, 2012, for discussions of

⁹ Invoice No. 790885, billing entry for May 31, 2012; Invoice No. 795169, billing entry for June 7, 2012. Calculation based on number of hours x Mr. Walker’s rate of \$400.00 per hour.

¹⁰ Transcript of Proceeding, May 31, 2012; June 7, 2012.

rebuttal testimony filed in the rate case. One must note the Authority already awarded BCU the full amount of rate case expense of \$64,000.00 sought by the Company, an exceedingly large amount for a small utility.¹¹ In a departure from the Authority's practice of amortizing recovery of rate case expense over three years, BCU was allowed to amortize these costs over two years.¹² Thus, not only is BCU already recovering its rate case expense, it is doing so at a faster pace than other regulated public utilities. By requesting deferred accounting treatment for the cost of the rate case hearing or portion thereof, BCU is requesting consumers to pay for rate case expenses twice. This is simply double recovery.

The legal fees submitted here for flood damages are intermingled with various other matters. For example, a March 1, 2012, entry shows 1.25 hours were billed for attending the pre-hearing conference which was for both the flood damage docket and the rate case, a conference that lasted 30 minutes.¹³ The same entry includes charges for reviewing TRA data requests issued in the show-cause docket and discussions of responses. However, in the show cause docket, data requests did not request information on flood damages.¹⁴ Nor was the TRA Staff assigned to the show-cause docket ever a party to the flood damage or rate case docket.

In another example, for April 4, 2012, 2.5 hours were billed for meeting with TRA Staff to discuss various proceedings at the TRA and follow-up with a TRA attorney on a motion to hold in abeyance which was filed with the Tennessee Court of Appeals.¹⁵ For April 11, 2012, 1.25 hours include discussions with the Consumer Advocate about discovery from the rate case (no discovery was filed in the flood damage docket) and a discussion between BCU's counsel and Chairman Hill about the regulation of wastewater utilities and the impact of new legislation.

¹¹ Docket 11-00198/Docket 11-00180, *Final Order*, (August 21, 2012), p. 12.

¹² *Id.*

¹³ Docket 11-00198/11-00180. Transcript of Status Conference, March 1, 2012.

¹⁴ Docket 11-00065, TRA Data Requests, March 1, 2012.

¹⁵ The entry references a "a motion" to be filed in "court." A joint motion was filed by the TRA and BCU with the Court of Appeals on April 10, 2012.

Billing entries for June 1, 4-8, and the 11-12 are all related to the rate case hearing and discussion with TRA Staff on various issues such as the Company's tariff. The claimed flood damage bills also include discussions with BCU to hire Terry Buckner or Darlene Stanley as consultants. Again, these charges have nothing to do with the flood of May 1, 2010.

In discussions with BCU, the Company disclosed it began allocating legal fees for the show-cause proceeding, rate case and flood damage issues together. The charges for legal fees presented here for "flood damage" are based on an allocation of 1/3 or 1/2 of the legal fees incurred for various matters. Allocating half of the cost of the rate case hearing between rate case expense and "flood damage" is an arbitrary allocation. It is akin to splitting a legal bill 50/50 for defending a doctor in a medical malpractice lawsuit and a lawsuit in which the doctor's dog has bitten a neighbor. One is not like the other. All things considered, one will be much more expensive than the other in terms of legal representation.

A rate case is a complex undertaking and involves numerous and often contested issues. *Tennessee Pub. Service Comm. v. Nashville Gas*, 551 S.W. 2d 315, 318 (Tenn.1977). Issues of revenues, recurring operation expenses, rate base, depreciation, rate design and return were contested in BCU's rate case. Each of these issues involves considerable analysis, a multitude of calculations, and different accounting methodologies. Additional complexity is dependent upon the extent to which a public utility attempts to challenge decisions the Authority has already determined in prior rate cases

In contrast, the flood damage issue was not complex. There was no legal contest as to whether BCU was entitled to recover expenses arising from damage caused by the flood of May 1, 2010.¹⁶ The issue in dispute was the amount of expenses appropriate for recovery. The flood

¹⁶ Docket 11-00180, CAPD Petition to Intervene, December 5, 2011, p. 2; Docket 11-00198, Direct Testimony of Dave Peters, April 23, 2012, p. 16

damage expenses the Consumer Advocate contested were the 20% overhead charges, the estimate for future repairs, interest expense, legal fees, fuel and meal charges.¹⁷ The Consumer Advocate witness devoted less than four pages of pre-filed testimony to the flood damage expenses.¹⁸ BCU's witness devoted two pages of pre-filed rebuttal testimony to the issue.¹⁹ Of the over two hundred pages of transcript for the BCU rate case hearings of May 31, and June 7, 2012, less than thirty pages discussed flood damages. Thus allocating the legal fees equally between the rate case and the flood damage issue simply lacks a reasonable basis. Given the award by the Authority of BCU's requested rate case expense in Docket 11-00198, adopting BCU's proposed legal fee allocation here will lead to double recovery of legal costs from BCU customers. It will also arbitrarily lead to recovery of legal fees incurred for various other proceedings, including the TRA's show-cause docket.

In essence, BCU is seeking to recover legal fees spent for the rate case and the show cause docket. The flood of May 1, 2010, has no connection to either the rate case or the show-cause proceeding. The Company was awarded its full rate case expense by the Authority. The flood damage expenses were already considered by the Authority in BCU's rate case. Nor should rate-payers be expected to foot the bill for the show-cause proceeding. As noted by the Authority in the recent Laurel Hills CCN case, specifically in regard to show-cause proceedings, the costs for matters that do not benefit customers should not be borne by the customers.²⁰ The show-cause for BCU was convened to address what action the TRA should take for BCU's violations of state law.²¹ Customers were certainly not the cause of such actions, nor could it be claimed customers have benefited from BCU's attempts to escape regulatory oversight. Yet,

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Docket 11-00198, Rebuttal Testimony of James Ford, May 22, 2012.

²⁰ Docket 12-00030, *Order Denying CCN and Requiring Divestiture of Water System*, p. 26.

²¹ Transcript of Authority Conference, August 1, 2011, p. 34-35.

BCU's allocation of legal fees to "flood damage" expenses makes the prospect of customers paying for various matters impossible to escape.

An illustration of BCU's allocation of legal fees to "flood damage" is evident in BCU's petition in this matter. Despite the fact that no new expenses for repairs related to the flood have been reported by the Company, the meter for BCU's "flood damage" legal expenses continues to run. As indicated by BCU's request in this docket, the expenses are growing and include the cost of preparing the petition in this matter as well as negotiations among BCU, the TRA Staff Party in the show-cause docket and the Consumer Advocate.²² The Company's position creates a self-perpetuating cost it expects customers to bear.

IV. The Authority Should Consider What Policy Incentives It Sends Public Utilities For Recovery of Legal Expenses

On October 25, 2011, BCU filed a petition for recovery of flood damages. Less than three weeks later, BCU filed a petition for a rate case on November 15, 2011. Nothing prevented these matters from being heard in the same docket. Piedmont Natural Gas Company and Atmos Energy Corporation both sought recovery of flood damage expenses during rate cases without a separate request. Indeed, the Authority eventually consolidated BCU's request for flood damage and the Company's rate case. In this matter, the filing of a separate docket outside of the rate case was inefficient and wasteful of resources. Moreover, the issues surrounding the flood damage were not so complex as to require a separate docket.

There was no dispute between the Consumer Advocate and BCU that the flood of May 1, 2010, was an extraordinary event and caused damage beyond the utility's normal maintenance and repair budget. The question was the appropriate amount of recovery. The Company's request for recovery of \$190,327.00 was not accepted by the Authority. Rather the Authority

²² *Petition of BCU*, April 1, 2013, p. 2, footnote 1.

agreed with the Consumer Advocate's recommendations, finding that approximately \$100,000.00 of the requested relief was "inappropriate and unreasonable."²³ Thus, 53% of what the Company submitted to the Authority for recovery of flood damage was found to be inappropriate and unreasonable.

The TRA has to consider what incentives it sends to a public utility in terms of controlling regulatory costs when it awards recovery of legal fees for matters in which the Authority has deemed the majority of the requested relief unreasonable and inappropriate. Household and business customers should not be punished with higher rates for legal fees when a public utility overreaches in the regulatory process.

Moreover, granting deferred accounting treatment by the Authority for any matter represents the opening of the door for potential recovery of non-recurring expenses. As the first step toward establishing in essence an exception to principle of retroactive rate-making, the Authority should be wary of granting a request for deferred accounting without an extraordinary basis. The record in this matter is bare as the legal bills themselves have not been filed. The flood of May 1, 2010, was indeed an extraordinary event beyond the Company's control and the Authority acted accordingly in BCU's last rate case in granting the appropriate flood damage expenses. However, the Authority should consider whether deferred accounting treatment for BCU's proposed legal fees in this matter rises to the level to which the Authority would grant an exception to the prohibition of retroactive rate-making for the Company and require customers in the future to pay for these expenses.

The relief sought by BCU goes beyond the Authority's Final Order in Docket 11-00198. Given the fact these are not "future costs" incurred after the hearing and in no way "specifically

²³ Docket 11-00198, *Final Order*, August 21, 2012, p.16.

related to the flood” of May 1, 2010, and that they include charges for various other matters and are based on an arbitrary allocation method, granting BCU’s petition is not in the public interest.

RESPECTFULLY SUBMITTED,



RYAN L. MCGEHEE, BPR #25559
Assistant Attorney General
Office of the Attorney General and Reporter
Consumer Advocate and Protection Division
P. O. Box 20207
Nashville, TN 37202-0207
(615) 532-5512
ryan.mcgehee@ag.tn.gov

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. Mail or electronic mail on May 3, 2013, upon:

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

Henry Walker, Esq.
Bradley Arant Boult
Cummings, LLP
1600 Division St., Suite 700
Nashville, TN 37203



RYAN L. MCGEHEE