

**July 18, 2014**

**PETITION OF BERRY'S CHAPEL UTILITY, INC. TO INCREASE RATES AND CHARGES; TARIFF TO RECOVER THE COST OF FINANCIAL SECURITY; IMPLEMENTATION OF PASS THROUGHS FOR SLUDGE REMOVAL, ELECTRICITY, CHEMICALS AND PURCHASED WATER**

**DOCKET NO.**  
**14-00004**

**ORDER GRANTING CONSUMER ADVOCATE’S MOTION TO STRIKE &  
ALLOWING CONSUMER ADVOCATE TO CONDUCT SUPPLEMENTAL DISCOVERY  
AND FILE SURREBUTTAL TESTIMONY**

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (“Authority” or “TRA”) for a pre-hearing conference held on July 10, 2014, in the Executive Conference Room of the TRA Offices located at 502 Deaderick Street, 4<sup>th</sup> Floor, Nashville, Tennessee. The Parties were in attendance and represented as follows:

**Henry Walker, Esq.**, Bradley, Arant, Boulton, Cummings, LLP, Roundabout Plaza  
1600 Division Street, Suite 700, Nashville, TN 37203; and

**Wayne Irvin, Esq., and Vance Broemel, Esq.,** Office of the Attorney General,  
Consumer Advocate and Protection Division, 425 5<sup>th</sup> Ave. N, John Sevier Building, P.O.  
Box 20207, Nashville, TN 37243.

During the pre-hearing conference, the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General (“Consumer Advocate”) and Berry’s Chapel Utility, Inc. (“Berry’s Chapel” or the “Utility”) (collectively referred to as the “Parties”) presented oral argument on a *Motion to Strike the Testimony of Michael Knotts and Certain Sections of the*

*Rebuttal Testimony of Robert T. Buckner or Deem the Utility's Amendment of its Original Petition as an Amended or New Petition Requiring a Restart of the Ratemaking Process ("Motion to Strike")* filed by the Consumer Advocate on July 1, 2014. Berry's Chapel filed its *Response to Consumer Advocate's Motion ("Response")* on July 3, 2014.

#### **RELEVANT BACKGROUND**

As was acknowledged by Berry's Chapel in its *Response* and during the pre-hearing conference, the Utility has undergone considerable internal upheaval since the filing of its *Petition* on January 16, 2014. As shown in the docket file, on February 20, 2014, Mr. Charles Kildgore, a member and ratepayer of Berry's Chapel, filed in the docket file a notice that it was his intention, along with other members of Berry's Chapel, to call a special meeting of the Utility's members for the purpose of electing a new Board of Directors to take control of and run the Utility. Mr. Kildgore complained that such action was necessary because, among other things, the Utility's management had failed to follow its Bylaws, were paying exorbitant legal fees, and filing actions to increase rates that were not of benefit to the members. Further, Mr. Kildgore requested that the TRA postpone action on the *Petition* in this docket until after the special election.<sup>1</sup>

On March 4, 2014, Mr. Kildgore filed an additional notice that the Special Meeting had been scheduled on March 13, 2014. Further, Mr. Kildgore alleged that the Utility had violated certain TRA regulations and that it was his hope that, upon its election, the new board would have opportunity to positively impact utility operations going forward.<sup>2</sup> On March 13, 2014, Mr. Kildgore filed comments concerning the *Objections to the Advocate's Motion for Additional*

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<sup>1</sup> Letter and attachments to TRA General Counsel, Jean Stone, from Charles E. Kildgore (dated and filed on February 20, 2014).

<sup>2</sup> Letter and attachments to TRA Director, Jim Allison, from Charles E. Kildgore (dated and filed on March 4, 2014).

*Discovery and to the Advocate's Questions*, and the bylaws filed as support for those objections, by Berry's Chapel on March 5, 2014. In addition, Mr. Kildgore stated that the Utility had failed to respond to his continued requests for certain Utility records.<sup>3</sup>

Thereafter, on April 1, 2014, in what would be the first of several requests to revise and extend the procedural schedule filed by the Parties, jointly and individually, the Parties confirmed that a new Board of Directors had been elected by the members of Berry's Chapel during the March 13, 2014 meeting and requested a thirty-day continuance of the docket proceedings. The Hearing Officer granted the Parties' request for additional time so that they could consider and address the Utility's change in control, determine what effects the change might have on the *Petition*, and to file appropriate testimony concerning any such changes.<sup>4</sup> Following the initial continuance, although additional revisions were made to certain deadlines, the procedural schedule was recommenced in earnest. In accordance with the deadline for filing rebuttal testimony, Berry's Chapel filed the Testimony of Michael Knotts ("Knotts Testimony"), identified therein as the [new] President and Chairman of the Board of Directors of Berry's Chapel, and the Rebuttal Testimony of Robert T. Buckner ("Buckner Rebuttal Testimony") on June 25, 2014.

#### **MOTION TO STRIKE**

In its *Motion to Strike*, the Consumer Advocate asserts that the Knotts Testimony and certain portions of the Buckner Rebuttal Testimony do not constitute rebuttal testimony and are improper filings. According to the Consumer Advocate, the Knotts Testimony, in its entirety, and the Buckner Rebuttal Testimony, in pertinent part, do not reference or address, let alone

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<sup>3</sup> Letter to TRA Director, Jim Allison, from Charles E. Kildgore dated March 8, 2014 (filed March 13, 2014).

<sup>4</sup> See *Order Establishing Revised Procedural Schedule* (April 2, 2014); *Order Granting Joint Motion to Revise Procedural Schedule and Establishing 2<sup>nd</sup> Revised Procedural Schedule* (May 20, 2014); and *Amended Order Granting Extension of Time and Establishing 3<sup>rd</sup> Revised Procedural Schedule* (June 19, 2014).

rebut, the Direct Testimony of William H. Novak (“Novak Testimony”) filed by the Consumer Advocate on May 30, 2104. Instead, the Knotts Testimony withdraws nearly all of the relief originally requested in the Utility’s *Petition* except for the pass-through mechanism or surcharge to comply with TRA regulations concerning financial security. Moreover, now only four weeks from hearing date set in this matter, Berry’s Chapel seeks to include a new rate request for a “Capital Improvements Surcharge” and new issues concerning the operation and management of the Utility.

The Consumer Advocate contends that the late-timing of Berry’s Chapel’s decision to use the Knotts Testimony to revise and amend its *Petition*, withdrawing most of its previous requested relief and incorporating a new surcharge request, significantly undermines the investigation and discovery that has been conducted over the last five months by the Consumer Advocate and the Authority, and effectively moots all testimony filed previously in the docket file. The Consumer Advocate contends that the Utility’s actions effectively operates as a denial of procedural due process and prejudices its rights to investigate, discover, present and file meaningful pre-filed testimony, and adequately prepare for the July 22, 2014 hearing in this case. Further, that such action violates TRA Rule 1220-1-2-.16(5), which entitles any party to cross-examine witnesses who testify and to submit rebuttal testimony subject to the standards of admissibility and limitations of the Authority. In addition, the Consumer Advocate asserts that the requests now made by Berry’s Chapel are more appropriately reviewed by the Authority under the alternative ratemaking provisions in Tenn. Code Ann. § 65-5-103(d).

During the pre-hearing conference, the Consumer argued the substance of its written motion and again requested that the Knotts Testimony and portions of the Buckner Rebuttal Testimony be stricken from the record or, alternatively, that the testimonies be deemed as

amending the *Petition*, restarting the ratemaking review process, and resetting the time in which the Authority would consider Berry's Chapel's requests.

## **RESPONSE**

In its *Response*, Berry's Chapel asserts that the testimony it has recently filed reduces its rate request by half and that the Consumer Advocate should welcome, not oppose, such action. Further, although the amount of revenue requested in this case has gone down, the financial information and evidence of the Utility's need for additional revenue, about which the Consumer Advocate has ample opportunity and, in fact, has discovered, has not changed. It contends that its requests to include various customer fees and for a surcharge to comply with the TRA's financial security requirement, as requested in its *Petition* and direct testimony, remain unchanged. According to Berry's Chapel, the proposal in the Knotts Testimony simply designates that a portion of the increased revenue it has requested be earmarked for capital improvements.

Further, the Utility notes that the Consumer Advocate is and has been aware of the Utility's change in leadership and control and, therefore, should not be surprised by the information and proposals contained in the Knotts Testimony. Nevertheless, Berry's Chapel states that it does not object to the Consumer Advocate taking the depositions of Mr. Knotts and Mr. Buckner concerning the events described in the Knotts Testimony or the revised request for a surcharge for capital improvements. Finally, Berry's Chapel asserts that there is no legal basis for striking its proposal or dismissing the rate case, and asks that the Consumer Advocate's motion be denied.

During the pre-hearing conference, counsel for Berry's Chapel reiterated, in large part, the arguments presented in the *Response*. In addition, Utility counsel admitted that the

information and proposals in the Knotts Testimony are not rebuttal, and in fact, do constitute matters that are new to the evidentiary record in this case.<sup>5</sup> The Utility asserted that, because such information is new, it had offered to make its witnesses available for deposition. Regardless, the information contained in the Knotts Testimony is highly relevant to the Authority's decision in this case.<sup>6</sup> Further, Berry's Chapel contended that its proposal for a surcharge for capital improvements is a matter of rate design, which simply results in a reduction of its overall request for an increase in rates, and is not issue as to the Utility's financial need or revenue requirements.<sup>7</sup>

#### **FINDINGS AND CONCLUSIONS**

Under TRA Rule 1220-01-02-.16(1), the admissibility of evidence presented before the Authority is governed by Tenn. Code Ann. §§ 65-2-109 and 4-5-313. Among other things, these statutes make clear that the Authority is not strictly bound by the rules of evidence applicable in court of law, and may exercise discretion to "admit and give probative effect to any evidence that possesses such value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs."<sup>8</sup> Further, it is the regular practice of the TRA, consistent with TRA Rule 1220-01-02-.16(3), to require the parties in a contested case proceeding to file pre-filed testimony that conforms with all applicable statutes, rules, and orders.

Under the authority delegated by the panel, and consistent with the TRA's Rules, the Hearing Officer entered and, upon the requests of the Parties has revised several times, a procedural schedule in this docket. As with any schedule, the goals of the procedural schedule in

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<sup>5</sup> Transcript of Prehearing Conference, p. 20, lines 24-25, p. 21, lines 9-11, p. 25, lines 7-12 (July 10, 2014).

<sup>6</sup> Transcript of Prehearing Conference, p. 25, lines 7-12 (July 10, 2014).

<sup>7</sup> Transcript of Prehearing Conference, p. 25, lines 18-24 (July 10, 2014).

<sup>8</sup> Tenn. Code Ann. § 65-2-109(1); *see also* Tenn. Code Ann. § 4-5-313(1), which states "when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."

this matter have been to consistently and efficiently move the docket toward a final resolution while providing the Parties a reasonable and adequate opportunity to conduct discovery, file pre-filed testimony, and prepare for a hearing on the merits of the *Petition*.

The Hearing Officer understands that the election of a new Board of Directors and change in operating control, which occurred during the pendency of its *Petition*, presented an unexpected and somewhat unusual circumstance for the Utility that has, at times, created uncertainty and caused delay. Nevertheless, the time for Berry's Chapel to file direct testimony and introduce any new issues or requests has well-since passed. The inclusion of new matters in pre-filed rebuttal testimony exceeds the scope and purpose of such testimony, as contemplated by the Authority. Rather narrow, the purpose of pre-filed rebuttal testimony is to allow the petitioner an opportunity, in a clear written format, to refute, contradict, or explain any evidence that has been presented by an opposing party. "'Rebutting evidence' is that which tends to explain or controvert evidence produced by an adverse party. . . [and] includes 'any competent evidence which explains or is in direct reply to, or a contradiction of, material evidence' introduced by an adverse party.'"<sup>9</sup>

The Knotts Testimony and Buckner's Rebuttal Testimony, in relevant part, while effectively revising or withdrawing much of the relief requested in the *Petition*, fails to explain or controvert any of the evidence produced by the Consumer Advocate in the Novak Testimony. While these testimonies maintain the Utility's previous requests for certain fees (late payment, disconnection, reconnection, and new applications) and a surcharge for financial security, they also introduce new issues concerning the current operating structure, management, and control, of the Utility and add a new rate request styled as a surcharge for capital improvements. The new issues and rate request materially alter the *Petition*, and are more accurately characterized as

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<sup>9</sup> *Godbee v. Dimick*, 213 S.W.3d 865, 877-78 (Tenn. Ct. App. 2006) (internal citations omitted).


amending, or as an amendment to, the *Petition*. As such, they do not constitute rebutting evidence or rebuttal testimony, and are, therefore, untimely and improper.

Nevertheless, the Hearing Officer finds that striking the testimonies, as urged by the Consumer Advocate, is not reasonable. Therefore, to the extent that the Utility has presented new issues and a new rate request in the Knotts Testimony and Buckner's Rebuttal Testimony, the Hearing Officer further finds that procedural due process requires that the Consumer Advocate have an opportunity to investigate and conduct discovery and file pre-filed surrebuttal testimony on these new matters. Therefore, upon the foregoing, the Hearing Officer concludes that, insofar as noted and discussed herein, the *Motion to Strike* should be granted.

**IT IS THEREFORE ORDERED THAT:**

1) To the extent that new issues have been raised and a new rate request incorporated into this proceeding, which has thereby materially changed and amended the *Petition*, the *Motion to Strike the Testimony of Michael Knotts and Certain Sections of the Rebuttal Testimony of Robert T. Buckner or Deem the Utility's Amendment of its Original Petition as an Amended or New Petition Requiring a Restart of the Ratemaking Process* is granted.

2) The Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General shall be given a reasonable opportunity to conduct discovery and file pre-filed surrebuttal testimony on the new issues and new rate request raised Berry's Chapel Utility, Inc., in the Testimony of Michael Knotts and certain portions of the Rebuttal Testimony of Robert T. Buckner, filed on June 25, 2014.<sup>10</sup>

  
Kelly Cashman-Grams, Hearing Officer

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<sup>10</sup> In accordance with the verbal ruling on July 10, 2014, the Hearing Officer entered an *Order Establishing Amended Procedural Schedule* on July 14, 2014. Upon an additional request from the Consumer Advocate, the Hearing Officer entered a *Second Amended Procedural Schedule* on July 17, 2014.