

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

IN RE:)
)
PETITION OF BERRY'S CHAPEL) **DOCKET NO. 14-00004**
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)

**CONSUMER ADVOCATE'S RESPONSE IN OPPOSITION
TO BERRY'S CHAPEL'S MOTION TO LIMIT INTERVENTION OF THE
CONSUMER ADVOCATE**

Berry's Chapel Utility, Inc. (the "Utility") has requested the Hearing Officer to limit the Consumer Advocate's intervention in this Docket.¹ As summarized in its Motion, the Utility states that the Consumer Advocate represents the interests of Tennessee consumers and, since the Utility's consumers are in control of the Utility, the Consumer Advocate's intervention should be limited. As support, the Utility provides a brief history of the composition of the Utility's board of directors² and asserts that the "utility is now owned by and controlled by its members, all of whom are utility customers." From that, the Utility argues that the Consumer

¹ See Motion to Limit Intervention of Consumer Advocate ("Motion") filed July 10, 2014 in this Docket.

² For clarity, the previous board of directors consisting of John Ring, Tyler Ring, and James Ford will be referred to as the "old Board" and the board of directors elected on or about March 17, 2014 (as stated in the Motion) will be referred to as the "new Board" in this Response.

Advocate's "intervention is no longer necessary to protect the interest of the company's customers." The Utility goes on to argue that the Consumer Advocate no longer meets the statutory requirements for intervention unless the Board does not represent the members or customers are prevented from becoming members. For the reasons set forth below, the Consumer Advocate opposes the requested limitation of its statutory intervention.

First of all, the plain language of the statutory authority creating the Consumer Advocate states:

(b)(1) The consumer advocate has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division may, with the approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the authority or any other administrative, legislative or judicial body and initial such proceeding.....³

This means that if the Attorney General approves intervention or participation in a matter involving a public utility, the Consumer Advocate has the authority and duty to do so.⁴

³ Tenn. Code Ann. § 65-4-118(b)(1).

⁴ It is important to note that this statutory authority also authorizes the Consumer Advocate the right to appeal decisions, the right to seek information and the right to enter into confidentiality agreements. See Tenn. Code Ann. 65-4-118(b)(2),(c) and (d). General consumers without legal representation would not individually have this authority and would need to obtain legal representation to participate in a contested rate case which they likely could not afford. Thus, their only option would be to participate in public comment without access to the necessary information to address specific requests made by the company only available to parties that enter into protective orders.

The Consumer Advocate's statutory right is in no way limited by the vote of the Utility's members to operate as a cooperative, because the Utility is not a cooperative under Tennessee law and continues to be regulated by the Tennessee Regulatory Authority ("Authority" or "TRA").⁵ By statute, the Consumer Advocate has the "duty and authority to represent the interests of Tennessee consumers of public utility services[.]"⁶ with intervention being one means to do so.⁷ The Utility's customers have been and continue to be consumers of public utility services. The Utility offers no factual or legal analysis or support to show that any of the Utility's customers are not "consumers" under Tenn. Code Ann. § 65-4-118(b)(1).⁸

It also is worth noting that since the Utility's customers could have become Utility members before March 17, 2014, the Utility's assertion that the election of the new Board on that date represents a change in the relationship of customers or Utility members to the Utility is without merit – and both the old Board and new Board were to be elected by the members.⁹ With respect to the Consumer Advocate's intervention, the Utility offers no authority under which the Consumer Advocate's intervention has been limited after unlimited intervention has been granted. And the Utility offers no authority for its apparent view that a change in a board of directors of the Utility and the adoption of cooperative operating principles makes a difference under Tennessee law dealing with interventions. On this basis,

⁵ As admitted by Mr. Knotts in his testimony filed on June 24, 2014, at page 13, lines 7-17.

⁶ Tenn. Code Ann. § 65-4-118(b)(1).

⁷ See id. The Utility nowhere questions the original unlimited intervention up to the time of filing the Motion.

⁸ The Utility admits that the Utility's consumers in this Docket are included in the definition of consumers in Tenn. Code Ann. § 65-4-118(b)(1). Utility's Motion, page 1, paragraph 2.

⁹ As admitted in the Utility's Motion, page 1, paragraph 3.

the Consumer Advocate requests that the Utility's Motion be denied.

In response to the Utility's arguments, the Consumer Advocate points out that the Utility presents a false choice when it argues for the limitation of the Consumer Advocate's intervention based on the new Board representing the members and customers having the opportunity to become members. The true issue here is whether the Tennessee Consumer Advocate intervention statute has been followed and whether there is a statutory or case law basis for changing the Consumer Advocate's intervention under that statute – here, the Consumer Advocate has intervened and there is now no basis to limit that intervention.

Having said that, to address the Utility's thin analysis, the Utility's argument that "consumers are now in control of the utility" does not provide a legal basis to limit the Consumer Advocate's intervention. And the only facts offered by the Utility to support their argument -- a change in the board of directors of the Utility and a vote by the members of the Utility to operate under cooperative principles – do not support the Utility's assertion and, rather than undercutting the intervention of the Consumer Advocate, essentially support the unlimited intervention of the Consumer Advocate.

With respect to its assertion about control by consumers resulting from a change in the Board, the Utility fails to provide information that would be required to evaluate control.¹⁰ The Motion does not state the number of Utility customers,

¹⁰ The Utility's assertion that control is only now in the hands of consumers is undercut by the Utility's own statement that "a number of customers had become members of [the Utility]" even before the election of the new Board. Motion, page 1, paragraph 3. Since the Consumer Advocate's intervention was granted before the change to the new Board and customers could become members

the number of Utility members, the number of members' votes required to constitute a quorum, the number of members' votes required to pass a resolution, or the number of members' votes required to elect a member to the Board. And even on an operational level, the Utility provides no evidence to evaluate control -- for example, the Utility fails to state whether the management contract with Utility Consultants, Inc., a company controlled by Tyler Ring has changed. Thus, far from supporting the assertion that the consumers are in control,¹¹ the Motion raises significant questions -- without providing answers -- about who actually is in control.¹² Since the Utility provides no support for its assertion that the consumers are in control, that aspect of its argument fails.

In addition, the Utility offers no meaningful support for its assertion that the adoption of cooperative principles results in consumers being in control. The Motion does not provide the legal effect of voting to operate under cooperative principles or even how operating under cooperative principles would be different from how the Utility was operated under prior approaches to the Utility's operations.¹³ Thus, the Motion again raises significant questions -- without providing answers -- about the effect of the adoption of cooperative principles. Since the Utility provides no

during the period before the new board was elected, it would seem, even from the Utility's perspective, that there was no change in facts to justify limiting the Consumer Advocate's intervention based on a change in the board of directors -- in other words, the underlying facts have not changed since the intervention was granted.

¹¹ It should be noted again -- see the discussion above about the Utility not qualifying as a cooperative -- that only by qualifying as a cooperative, even if the Utility were controlled by its consumers, there would be no basis under Tennessee law for removing the Utility from TRA jurisdiction or for a limitation under the intervention rules.

¹² A reasonable inference, from a review of the Utility's Bylaws, is that a relatively small number of members who decide to vote (non-member customers are not allowed to vote) may elect a Board -- this would concentrate control in a small number of individuals rather than providing even a semblance of control to the rest of the Utility's consumers. See also footnote 15 in this Response.

¹³ See the discussion above about the Utility not qualifying as a cooperative under Tennessee law.

meaningful support for its assertion that adoption of cooperative principles results in consumers being in control, that aspect of its argument fails.

Rather than undercutting the need for an unlimited intervention by the Consumer Advocate, the foregoing failures to address or answer questions raised by its Motion and related analysis, in combination with information in this Docket and on the Utility's website, demonstrate the need for a representative for the all of the Utility's consumers (both members and customers who are not members). The new Board at times appears to be not much of a change from the old Board in terms of adequately representing all of the Utility's consumers. For example, the new Board appears willing to not disclose important information to consumers¹⁴ and to make it more difficult for even Utility members to vote on Utility matters.¹⁵ Further, the Utility in the Motion itself misrepresents the position of the Consumer Advocate with respect to its representation of the Utility's consumers.¹⁶ By way of contrast,

¹⁴ See, for example, Mr. Knotts' letter to the Utility's ratepayers, dated June 24, that omits any statement about the amendment in this Docket of the Utility's tariff for application, disconnect, reconnection, and late payment fees, which are clearly intended by the Utility as a rate increase for additional operating revenue, and otherwise provides inadequate information to ratepayers with respect to support for the changes to the original petition in this Docket made by Mr. Knotts testimony and Mr. Buckner's rebuttal testimony. See Testimony of Michael Knotts, Appendix Two.

¹⁵ See Bylaws of Berry's Chapel Utility, Inc. ("Bylaws") page 3, section 2.16 (changing quorum requirement from 5% to 10% of all members for the transaction of business at meeting of the members), and page 4, section 2.17 (amending Voting Requirements section to prohibit proxy voting), as set out on the Utility's website www.harpethcoop.com as of the date this Response is filed. These restrictions on voting rights, by limiting proxy rights and increasing the quorum required to conduct business at a Utility members' meeting, appear to be a step by the new Board in the direction of what Mr. Knotts complained about with respect to the old Board – that the old Board had become self-perpetuating. See Motion, page 1, paragraph 3. Note that these restrictions, which were adopted by the new Board without member approval on July 14, 2014, would concentrate and potentially perpetuate power in the new Board rather than opening up the Utility to greater participation by all consumers. Bylaws, page 12.

¹⁶ The Utility states in its Motion that the Consumer Advocate "implicitly recognizes that his client has changed by questioning whether the new board '*would represent customers who are not members.*'" Motion page 2 footnote 1 (italics added). The Utility, as it uses the italicized phrase, misrepresents the Consumer Advocates position by leaving out the full quote, which states:

the Consumer Advocate works to assure that all of the Utility's consumers are represented fairly.

The false choice presented by the Utility appears to serve as an attempt to muddy the water about Tennessee's statutory Consumer Advocate intervention law and in the course of that muddying to create some artificial and unsupported new limitation on interventions. It further appears to credit the change in the board of directors with changes at the Utility that there is no evidence have occurred and – even taking the Utility on its bare assertions that such changes have occurred, the Utility offers no evidence of the effects claimed by the Utility – with those claims being even more unfounded upon a closer analysis of the evidence in this Docket that demonstrates that at times the new Board appears to not be much of a change from the old Board in terms of representing customers or Utility members.

By way of contrast, in this Docket, the Tennessee Consumer Advocate intervention statute has been followed and there is no statutory or case law basis for changing the Consumer Advocate's intervention under that statute – and the Consumer Advocate has demonstrated its positive, meaningful, and fair representation of all Utility consumers (whether members or not). On the basis of the foregoing, the Consumer Advocate respectfully requests that the Utility's Motion be denied.

"Members of the cooperative would presumably be represented by Mr. Knotts and the other Board members, but left unsaid by Mr. Knotts is who would represent customers who are not members (for whatever reason) -- a role filled in this Docket by the Consumer Advocate on behalf of all customers (whether members or not)." Consumer Advocate Motion to Strike filed July 1, 2014, page 7. Thus, the language of the Consumer Advocate's motion not only directly contradicts the Utility's argument, but emphasizes the need for continued unlimited intervention of the Consumer Advocate.

RESPECTFULLY SUBMITTED,



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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 upon:

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This the 22nd day of July, 2014.



WAYNE IRVIN