

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

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IN RE:

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.  
14-00001

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**ORDER GRANTING THE CONSUMER ADVOCATE'S MOTIONS  
FOR LEAVE TO FILE A RESPONSE TO OBJECTIONS OF BERRY'S CHAPEL  
& FOR LEAVE TO ASK ADDITIONAL DISCOVERY REQUESTS**

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This matter is before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") upon a *Motion for Leave to Ask Additional Discovery Requests* and supporting Memorandum ("*Motion*") filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General ("Consumer Advocate") on February 27, 2014. On March 5, 2014, Berry's Chapel Utility, Inc. ("Berry's Chapel" or the "Utility") filed its *Objections to the Advocate's Motion for Another Round of Discovery and to the Advocate's Questions* ("*Response*") and, on March 10, 2014, a *Correction and Amendment to Filing of March 5, 2014* ("*Amended Response*"). In addition, on March 10, 2014, the Consumer Advocate filed a *Motion for Leave to File a Response to Objections of Berry's Chapel* with its Response attached as Exhibit A ("*Reply*").

In accordance with TRA Rule 1220-1-2-.11(5), the Consumer Advocate filed its *Motion* requesting permission to serve upon Berry's Chapel additional discovery requests concerning the

process for and authorization of Berry's Chapel to file its *Petition* for a rate increase in this docket. In support of its *Motion*, the Consumer Advocate states that the role of the Utility's members in authorizing or directing Berry's Chapel to file its *Petition* was recently raised in a letter filed with the Authority on February 20, 2014 by Charles Kildgore, a customer and member of Berry's Chapel. Further, Mr. Kildgore has proposed a special meeting of the Utility members and board on March 13, 2014, which might impact the proceedings in this docket. Therefore, in order to appropriately develop the record in this matter, the Consumer Advocate requests permission to propound and, attaches as Exhibit A to its *Motion*, additional six (6) discovery questions for the purpose of obtaining relevant information concerning these matters.

In its *Response*, Berry's Chapel objects to the Consumer Advocate's additional discovery questions. First, Berry's Chapel asserts that the additional questions, asked after the deadline for the first round of discovery and before the second round scheduled for April 25, 2014, constitutes an additional round of discovery, which may be asked during the second round of discovery. As such, a departure from the established procedural schedule is not warranted.<sup>1</sup> Second, aside from the first question, to which Berry's Chapel provides a substantive answer in its *Response*, Berry's Chapel contends that the questions sought to be propounded by the Consumer Advocate pertain to the Utility's corporate structure and governance, and are neither relevant to the determination of rates nor are issues within the TRA's jurisdiction to resolve.<sup>2</sup> Finally, in its *Amended Response*, Berry's Chapel asserts that its charter and bylaws, as amended in 2011, state that the Board of Directors controls the Utility's operations, and that the current Board of Directors shall continue to serve in such capacity until the first annual meeting of members, at which time the members may elect Directors. In addition, Berry's Chapel states that

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<sup>1</sup> *Response*, pp. 2-3 (March 5, 2014).

<sup>2</sup> *Id.* at pp. 3-4.

the first annual meeting has not yet occurred, and that the current Board of Directors has authority to fix the date of the first annual meeting of members and, therefore, to control the timing of the transition to a member-elected Board of Directors. Finally, Berry's Chapel states that upon conclusion of the rate case proceeding in this docket and resolution of other pending regulatory matters, the current Board of Directors intends to call the first annual meeting. As such, the Consumer Advocate's proposed discovery requests as to the role or authority of Utility members to authorize or direct the filing of the *Petition* have no relevance in this docket.<sup>3</sup>

In its *Reply*, the Consumer Advocate states that the Utility's current corporate charter and by-laws grant members with substantial rights, including the election of the Board of Directors. As such, the Consumer Advocate contends that its questions, which seek identification of the number and name of members and directors, are relevant to determine whether the by-laws have been followed and adhered to by Berry's Chapel and that the Utility's management has reliably and properly exercised its authority. Further, responses to its requests are relevant and helpful to determine the criteria for membership and who the members of the non-profit utility are, which are related to issues concerning management of the utility and service quality and are properly for the TRA's consideration in this rate proceeding. In addition, in light of the member's meeting proposed for March 13, 2014, the Consumer Advocate reiterates that the information it has requested should be provided as soon as possible.<sup>4</sup>

## **FINDINGS & CONCLUSIONS**

Under TRA Rule 1220-1-2-.11(1), when informal discovery is not practicable, any party to a contested case proceeding may petition for a discovery schedule and, thereafter, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure. In

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<sup>3</sup> *Amended Response* (March 10, 2014).

<sup>4</sup> *Reply* (March 10, 2014).

addition, TRA Rule 1220-01-02-.11(5)(a) prohibits any party from propounding more than forty discovery requests on any other party without first obtaining permission of the Authority:

No party shall serve on any other party more than forty (40) discovery requests including sub-parts without first having obtained leave of the Authority or a Hearing Officer. Any motion seeking permission to serve more than forty (40) discovery requests shall set forth the additional requests. The motion shall be accompanied by a memorandum establishing good cause for the service of additional interrogatories or requests for production. If a party is served with more than forty (40) discovery requests without an order authorizing the same, such party need only respond to the first forty (40) requests.

Under the Rule, any motion for additional discovery must establish good cause and set forth or include the additional requests sought to be served. The purpose of discovery is to facilitate the mutual exchange of information, obtain knowledge of all relevant facts prior to trial or hearing, to do away with trial by ambush, and to generally rid trials of an element of surprise that often leads to results based not upon the merits but upon unexpected legal maneuvering.<sup>5</sup>

The Rules of Civil Procedure permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.<sup>6</sup> Through these instruments, a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”<sup>7</sup> The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.<sup>8</sup> The Tennessee Court of Appeals has commented on relevancy as follows:

Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase “relevant to the subject matter involved in the pending action” has been construed “broadly to

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<sup>5</sup> See, *Strickland v. Strickland*, 618 S.W.2d 496 (Tenn. App. 1981); *Pettus v. Hurst*, 882 S.W.2d 783 (Tenn. App. 1993).

<sup>6</sup> Tenn. R. Civ. P. 26.01.

<sup>7</sup> *Id.* at 26.02(1).

<sup>8</sup> *Id.*

encompass any matter that bears on or that reasonably could lead to [an]other matter that could bear on, any issue that is or may be in the case.”<sup>9</sup>

Further, parties may learn of information related to books, documents or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.<sup>10</sup> However, Tennessee’s rules do provide some limitations. Rule 26.02 permits a court to limit discovery under certain circumstances, such as undue burden, and Rule 26.03 permits a court to issue protective orders as justice requires.<sup>11</sup>

Upon review and due consideration, the Hearing Officer finds that the *Motion* complies with TRA Rule 1220-01-02-.11(5)(a) and that the information requested is relevant and reasonably related to issues that may be considered by the TRA in this docket. Further, in light of the actions of certain members of the Utility in calling for a meeting, which proposed to be held on March 13, 2014, it is reasonable that responses to discovery be provided sooner rather than later in these proceedings. Therefore, the Hearing Officer concludes that good cause exists for allowing the Consumer Advocate to propound the additional discovery questions requested in this matter, which are attached as Exhibit A to its *Motion*, and that Berry’s Chapel should be required to provide responses to those discovery requests without unnecessary delay.

**IT IS THEREFORE ORDERED THAT:**

1) The *Motion for Leave to File a Response to Objections of Berry’s Chapel*, filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General on March 10, 2014, is granted.

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<sup>9</sup> *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).

<sup>10</sup> Tenn. R. Civ. P. 26.02(1).

<sup>11</sup> *Id.* at 26.02 & .03.

2) The *Motion for Leave to Ask Additional Discovery Requests*, filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General on February 27, 2014, is granted.

3) Berry's Chapel Utility, Inc., shall answer the additional discovery questions set forth in Exhibit A to the *Motion for Leave to Ask Additional Discovery Requests*, and file a copy of its responses in the docket file, no later than **March 17, 2014**.

  
Kelly Cashman-Grams, Hearing Officer