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December 18, 2006

VIA HAND DELIVERY
Sarah Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37219

Re: Joint Petition of Kingsport Power Company d/b/a
AEP Appalachian Power and Weyerhaeuser Company
For Approval of a Special Contract
Docket No. 06-00301
Date Response to the TRA Staff from Weyerhaeuser Company

Dear Chairman Kyle:

Enclosed you will find the original and thirteen copies of Weyerhaeuser Company's response to the data request of the staff dated December 8, 2006 from Kelly A. Cashman-Grams in the above referenced docket.

Please contact me if you have any questions or need additional information.

Sincerely,

D. Billye Sanders

D. Billye Sanders
Attorney for Weyerhaeuser Company

cc: William C. Bovender, Esq.
James R. Bacha, Esq.
Bob Kenney

Weyerhaeuser Company's Response to Data Request from the TRA Staff
dated December 8, 2006
Docket No. 06-00301

1. Upon careful review, we have determined that to properly effectuate the Supplemental portion of the Special Contract (Exhibit "B" to the *Joint Petition*), Weyerhaeuser Company may be required to obtain a Certificate of Convenience and Necessity ("CCN") from this Authority. If you disagree, please provide a complete and thorough response detailing the factual and legal bases for your contention.

RESPONSE: It is the position of Weyerhaeuser Company ("Weyerhaeuser") that Weyerhaeuser does not need a Certificate of Convenience and Necessity ("CCN") in order to effectuate the supplemental portion of the Special Contract (Exhibit "B" to the *Joint Petition*), because Weyerhaeuser is not a public utility pursuant to T.C.A. § 65-4-104 and Weyerhaeuser's sale of power into the wholesale market is not governed by the Tennessee Regulatory Authority.

A public utility is defined as:

> 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.*

T.C.A. § 65- 4-101 *(emphasis added).*

According to the plain language of T.C.A. §65-4-101, to satisfy the statutory definition of a public utility, a company providing power must be dedicated to the public use under privileges, franchises, licenses or agreements granted by the state or any political subdivision thereof.

In the present case, Weyerhaeuser does not satisfy the statutory definition of a public utility. Weyerhaeuser's power generation is not dedicated to the public use and Weyerhaeuser will not be owned or operated under a franchise, license or agreement with the state or a political subdivision of the state.

A public use is synonymous with a public utility. Tennessee's courts have opined that a public use is "anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities." *Memphis Natural Gas Co. v. McCanless Commissioner of Finance and Taxation,* 194 S.W. 2d. 476,479 (Tenn. 1946) *quoting In re Stewart v. Great Northern Ry. Co.,* 68 N.W. 208 (Minn).[1] Furthermore, a public utility is a business that supplies services which the public has a legal right to demand and receive, has dedicated its property to the public use, or is so affected by the public interest that it may be regulated for the public good. *Federal Express Corp v. Tennessee State Board of Equalization,* 1985 Tenn. App. Lexis 2850 *8 (Tenn. Ct. App. 1985); *See Johnson v. City of Milligan Utility Dist., 276 S.W. 2d 748 (Tenn. 1954); Nashville Water Co. v. Dunlap, 138 S.W. 2d. 424 (Tenn. 1940); State ex. Rel. Pruzan v. Redman, 374 P.2d. 1002 (1962).*

In an informal TRA Staff opinion dated, September 16, 1998 (the "1998 Opinion"),[2] the TRA General Counsel outlined factors that the TRA considers in determining whether a company is a public utility. The General Counsel stated that the facts of a particular case are controlling and cited *Memphis Natural Gas Co. v. McCanless,* Id., as guidance for determining whether a company is a public utility. This case supports Weyhaeuser's position that it is not a public utility. The *McCanless* case involved a company that was providing natural gas to retail customers in the city of Memphis pursuant to a contract with the city of Memphis. Although the court stated that the term "public use" is a flexible one, it also stated that sale of a regulated commodity to the ultimate consumer is such an operation as is affected by and dedicated to the public use. Id. Weyerhaeuser will only sell power to PJM Interconnection ("PJM") or into the wholesale market. PJM is a regional transmission organization ("RTO"), which buys power in the competitive wholesale market, manages wholesale power and sells wholesale power to local distribution companies. Weyerhaeuser will not sell its power to the general public, i.e., retail customers/end users, and will not hold itself out as a common carrier. Therefore, Weyerhaeuser's power is not dedicated to a public use.

In a later informal opinion issued by the TRA Staff on April 22, 2002 (the "2002 Opinion")[3], TRA Counsel again provided guidance regarding the factors

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[1] A public use has been defined as something that is "of or belonging to the people at large, relating to or affecting the whole people of a state, nation, or community at large." *Cawker v. Myeer,* 133 N.W. 157 (Wis. 1911) *quoting* Century Dictionary.

[2] Copy attached as Appendix 1.

[3] Copy attached as Appendix 2.

that the TRA would consider in determine whether a company was a public utility. The company in question was engaged in cogeneration and sold excess electric power and steam to one customer. The TRA Counsel stated that the sale to one retail customer did not necessarily mean the company would be considered a public utility, if the business were not dedicated to the public use. The analysis stated that the owner's intent not to serve the general public would be a key factor in determining whether the entity's service was dedicated to the public use.

In the 2002 Opinion, the company in question was providing power to one retail customer and the staff concluded that the company would likely not be considered a public utility by the TRA because it was not the intent of the company to serve the general public. In Weyerhaeuser's case, its intent is even further removed from serving the general public because it will not serve any retail customers.

Furthermore, the sale to PJM is interstate commerce, which is outside the scope of the jurisdiction of the TRA.

Finally, because, Weyhaeuser is not seeking to provide service to the general public, no franchise or license is needed from the state or a political subdivision.

December 18, 2006

Appendix 1

TENNESSEE REGULATORY AUTHORITY

460 James Robertson Parkway
Nashville, Tennessee 37243-0505

September 16, 1998

Guilford F. Thornton, Jr., Esq.
Stokes & Bartholomew
424 Church Street, 28th Floor
Nashville, TN 37219-2386

RE: Brownsville Power I, LLC

Dear Mr. Thornton:

By letter dated August 3, 1998, you have inquired whether this agency can concur with your opinion that Brownsville Power I, LLC ("Brownsville"), need not secure a Certificate of Public Convenience and Necessity ("CCN") from the Tennessee Regulatory Authority (the "Authority") in order to conduct business in Tennessee. In your letter to me, you indicated that you have previously spoken about this issue with other Authority staff members and that "[t]heir collective input" contributed to your legal conclusion that Brownsville was not a public utility within the context of Tenn. Code Ann. § 65-4-101 et seq. My communications with the persons indicated in your letter did not reveal that a conclusion had been reached by any member of the Authority staff on the issue presented. Rather, the staff intended to provide either you or your representative, as the case may be, with general information about the characteristics of those entities that have been previously recognized by the Authority as being subject to the statutory CCN requirements.

This letter supersedes any prior communications, either oral or written, that may have been provided to you, or your representative, by any member of the Authority's staff in connection with this matter. As you are aware, your letter request has not been interpreted by the Authority as a Petition for Declaratory Relief, and any deliberations and concluding opinions of the Authority's Directors on this matter are reserved for further

proceedings.

The Authority has the power to regulate all public utilities that fit the definition of "public utility" within the context of Tenn. Code Ann. § 65-4-101, and are not expressly exempt thereunder. Such public utilities fall within the mandate of Tenn. Code Ann. § 65-4-201 and are required to obtain a certificate of public convenience and necessity prior to the "construction, establishment and operation" of its utility service within Tennessee. The activities contemplated by Brownsville may not, under the limited circumstances described in your letter, presently constitute a public utility subject to the general jurisdiction of the Authority; however, be advised that just as Brownsville's proposed business plan arose out of a changing industry climate responding to deregulation, it is well recognized that the term "public use" is "flexible" and expands "with the growing needs of a more complex social order." Memphis Natural Gas Co. v. McCanless, 194 S.W.2d 476, 479 (1946).

Under Tenn. Code Ann. § 65-4-104, the Authority is granted the right to exercise "general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary to carry out the provisions of this chapter." Public utility is further defined under Tenn. Code Ann. § 65-4-101 as:

> (a) "Public utility" includes 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 herein defined shall not be construed to include the following (hereinafter called nonutilities):
>
> (1) Any corporation owned by or any agency or instrumentality of the United States;
>
> (2) Any county, municipal corporation or other subdivision of the state of Tennessee;

> (3) Any corporation owned by or any agency or instrumentality of the state;
>
> (4) Any corporation of 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);
>
> (5) Any cooperative organization, association or corporation not organized or doing business for profit;
>
> * * *

Under the statutory definition of public utility, the Authority considers, among other things, whether the company at issue could reasonably be construed as a common carrier and whether its utility service is "affected by and dedicated to the public use, under privileges, franchises, licenses or agreements, granted by the state or by any political subdivision thereof." It is well accepted that common carriers are among those who fall subject to the Authority's jurisdiction. Memphis Natural Gas Co. v. McCanless, 194 S.W.2d 476 (1946) (finding that "Code Section 5448, defines a public utility, for the purpose of control and regulation by the commission, as including common carriers of gas 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). It is also clear that the sale of a regulated commodity to the ultimate consumer is such an operation as is affected by and dedicated to the public use. See id. at 480.

Instead of focusing on whether a business entity characterizes itself as either a private carrier or common carrier, Tennessee courts have determined that the facts of a particular case control whether a business operation may be classed as that of a public utility. Johnson City v. Milligan Utility District, 276 S.W.2d 748 (Tenn. Ct. App. 1954). Generally, "anything which will satisfy a reasonable public demand for . . . transmission of intelligence or commodities (In re Stewart v. Great Northern Ry. Co., 65 Minn. 515, 68 N.W. 208 . . .), and of which the general public, under reasonable regulations, will have a definite and fixed use, independent of the will of the party in whom title is vested, would

be a public use." McCanless, 194 S.W.2d at 479. Once an activity goes "beyond the mere sale to a distributor" of a commodity in interstate commerce, it may fall within the statutory definition of public utility. Id. at 480.

The information provided in your letter indicates that the only sales that Brownsville will engage in will be interstate. If this is the case, then jurisdiction may not reside in this agency but instead in the federal government. This letter states no opinion with respect to the applicability of any federal statutes or regulations. Likewise, this letter does not address the application of statutes or regulations of any other state to Brownsville's proposed activities.

The information provided herein is not intended to be taken as legal advice or counsel to either you or your client; nor is such information binding upon the Authority. It is hoped that the information provided will assist you in understanding some of the legal principles the Authority considers when it evaluates whether it has jurisdiction in a given matter. The Authority reserves the right to enforce its statutory authority to the fullest extent of the law.

Sincerely,

Richard Collier

Richard Collier
General Counsel

xc: Carla Fox, Counsel
Glynn Blanton, Chief, Gas Water & Electric Division
Hal Novak, Manager, Gas, Water & Electric Division
Chris Klein, Ph d Chief, Economic Analysis Division
K. David Waddell, Executive Secretary

Appendix 2

TENNESSEE REGULATORY AUTHORITY

460 James Robertson Parkway
Nashville, Tennessee 37243-0505

April 22, 2002

BY FACSIMILE

D. Billye Sanders, Esq.
Waller, Lansden, Dortch & Davis
511 Union Street, Suite 2100
Nashville, Tennessee 37219

Dear Ms. Sanders:

This letter is in response to our telephone conversation on April 9, 2002 during which you inquired whether, under Tennessee law, a cogeneration facility would be considered a "public utility" subject to regulation by the Tennessee Regulatory Authority. As I understood your statement of the facts, the facility will (1) generate electric power and steam which it will consume itself, sell at wholesale, or both and (2) sell the excess electric power and steam it produces to a single retail customer. Your question is in regard to whether the second activity will bring the facility within the definition of "public utility."

Tenn. Code Ann. § 65-4-201(a) defines "public utility" as

> 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 subdivisions thereof.

Subsections (1) through (9) of Tenn. Code Ann. § 65-4-201(a), as well as Tenn. Code Ann. § 65-4-201(b), provide exceptions to this definition. Such exceptions are classified as "nonutilities" on the basis of the form of ownership of the utility. Assuming that the ownership of the facility in question does not render it a "nonutility," the question focuses on the type of service provided and whether the facility is "affected by and dedicated to the public use." The type of utility service the facility will provide brings it within the definition of "public utility." Tenn. Code Ann. § 65-4-201(a) specifically lists

"electric light" and "power." This section also lists "heat," as well as "any other like system," and thus steam falls with the statutory definition as well.

A more difficult question arises with regard to the number of customers. Tenn. Code Ann. § 65-4-201(a) sets no minimum number of customers for a public utility. In *Cawker v. Meyer*, 133 N.W. 157, 159 (Wis. 1911), the Wisconsin Supreme Court, construing a statute similar to Tenn. Code Ann. § 65-4-201(a), held that "whether or not the use is for the public does not necessarily depend upon the number of customers." The *Cawker* court even goes so far as to say that "there may be only one [customer], and yet the use be for the public." *Id.* The fact that a company serves its customers only through private contracts, and not through a general rate tariff, has been held not to remove the company from "public utility" status. *Natural Gas Service Co. v. Serv-Yu Cooperative, Inc.*, 219 P.2d 324, 327 (Ariz. 1950). Nor does the contention that the company makes its service available to only a limited segment of the public, and not to any member of the public at large who demands service, automatically prevail against a finding that the company is a public utility. *Iowa State Commerce Comm'n v. Northern Natural Gas Co.*, 161 N.W.2d 111, 116 (Iowa 1968).

Courts have stated that the determination whether a facility is "dedicated to the public use" is "flexible," *Great Falls Power Co. v. Webb*, 133 S.W. 1105, 1107 (Tenn. 1911), and is to be made on a case-by-case basis depending on the particular facts and circumstances. *Cawker*, 133 N.W. at 159. Nevertheless, some guidance can be found in the courts' fairly strong agreement that the company's intent can be indicative of whether or not it is a public utility. *Cawker*, 133 N.W. at 159, *Serv-Yu*, 219 P.2d at 326.

The court in *Cawker* states, for example, that the fact that a company at present serves only a small number of customers does not mean that it is not a public utility, if the company's intent is to extend its service to the broader public. *Cawker*, 133 N.W. at 159. Applying the question of intent, the court found that a plant that supplied power to the plant owner's tenants and "incidentally" to "a few neighbors" was not a public utility. *Id.* The court noted, however, that "[s]hould plaintiffs . . . enlarge their field of service, it is by no means certain that they would remain exempt from the operation of the law. And, having come within its provisions, they would be required, to the extent of the capacity of their plant, to serve any one making a demand upon them, under such regulations as the Railroad Commission might lawfully prescribe." *Id.*

Perhaps this analysis, based on the facts we discussed, will provide some guidance as to the way in which a determination would be made under Tennessee law whether the facility in question is a public utility by virtue of the sale of its excess electric

power and steam to a single retail customer. It would appear that neither a small number of customers nor service pursuant to private contracts exempts a company from public utility status, and these factors are in any case not as important as the question of the intent of the owner with regard to the utility's output. Thus, if the owner's intent at present is to continue serving only a single customer, the facility would likely be held not to be "dedicated to the public use," and it would be less likely to be classified as a public utility under Tenn. Code Ann. § 65-4-201(a). If, however, the intent at present is to make the facility's output available to the public, or if the future actions of its owner, such as expanding the facility's capacity or accepting additional customers, indicates a change toward dedication to the public use, the facility would be more likely to be considered a public utility.

Sincerely,

Jon Wike

Jon Wike
Counsel