

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**December 07, 2015**

<b>IN RE:</b>	)	
	)	<b>DOCKET NO.</b>
<b>PETITION OF KINGSPORT POWER COMPANY</b>	)	<b>15-00093</b>
<b>D/B/A AEP APPALACHIAN POWER FOR A</b>	)	
<b>GENERAL RATE INCREASE</b>	)	

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**ORDER GRANTING INTERVENTION TO SUNRUN INC. AND  
THE ENERGY FREEDOM COALITION OF AMERICA  
SUBJECT TO CERTAIN LIMITS AND CONDITIONS**

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This matter came before the Hearing Officer of the Tennessee Regulatory Authority (“Authority” or “TRA”) during a status conference held on October 28, 2015 to consider, among other things, the petitions to intervene filed in the docket file. Along with the petitioner, Kingsport Power Company d/b/a AEP Appalachian Power (“Kingsport”), the following parties attended the status conference and also filed petitions to intervene: the Consumer Protection and Advocate Division of the Office of the Tennessee Attorney General (“Consumer Advocate”), East Tennessee Energy Consumers (“ETEC”), Sunrun Inc. (“Sunrun”), and the Energy Freedom Coalition of America (“EFCA”) (collectively, the “Parties”).<sup>1</sup>

**BACKGROUND**

Kingsport is a public utility, subject to TRA jurisdiction, engaged in the business of distributing electric power service to approximately 47,000 customers in its service area, which includes portions of Sullivan, Washington and Hawkins Counties, Tennessee, the City of Kingsport, Tennessee, and the Town of Mount Carmel, Tennessee. On September 28, 2015,

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<sup>1</sup> This Order considers the petitions to intervene filed by Sunrun and EFCA. A separate Order on the interventions of the Consumer Advocate and ETEC is entered in the docket file.

Kingsport filed a *Petition of Kingsport Power Company d/b/a AEP Appalachian Power General Rate Case* (“*Petition*”) seeking approval to adjust its rates and charges for electric service in the amount of approximately \$12 million, or 13.2%, and to implement revised tariffs, including its net metering service rider tariff. Included in its *Petition*, Kingsport gives notice of its intention to file 120 days prior to the completion of this rate case, a request for a Variable Cost Rider under Tenn. Code Ann. § 65-5-103(d) and a Rate Realignment Surcharge.

During the regularly scheduled Authority Conference held on October 19, 2015, the voting panel of Directors appointed General Counsel or her designee to act as Hearing Officer to prepare this matter for hearing.<sup>2</sup> On October 20, 2015, the Hearing Officer entered a *Notice of Status Conference* setting a status conference with the parties on October 28, 2015. During the status conference, the Hearing Officer heard and considered the petitions to intervene discussed below and made a verbal ruling permitting their intervention, limited to the net metering issue, with a formal Order to follow.<sup>3</sup>

## **PETITIONS TO INTERVENE**

### ***Sunrun***

In its *Petition to Intervene*, Sunrun seeks intervention as of right under Tenn. Code Ann. § 4-5-310(a). Sunrun asserts that it is the largest dedicated residential solar company in the United States, and that it installs, monitors and maintains the solar panels on a homeowner’s roof. Sunrun currently offers its services in South Carolina and fourteen other states, and would like to expand its business into Tennessee, including the Kingsport service area. Further, Sunrun notes that, in this case, Kingsport proposes changes to its “Net Metering Service Rider” tariff,

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<sup>2</sup> *Order Convening a Contested Case and Appointing a Hearing Officer* (October 28, 2015).

<sup>3</sup> To the extent that Sunrun and EFCA assert in their written filings made after the status conference that the Hearing Officer’s verbal ruling granting intervention was premised particularly upon Tenn. Code Ann. 4-5-310(a) or made pursuant to mandatory intervention as a matter of right, this assertion is incorrect. Any confusion as to the basis of the Hearing Officer’s grant of intervention or the scope of such intervention is clarified in this Order.

which includes closing its current net metering service to new customers after 2016 and offering a new, different net metering service to customers in 2017.

According to Sunrun, the new tariff will make customer-generated solar power a less attractive option and therefore have a detrimental impact on Sunrun's ability to offer its services to Kingsport's customers. Sunrun asserts that it has a financial interest in the outcome of this case, and therefore its "legal rights, duties, privileges, immunities, or other legal interest" may be determined in this proceeding. Further, it states that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by its intervention. As such, Sunrun requests permission to intervene and participate in this case.

***Energy Freedom Coalition of America ("EFCA")***

According to its *Petition to Intervene*, EFCA asserts that it has initiated an application to do business in Tennessee and that its members are participating in requests for proposals in the state. EFCA states that its members include full-service distributed rooftop solar providers and solar product manufacturers that serve customers in multiple states. According to EFCA, Kingsport's revised net metering service tariff would directly impact the cost of electric service paid by customers seeking to develop rooftop solar and have a chilling effect on the expansion of the solar market in Tennessee. EFCA asserts that the revised tariff is discriminatory to rooftop solar customers, will discourage consumer choice and investment in self-generation of energy, and stifle the development of distributed rooftop solar energy resources in Tennessee. As such, EFCA contends that its members' interests in preserving consumer choice and expanding the solar market are directly related to the broader public interest of reliable electric service at just and reasonable rates. Finally, EFCA asserts that the TRA would benefit from its participation and perspective in this proceeding due to its experience in similar proceedings in other states,

and that it has a justiciable interest in the disposition of the case. As such, ETEC requests permission to intervene and participate in this case.

In an amendment to its petition to intervene, filed on October 30, 2015, EFCA identifies itself as an organization that seeks to promote public awareness of the benefits of solar and alternative energy through public advocacy, and notes that its membership includes SolarCity Corporation, Silveo Solar, and Zep Solar. In addition, EFCA clarifies that its interests are affected by proposed changes the net metering tariff and by any cost of service or rate design changes that distinguish between customer generators.

### **Kingsport's Objections to Intervention**

During the Status Conference, Kingsport discussed its objections to the requests to intervene filed by Sunrun and EFCA. With the hearing officer's permission, Kingsport filed its *Objection to Petitions to Intervene* ("Objection") in the docket file on November 3, 2015. In its Objection, Kingsport contends that neither Sunrun nor EFCA are authorized to or actually doing business in Tennessee, have any Tennessee customers, or any offices in or any connection with the Kingsport service area. Neither Sunrun nor EFCA have sufficient contacts with the state of Tennessee to confer personal jurisdiction over them by Tennessee Courts. Likewise, both lack standing to pursue their claims, which are hypothetical and shared in common with other solar companies. Kingsport contends that Sunrun and EFCA are comparable to any other manufacturer of electricity consuming devices (e.g., a toaster or a clothes dryer) that may, or may not, sell products to customers in the Kingsport service area. And, allowing them to have standing in this case, like actual customers, would significantly and inappropriately broaden the scope of intervention.

In the alternative, Kingsport states that if the petitions are granted, they should be limited

to the issues concerning the proposed net metering tariff. Intervention should not extend to cost of service, rate design, or other issues in the base rate case. In addition, Kingsport raises an additional issue in asserting that Sunrun and EFCA should not be permitted to receive Kingsport's confidential responses that do not relate to the net metering tariff.

## **Responses to Objection**

### ***Sunrun***

In its response, filed on November 10, 2015, Sunrun noted that the Hearing Officer's decision, made verbally during the status conference, allowed Sunrun to intervene but limited its participation to the net metering service rider tariff issue. Further, upon Sunrun's statement that its interest concerns the tariff but that it could not predict whether other issues impacting Sunrun might arise, the Hearing Officer noted that should other issues arise, Sunrun could request that the Hearing Officer review the limits of its intervention. In addition, Sunrun asserts that it does not intend to submit discovery questions on issues unrelated to the net metering tariff, but should be entitled to receive copies of all discovery responses, whether confidential or non-confidential, by any party. And, that only by reviewing this information can it determine what, if any, other issues might impact Sunrun. As such, Sunrun asks that Kingsport's request to limit its access to discovery responses be denied.

### ***EFCA***

In its response, filed on November 10, 2015, EFCA states that it was issued a certificate authorizing it to transact business in Tennessee by the Tennessee Secretary of State on October 29, 2015. EFCA asserts that its members are attempting to expand business to Tennessee and are engaged in business development efforts in the Kingsport service area. EFCA contends that its member business expansion efforts are sustained over a multi-year period, thereby demonstrating

a distinct and palpable interest. Its members work with customers who seek to generate electricity through the installation of solar panels. EFCA asserts that the adjustments to Kingsport's rates and charges will significantly impact a customer's decision to install rooftop solar, and that its interests are distinguishable from that of a manufacturer of electricity consuming devices like a toaster or clothes dryer.

In addition, EFCA requests clarification of the scope of its limited intervention made during the status conference. EFCA asserts that its participation in this case should not restrict its ability to address fundamental rate making issues raised by the net metering tariff, including measures proposed by Kingsport to reduce or eliminate cross-subsidization of rates between customer classes. EFCA contends that its participation should include the net metering service tariff as well as issues related to cost of service, rate design, and ratemaking practices and principles that relate to rates that affect the proposed net metering tariff, and that it should be allowed unlimited participation in and access to discovery and the information that it produces.

### **Kingsport's Reply**

In its reply, filed on November 12, 2015, Kingsport notes that, despite the limits to intervention imposed by the Hearing Officer in her verbal oral ruling during the status conference, both Sunrun and EFCA have requested unlimited access to Kingsport's discovery and data responses, including confidential responses, and to take unlimited discovery. Further, Kingsport contends that as Sunrun and EFCA are not actually doing business in Tennessee, but are challenging the effect that the rider could have on electric rates to potential customers, both lack standing in this proceeding. Further, as the Consumer Advocate is positioned to represent the interests of consumers who have or will engage in solar energy activities, the participation of Sunrun and EFCA is, at least, redundant.

Kingsport contends that Sunrun and EFCA should not be permitted unlimited access to all information Kingsport submits in response to data and discovery requests, particularly confidential information under the Protective Order, and should be restricted to propounding discovery related only to net metering issues. In light of the limited grant of intervention, Kingsport proposes that the following discovery limits should be placed on Sunrun and EFCA: 1) allow Sunrun and EFCA to submit discovery on the net metering issue; 2) permit Kingsport to respond and/or object; and 3) information can be properly disseminated. Finally, Kingsport asserts that access to all information divulged by Kingsport should be limited and should not include information subject to the Protective Order that is not related to net metering.

## **FINDINGS & CONCLUSIONS**

Under Tenn. Code Ann. § 65-2-107, “All persons having a right under the provisions of the laws applicable to the authority to appear and be heard in contested cases as defined in this chapter shall be deemed parties to such proceedings for the purposes of this chapter. In addition, the authority may upon motion allow any interested person to intervene and become a party to any contested case.” Along with its own statutes and rules, contested case proceedings before the Authority are governed by the provisions of Tenn. Code Ann. § 4-5-101, *et seq.*, known as the Tennessee Uniform Administrative Procedures Act (“UAPA”). Tenn. Code Ann. § 4-5-310 establishes the following criteria for considering requests for mandatory and permissive intervention:

- (a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:
  - (1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;
  - (2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be



determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

- (3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.
- (b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.<sup>4</sup>
- (c) If a petitioner qualifies for intervention, the administrative judge or hearing officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:
  - (1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
  - (2) Limiting the intervenor's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
  - (3) Requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings.
- (d) The administrative judge, hearing officer or agency, at least twenty-four (24) hours before the hearing, shall render an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The administrative judge, hearing officer or agency may modify the order at any time, stating the reasons for the modification. The administrative judge, hearing officer or agency shall promptly give notice of an order granting, denying or modifying intervention to the petitioner for intervention and to all parties.

Similarly, TRA Rule 1220-01-02-.08 directs that requests for intervention before the Authority are to be made and considered as follows:

- (1) Petitions for intervention shall be granted in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-2-107.
- (2) A petition for intervention shall set forth with particularity those facts that demonstrate that the petitioner's legal rights, duties, privileges,

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<sup>4</sup> Tenn. Code Ann. § 4-5-310.



immunities or other legal interests may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law. Intervention may be denied or delayed for failure to provide such specific facts.

- (3) A petition for intervention shall be filed at least seven (7) days prior to the date of the contested case hearing.<sup>5</sup>

Tenn. Code Ann. 4-5-310(a)(2) and TRA Rule 1220-01-02-.08(2) require that a petition to intervene state particular facts that demonstrate that a legal right or interest held by the petitioner is at stake in or may be determined in the proceeding or otherwise qualifies as an intervenor under any provision of law. In the instant proceeding, the Hearing Officer agrees with Kingsport that neither Sunrun nor EFCA have demonstrated that it holds a legal right, duty, privilege, immunity or other legal interest, which may be determined in this proceeding, that is not common generally to other solar companies providing similar products or services. While Sunrun and EFCA both state that they are making efforts and seek to expand into Tennessee, including the Kingsport service area, neither is actually doing business or has customers in Tennessee. The claims of legal interest presented by Sunrun and EFCA relate to the effect that the TRA's determinations in this case might have on potential future business or expansion of the solar energy market, but do not involve any specific rights or interests held by Sunrun or EFCA. Thus, while Sunrun and EFCA might have a general interest in participating in this proceeding, such interest does not meet the requirements of mandatory intervention, or intervention of right, under Tenn. Code Ann. § 4-5-310(a).

Nevertheless, under Tenn. Code Ann. § 4-5-310(b) and § 65-2-107, the Authority may allow any interested person to intervene "upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings." Consistent with this discretionary authority, during the status conference, the Hearing Officer

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<sup>5</sup> Tenn. Comp. R. & Regs. 1220-01-02-.08.

granted the intervention requests of Sunrun and EFCA, but limited their participation to the net metering tariff and issues. As the petitions filed by Sunrun and EFCA were received in the early stages of the case, before a procedural schedule was established, and well in advance of the anticipated hearing date, the Hearing Officer considers the petitions timely-filed. Upon review of the filings, the Hearing Officer recognizes that the net metering tariff and issue is of particular importance and interest to Sunrun and EFCA. Moreover, as the net metering issue is somewhat new or unique in proceedings before the Authority, the Hearing Officer finds participation by Sunrun and EFCA would be helpful to the TRA's understanding of the issue and beneficial to the proceedings overall. Further, their participation should not impair the interests of justice or the orderly and prompt conduct of the proceedings.

In addition, as the scope of intervention is limited to the particular issue in which Sunrun and EFCA has an interest, the Hearing Officer finds that so too their "use of discovery, cross-examination, and other procedures" should be limited "so as to promote the orderly and prompt conduct of the proceedings."<sup>6</sup> As such, the Hearing Officer finds acceptable Kingsport's proposed procedure for taking discovery, as follows:

1. Sunrun and EFCA are permitted to submit formal discovery on the net metering tariff and net metering issues;
2. Kingsport may respond or object (or both), consistent with the Procedural Schedule; and
3. Information shall be properly disseminated, as further discussed below.

Further, the Hearing Officer finds it appropriate, and in the interests of justice, that access to confidential discovery responses and information produced by Kingsport under seal, which are unrelated to the proposed net metering tariff and the net metering issues should be protected. In considering how best to balance the interests of the utility in protecting its confidential

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<sup>6</sup> Tenn. Code Ann. § 4-5-310(c)(1) and (2).

information and those of Sunrun and EFCA, who have been granted discretionary intervention limited to the net metering tariff and net metering issues, to adequately review and prepare the case, the Hearing Officer finds that, while not directly applicable because Sunrun and EFCA are not competitors of Kingsport, the Authority's directive in previous cases concerning access to confidential discovery by competitors is analogous and helpful.<sup>7</sup>

Therefore, consistent with Authority precedent, the Hearing Officer finds that the parties, Kingsport, Sunrun, and EFCA, should confer, craft, and submit for the Hearing Officer's consideration, an revised agreed protective order that adds a provision, or provisions, specific to Sunrun and EFCA that limits access to confidential discovery responses and information not related to the net metering tariff or net metering issues to outside counsel for Sunrun and EFCA. Further, the new provision/s should, at a minimum, expressly prohibit disclosure of such confidential information by outside counsel for Sunrun and EFCA to their respective clients, company representatives and personnel, and anyone else that does not have a need to know the information for purposes of participating in this case. In the event that an objection to whether certain confidential information is included for protection is lodged, the Hearing Officer will review the information *in camera* and rule as to whether such information is protected from disclosure to Sunrun and EFCA. To the extent that it is not already part of the Protective Order, and not addressed herein above, the parties should discuss and incorporate any other language that is reasonable and serves to appropriately protect Kingsport's confidential information that is

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<sup>7</sup> For example, see *In re Application of Telemate, LLC for a Certificate of Authority to Provide Operator Services and/or Resell Telecommunications Services in Tennessee*, Docket No. 11-00181, *Initial Order of the Hearing Officer Granting Limited Intervention to Pay-Tel Communications, Inc.* (August 9, 2012); see *In re Docket to Evaluate Atmos Energy Corporation's Gas Purchases and Related Sharing Incentives*, Docket No. 07-00225, *Order on Protective Order Disputes* (February 14, 2008); and see *In re Petition to Open an Investigation to Determine Whether Atmos Energy Corp. Should be Required by the TRA to Appear and Show Cause that Atmos Energy Corp. is not Overearning in Violation of Tennessee Law and that It is Charging Rates that are Just and Reasonable*, Docket No. 05-00258, *Order Resolving Discovery and Protective Order Disputes and Requiring Filings*, pp. 15-19 (June 14, 2006).

not related to the net metering tariff or net metering issue.

Finally, the Hearing Officer further finds that Sunrun and EFCA should be required to confer so as to combine and/or avoid duplication in discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings.

THEREFORE, upon due consideration, and consistent with her verbal ruling during the status conference, the Hearing Officer concludes that the requests to intervene filed by Sunrun and EFCA were timely-filed and should not impair the interests of justice or the orderly and prompt conduct of the proceedings. As such, the Hearing Officer further concludes that Sunrun and EFCA should be permitted intervention under Tenn. Code Ann. § 4-5-301(b) and 65-2-107, but that intervention should be conditioned and limited as follows:

- 1) Participation by Sunrun and EFCA in this proceeding is limited to the net metering tariff and net metering issue, i.e., the designated issue in which each has a particular interest;

- 2) Sunrun and EFCA are permitted to submit formal discovery on the net metering tariff and net metering issue. Access to confidential discovery responses and information produced by Kingsport that are unrelated to the proposed net metering tariff and the net metering issues is limited as discussed above. The parties, Kingsport, Sunrun, and EFCA, shall confer, craft, and submit to the Hearing Officer, an agreed revised protective order that includes the elements discussed herein above as well as any other provisions that are reasonably necessary to protect Kingsport's confidential information that is unrelated to the net metering tariff or net metering issue; and,

- 3) Sunrun and EFCA should confer so as to combine and/or avoid duplication in discovery, cross-examination, and other procedures so as to promote the orderly and

prompt conduct of the proceedings.

Also, as noted during the status conference, upon good cause and a sufficient showing that intervention should be altered or expanded, Sunrun and EFCA are not precluded from requesting that the Hearing Officer review the conditions and limitations imposed on their interventions.

**BE IT THEREFORE ORDERED THAT:**

1) The *Petition to Intervene* filed by Sunrun Inc. and the *Energy Freedom Coalition of America Petition to Intervene and Amendment*, requesting intervention pursuant to Tenn. Code Ann. 4-5-310(a) are denied.

2) Sunrun Inc. and the Energy Freedom Coalition of America may intervene and each participate as a party in this proceeding in accordance with Tenn. Code Ann. 4-5-310(b) and (c) and 65-2-107, subject to the conditions and limits discussed herein above in this Order.

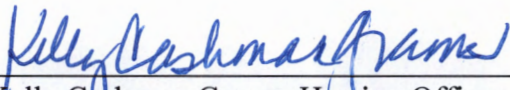
3) The participation of Sunrun Inc. and the Energy Freedom Coalition of America shall be limited to the net metering tariff and net metering issues, and each shall as much as possible confer so as to combine and/or avoid duplication in discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings.

4) Kingsport Power Company d/b/a AEP Appalachian Power, Sunrun Inc., and the Energy Freedom Coalition of America shall confer, craft, and submit to the Hearing Officer, an agreed revised protective order that includes the elements discussed herein above as well as any other provisions that are reasonably necessary to protect Kingsport's confidential information that is unrelated to the net metering tariff or net metering issue, by **December 17, 2015**.

5) Sunrun Inc. and the Energy Freedom Coalition of America shall receive copies of any notices, orders, or other documents filed in the docket file, subject to the conditions and limits discussed herein and as conforming with the Protective Order, and any amendments and

revisions made thereto, ordered by the Hearing Officer.

6) Any party aggrieved by the decision of the Hearing Officer in this Order may file a petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.



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Kelly Cashman-Grams, Hearing Officer