

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 07, 2015

IN RE:

**PETITION OF KINGSPORT POWER COMPANY
D/B/A AEP APPALACHIAN POWER FOR A
GENERAL RATE INCREASE**

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**DOCKET NO.
15-00093**

**ORDER GRANTING INTERVENTION TO
THE TENNESSEE SOLAR ENERGY INDUSTRIES ASSOCIATION
SUBJECT TO CERTAIN LIMITS AND CONDITIONS**

This matter is before the Hearing Officer of the Tennessee Regulatory Authority (“Authority” or “TRA”) upon the *Petition to Intervene* filed by the Tennessee Solar Energy Industries Association (“TenneSEIA”) on November 17, 2015.

BACKGROUND

Kingsport Power Company d/b/a AEP Appalachian Power (“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, Kingsport filed a *Petition of Kingsport Power Company d/b/a AEP Appalachian Power General Rate Case* 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.

PETITION TO INTERVENE

In its *Petition to Intervene*, TenneSEIA seeks intervention as of right under Tenn. Code Ann. § 4-5-310(a). TenneSEIA is the Tennessee state chapter of the national Solar Industries Association, which promotes solar energy, and represents the interests of the solar energy industry in Tennessee. Further, TenneSEIA notes that it will supplement its filing with a list of the specific members that have elected to participate in this proceeding, which includes companies that design, install, monitor, and maintain solar panels on a customer's roof that are located in Tennessee and currently serving and seeking to serve customers in the Kingsport service area. TenneSEIA asserts that Kingsport's proposed changes to its "Net Metering Service Rider" tariff will make customer-generated solar power a less attractive option and would therefore have a direct financial impact on TenneSEIA's ability to offer services to customers in the Kingsport service area. As such, TenneSEIA 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 it agrees to abide by the Procedural Schedule established in the docket and that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by its intervention.

OBJECTION TO INTERVENTION OF TENNESEIA

In its *Objection to Petition to Intervene of TenneSEIA*, filed on November 18, 2015, Kingsport contends that two other solar industry-related entities have been allowed intervention in this proceeding and there is nothing in TenneSEIA's petition that suggests that the Consumer Protection and Advocate Division of the Office of the Tennessee Attorney General ("Consumer

Advocate”), Sunrun Inc. (“Sunrun”), and/or the Energy Freedom Coalition of America (“EFCA”) are incapable of sufficiently representing solar interests on net metering issues. Particularly as the same counsel represents Sunrun and TenneSEIA, there is no need for yet another solar party to participate and conduct duplicative discovery. There is no need for four intervenors whose interests are the net metering tariffs, and requiring Kingsport to respond to four sets of discovery on the same issue is contrary to Tenn. Code Ann. 4-5-310(c). As such, Kingsport asserts that the interests of solar companies will be adequately represented and that TenneSEIA’s request be denied.

Alternatively, Kingsport states that if the petition is granted, that the three solar intervenors should be required to submit one joint set of discovery requests limited to net metering issues, including the two tariffs, Rider N.M.S. and Rider N.M.S.2. And, that the solar intervenors, including TenneSEIA, should not have unlimited access to discovery or to Kingsport’s confidential responses to data and discovery requests that do not directly relate to net metering issues filed under the Protective Order.

RESPONSE TO OBJECTION

In its response, filed on November 23, 2015, TenneSEIA reiterates its intention to file a list of TenneSEIA members who have elected to participate in this intervention, and that member service firms are not included in the intervention. Further, TenneSEIA asserts that Kingsport’s argument that the interests of solar providers are sufficiently represented by at least three other intervenors is without logical or legal support. TenneSEIA admits that solar providers are similar to other vendors of products utilizing electricity in that they “design, install and maintain behind-the-meter solar equipment which, like thermal windows or extra layers of insulation,

reduce the homeowner's electric bill.”¹ Nevertheless, TenneSEIA contends that its members, which are currently providing rooftop solar panels to customers located in Kingsport's service area, have a more direct interest than either Sunrun or the EFCA. Further, TenneSEIA contends that, in light of Kingsport's pre-filed testimony that justifies its changes to the net metering tariff on the basis of cross-subsidization of costs, Kingsport's assertion that the Consumer Advocate can adequately represent the interests of solar customers while at the same time representing the interest of customers' interests that conflict is not plausible. Further, TenneSEIA asserts that under Tenn. Code Ann. 4-5-310(a), any person with a “legal interest” which “may be determined in the proceeding” is entitled to intervene as a matter of right, and such right may not be denied because other parties with similar interests are already in the case.²

TenneSEIA states that it will accept a decision by the Hearing Officer that, like that of Sunrun and EFCA, limits its intervention to net metering issues and allows it to ask for expanded participation should circumstances warrant. TenneSEIA asserts that it should not be denied access to information that would inhibit its ability to monitor the proceedings and determine whether or not to request expanded intervention. Further, since TenneSEIA and Sunrun are represented by the same counsel, it states that those two intervenors can readily combine their discovery requests. But as EFCA has separate counsel with a different approach to the case, it would be burdensome and impractical to combine into one filing discovery requests with EFCA, but admits that reasonable steps to cooperate with counsel to avoid duplication of requests is appropriate.

¹ *Petition to Intervene*, pp. 2-3 (November 23, 2015).

² To the extent that TenneSEIA asserts that the Hearing Officer's verbal ruling, made during the status conference on October 28, 2015, granting intervention to Sunrun and EFCA was premised particularly upon Tenn. Code Ann. 4-5-310(a) or made pursuant to mandatory intervention as a matter of right, such assertion is incorrect. Any confusion as to the basis of the Hearing Officer's grant of intervention as to Sunrun and EFCA or the scope of such intervention is clarified in the *Order Granting Limited Intervention to Sunrun Inc. and the Energy Freedom Coalition of America Subject to Certain Conditions and Limitations* (December 7, 2015).

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.³
- (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:

³ Tenn. Code Ann. § 4-5-310.

- (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, 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.⁴

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 finds that

⁴ Tenn. Comp. R. & Regs. 1220-01-02-.08.

TenneSEIA has not 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 solar providers and companies providing similar products or services. While TenneSEIA asserts that its members currently have customers in the Kingsport service area, such does not rise to the level of an actual right or legal interest at stake that may be determined in the proceeding. Thus, while TenneSEIA has 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.” As TenneSEIA consents to the Procedural Schedule established in the docket, and the limitation of its intervention to the net metering tariffs and net metering issues. The Hearing Officer recognizes that the net metering tariffs and issue is of particular importance and interest to TenneSEIA, and finds that its participation would be helpful to the TRA’s understanding of the issue and beneficial to the proceedings overall.

Further, as both Sunrun and TenneSEIA are represented by the same counsel and can therefore readily combine its “use of discovery, cross-examination, and other procedures,” and has stated that it will cooperate with EFCA counsel to avoid duplication, the Hearing Officer finds that its participation should not impair the interests of justice or the orderly and prompt conduct of the proceedings. Finally, its petition was filed well in advance of the anticipated hearing date, and the Hearing Officer considers its petition timely-filed. Therefore, consistent with her discretionary authority, the Hearing Officer finds it appropriate to grant intervention

under Tenn. Code Ann. 4-5-310(b) and 65-2-107, limited to the net metering tariffs and net metering issues and subject to the conditions and limits discussed below.

As the scope of intervention is limited to the particular issue in which TenneSEIA has an interest, the Hearing Officer finds that the “use of discovery, cross-examination, and other procedures” should be limited “so as to promote the orderly and prompt conduct of the proceedings.”⁵ As committed to by TenneSEIA in its Response, the Hearing Officer finds it acceptable that Sunrun and TenneSEIA shall combine its discovery, cross-examination and other procedures, and confer and cooperate with counsel for EFCA to combine, if possible, and/or avoid duplication in discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings.

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 information and the interests of TenneSEIA to adequately review, monitor and prepare its case, the Hearing Officer finds that, while not directly applicable because TenneSEIA is not competitor of Kingsport, the Authority’s directive in previous cases concerning access to confidential discovery by competitors is analogous and helpful.⁶

As has also been ordered of Sunrun and EFCA, TenneSEIA should, together with

⁵ Tenn. Code Ann. § 4-5-310(c)(1) and (2).

⁶ 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).

Kingsport, Sunrun, and EFCA, confer, craft, and submit for the Hearing Officer's consideration, an revised agreed protective order that adds a provision, or provisions, specific to TenneSEIA that limits access to confidential discovery responses and information not related to the net metering tariff or net metering issues to outside counsel. Further, the new provision/s should, at a minimum, expressly prohibit disclosure of such confidential information by outside counsel for TenneSEIA to its respective client, members, 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 TenneSEIA. 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 not related to the net metering tariff or net metering issue.

THEREFORE, upon due consideration, the Hearing Officer concludes that TenneSEIA's request to intervene was 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 TenneSEIA 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 TenneSEIA 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) TenneSEIA is permitted to submit formal discovery on the net metering tariff

and net metering issue, and shall combine its discovery with Sunrun, who is represented by the same counsel. 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. TenneSEIA shall confer with Kingsport, Sunrun, and EFCA, to 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) TenneSEIA shall combine its use of discovery, cross-examination, and other procedures with Sunrun, who is represented by the same counsel, and should confer with counsel for EFCA so as to combine, if possible, and/or avoid duplication in discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings.

Also, upon good cause and a sufficient showing that intervention should be altered or expanded, TenneSEIA is not precluded from requesting that the Hearing Officer review the conditions and limitations imposed on its intervention.

BE IT THEREFORE ORDERED THAT:

1) The *Petition to Intervene* filed by the Tennessee Solar Energy Industries Association for intervention pursuant to Tenn. Code Ann. 4-5-310(a) is denied.

2) Tennessee Solar Energy Industries Association may intervene and 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 in this Order.

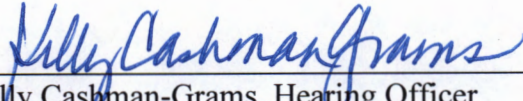
3) The participation of Tennessee Solar Energy Industries Association is limited to

the net metering tariffs and net metering issues, and shall combine its use of discovery, cross-examination, and other procedures with Sunrun Inc., who is represented by the same counsel, and confer with counsel for the Energy Freedom Coalition of America so as to combine as much as possible and/or avoid duplication in discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings.

4) Tennessee Solar Energy Industries Association shall confer with Kingsport Power Company d/b/a AEP Appalachian Power, Sunrun Inc., and the Energy Freedom Coalition of America to 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) Tennessee Solar Energy Industries Association 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 conforms 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.


Kelly Cashman-Grams, Hearing Officer