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Bradley

May 25, 2016

Ms. Monica Ashford, Hearing Officer
c/o Sharla Dillon
Tennessee Regulatory Authority
502 Deaderick Street, 4th Floor
Nashville, TN 37243

Re: Petition of Kingsport Power Company d/b/a AEP Appalachian Power, General Rate Case
Docket No. 16-00001

Dear Ms. Ashford:

Please accept for filing the attached Reply Brief (and accompanying request to make the filing).

As argued in the brief, the Solar Intervenors ask that you either dismiss Kingsport's net metering tariff as illegal or strike it from the rate case as irrelevant. We believe that as Hearing Officer you have the authority to sever this issue from the case and either dismiss it or move it into another docket. If, however, you determine that you have not been delegated the power to take the net metering issue out of this docket, we ask that you refer this issue to the Directors for a decision at the Authority's June 20 conference.

Similarly, if you conclude that you have the authority to grant in whole or in part the requested relief and believe that oral argument would be helpful, we ask that the argument be scheduled as soon as practical. On the other hand, if you decide that this matter should be referred to the Directors, we ask that oral argument be scheduled for June 20 during the conference.

Sincerely,

BRADLEY ARANT BOULT CUMMINGS LLP

By: Henry Walker

HW/dbi
Enclosure
cc: All Counsel (w/ enclosure)

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION OF KINGSPORT POWER	)	**DOCKET NO. 16-00001**
COMPANY d/b/a AEP APPALACHIAN	)	
POWER, GENERAL RATE CASE	)	

REPLY OF THE SOLAR INTERVENORS

The Solar Intervenors,[1] pursuant to TRA Rule 1220-1-2-.06(3), request leave to file this reply to the "Response" filed by Kingsport Power Company ("Kingsport" or "the Company") concerning the pending motion to sever and dismiss the utility's proposed net metering tariff. Counsel for Kingsport does not oppose this request.

Summary

Kingsport implicitly acknowledges that its proposed net metering tariff discriminates against customers who use solar panels to reduce their electric bills. Resp. at 3, 8. The utility argues, however, that it is entitled to a hearing to present evidence "justifying" the tariff's disparate treatment of solar customers. Resp. at 7, 8.

Kingsport's argument is aimed at the wrong target.

For over a century, the regulatory statutes in Tennessee and in virtually every other jurisdiction have prohibited "unjust discrimination" in utility rates. Under those statutes and the case law applying them, a utility may charge different rates to similarly situated customers if the utility can demonstrate good reasons for doing so. Relying on those cases, Kingsport argues "there is justification" for imposing higher rates on solar customers. Resp. at 7.

That argument has nothing to do with the statute at issue here.

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[1] This reply is filed by The Alliance for Solar Choice, The Energy Freedom Coalition of America, and the Tennessee Solar Energy Association (collectively, "the Solar Intervenors").

The Solar Intervenors rely on T.C.A. § 65-4-105(d), enacted in 1980 at a time of national concern over energy shortages and the conservation of fossil fuels. The 1980 law protects "customers who use solar . . . equipment as a source of energy" from "discrimination" in "rates, fees or charges." The word "unjust" does not appear in the 1980 law. If the newer law is to be given any effect, it must mean something different from the older statutes. It must mean exactly what it says: any discrimination in rates against solar customers – not just discrimination that is "unjust" – is illegal. Therefore, regardless of Kingsport's belief that there are good reasons for its new tariff, the utility's proposal to charge higher rates to solar customers is illegal on its face.

The proposed net metering tariff should be dismissed as illegal or struck as irrelevant to the rate case. If the Hearing Officer determines, however, that she cannot take either action, the Solar Intervenors ask that she refer the issue to the Directors for a decision at the agency's June 20 conference.

Argument

1. <u>The net metering tariff is illegal on its face</u>.

This issue is straight forward. The Solar Intervenors argue that Kingsport's proposal to impose a demand charge on solar customers violates T.C.A. § 65-4-105(d). Kingsport admits that the tariff will increase rates for solar customers but argues that the company is entitled to an evidentiary hearing to present "facts that justify" its proposal. Resp. at 9.

The 1896 law establishing the Tennessee Railroad Commission (predecessor to the Tennessee Regulatory Authority) outlawed "unjust discrimination" in railroad rates. Public Acts of 1897, Chapter 10, Section 22. That prohibition survives today in T.C.A. § 65-4-122 which makes "unjust discrimination" by "any common carrier" a criminal offense. Similarly, when the Commission was given jurisdiction over electric companies in 1919, the General Assembly

enacted legislation prohibiting a "public utility" from charging an "unjustly discriminatory" rate. T.C.A. § 65-5-104(a)(1). As the Tennessee Court of Appeals wrote, "[T]he statutes [T.C.A. § 64-4-122 and § 65-5-104] only prohibit discrimination that is unjust or unreasonable or preferences that are undue or unreasonable." Consumer Advocate Division v. Tennessee Regulatory Authority, 2002 WL 159700 (Tenn. Ct. App., 2002).

The prohibition against "unjust discrimination" did not, of course, originate in Tennessee but was taken from the Interstate Commerce Act of 1887[2] and from English and American common law. Mr. Robert E. Burns, a regulatory expert (now retired) on the staff of the National Regulatory Research Institute ("NRRI"), explains the history and development of the "unjust discrimination" standard in ratemaking:[3]

> The explicit prohibition against undue or unreasonable discrimination or preference in rates or services is one of the universal obligations imposed by state and federal public utility laws. The prohibition is a legal term of art that is rooted in English and American common law. It is intimately tied to the utility's obligation to provide service to all who request it. The requirement that rates be reasonable follows from the requirement that anyone requesting service must be served, since the ability to charge an exorbitant rate is equivalent to the power to deny service. In early English common law, the requirement that rates be reasonable only prohibited extreme forms of price

[2] Section 2 of the 1887 Interstate Commerce Act defined and prohibited "unjust discrimination":

> That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

[3] Robert E. Burns, "Are Reliability – Differentiated Products Unduly Discriminatory?" Service Opportunities for Electric Utilities: Creating Differentiated Products, Shmuel Oren and Stephen Smith, eds. (1993), at 327-330.

> discrimination. Differences in rates based on value of service were permitted.
>
> But the common law has evolved such that while not all discriminatory rates or services offerings are unduly so, undue discrimination is explicitly forbidden by public utility law. The word discrimination itself is synonymous with any kind of rate or service difference not based on cost differences. What makes specific differences undue? Interpretations of undue price and service discrimination statues have been developed by state commissions and courts on a case-by-case approach. Even so, there are many common themes. These are (1) that similarly situated customers should be treated equally; (2) that unequal treatment of similar customers constitutes discrimination; (3) that undue price discrimination depends on whether there is a reasonable basis for the discrimination, that is, whether the discrimination is predicated on differences in costs or service; (4) that the presence of anticompetitive harm resulting from cross subsidies be considered; and (5) that any basis for discrimination be clearly articulated.

State courts have long wrestled with these concepts. As the Missouri Supreme Court wrote in 1916, "Is the discrimination unjust? If a discrimination be apparent, as it is in the instant case, it does not follow as an inevitable corollary that it is an unjust discrimination." State of Missouri v. Missouri, Kansas, and Texas Railway Company, 262 Mo. 507, 172 S.W. 40 (Missouri Supreme Court, 1916); see also State v. St. Louis S. W. Ry. Co. of Texas, et al., 197 S.W. 1006 (Texas Court of Civil Appeals, 1917) (holding "unjust discrimination is unlawful even in the absence of a statute or constitutional provision making it so, by reason of the fact that it was forbidden by the common law").

The prohibition against "unjust discrimination" is also found in federal law. The Federal Communications Act prohibits telephone companies from making any "unjust or unreasonable discrimination in charges." 47 U.S.C. § 202(a). The Federal Power Act prohibits pipeline, gas and electric companies from charging rates that are "unjust, unreasonable, unduly discriminatory

or preferential." 16 U.S.C. § 824(e). The annotations to those federal statutes are filled with cases interpreting and applying this long established regulatory standard.

Those are the laws and cases that Kingsport relies upon in arguing that "[u]nder well-established rate-making law, a claim of discrimination . . . is largely a factual inquiry that evaluates if similarly situated customers are treated differently and if there is justification for such disparate treatment." Resp. at 7. Each of the cases cited by Kingsport involves a statute which prohibits "unjust" discrimination and discusses whether the conduct at issue is "unjust" in light of the circumstances. See Consumer Advocate Division v. Tennessee Regulatory Authority, supra.

Kingsport, however, cites no cases interpreting T.C.A. § 65-4-105(d) which was enacted in 1980 following a national oil shortage and the 1978 enactment of the federal Public Utility Regulatory Policies Act ("PURPA") which encouraged the development of alternative energy sources. The 1980 statute is different in many respects from the older Tennessee statutes which apply to all TRA-regulated utilities and protects all customers from "unjust" discrimination. In contrast, the 1980 law

(1) does not apply to all public utilities but only to electric utilities;

(2) does not apply to utility customers generally but only to customers who "use solar or wind powered equipment as a source of energy";

(3) does not prohibit "unjust" discrimination but, more broadly, any "discrimination"; and

(4) does not apply only to TRA-regulated utilities but to all electric companies in Tennessee, including cooperatives, utility districts and municipal electric companies.[4]

[4] See Chapter 755 of the Public Acts of 1980, attached to the original Motion to Sever and Dismiss.

The 1980 statute was obviously written for a specific purpose: to prevent any electric utility in Tennessee from raising rates to customers who use solar power to generate electricity for their own use. What other purpose could the statute have? If the legislature had intended to allow utilities to increase rates to solar customers in circumstances where "there is justification for such disparate treatment" (Resp. at 7), there would have been no need for the 1980 statute. State law already proscribed "unjust discrimination."

To interpret the 1980 statute as Kingsport does would render it meaningless. In light of the pre-existing prohibitions against "unjust" discrimination and the extensive case law allowing a utility to present facts justifying discriminatory rates in appropriate circumstances, the 1980 statute – if it has any meaning at all – must provide solar customers with something more than protection against "unjust" discrimination. It must mean that a utility, without exception, cannot charge higher rates to customers solely because they use solar equipment to generate a portion of their own power. No other interpretation makes sense or fits the plain words of the statute.

Kingsport's current net metering tariff is consistent with the 1980 law. As the Authority pointed out in approving the current tariff, "All monthly charges will be billed under the appropriate rate schedule." Docket 11-00111 (Sept. 28, 2011), Order at 1-2. In other words, residential customers using solar panels are billed under the same rate schedule as other residential customers. Such a requirement is necessary to ensure that Tennessee's net metering program does not "discriminate" against solar customers in "rates, fees, or charges." The current tariff is legal; the proposed tariff is not.[5]

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[5] Kingsport states that the Authority in 2006 "declined to adopt" federal net metering standards. Resp. at 2, n. 1. That is disingenuous. The Authority declined to order the Company to implement net metering only because the Company "has committed to work with residential and small commercial customers who request net metering through the use of special contracts." Docket 06-00010, Order at 4. Five years later, when the number of net metering requests increased, the Authority asked the Company to file a net metering tariff which remains in effect today. Docket 11-00111.

2. The net metering tariff is irrelevant to the rate case.

If the Hearing Officer determines that she is not authorized to rule on the legality of the proposed tariff, she should strike it because it is irrelevant to the Company's rate case. As the Solar Intervenors have pointed out – and Kingsport does not dispute – Kingsport's proposed tariff has no impact on the Company's rate case. Kingsport's request for a $12 million rate increase becomes effective no later than September 4, 2016, nine months after the Company filed its case. The proposed net metering tariff, however, is not scheduled to become effective until January 1, 2017. What is the point of addressing it now? Why spend hours of testimony and public comment on an issue which impacts only a handful of customers and is irrelevant to the rate case? In these circumstances, it is well within the traditional role of the Hearing Officer to rule whether or not certain matters are irrelevant and should be struck from the case.[6]

Conclusion

The Solar Intervenors are scheduled to file testimony on June 24, 2016. Prior to that time, the Hearing Officer should dismiss the proposed net metering tariff as illegal or strike it as irrelevant. If the Hearing Officer concludes that she cannot do either, we ask that this issue be placed on the Directors' conference agenda for June 20, 2016.

[6] See, for example, Docket 13-00017, "Order Denying in Part and Granting in part TWSI's Motion to Strike," January 10, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2016, a copy of the foregoing document was served on the parties of record, via electronic email transmission and regular U.S. Mail, postage prepaid, addressed as follows:

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