

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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IN RE:)	
)	
PETITION OF KINGSPORT POWER COMPANY)	DOCKET NO.
D/B/A AEP APPALACHIAN POWER FOR A)	16-00001
GENERAL RATE CASE)	

**ORDER REFLECTING HEARING OFFICER’S RULING WITH RESPECT TO THE
CONSUMER ADVOCATE’S MOTION TO COMPEL**

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (“Authority” or “TRA”) at Status Conferences held on March 14, 2016 and March 17, 2016 for consideration of the *Motion to Compel Kingsport Power Company d/b/a AEP Appalachian Power to Answer Consumer Protection and Advocate Division’s First Round Discovery Request* (“*Motion to Compel*”) filed by the Consumer Protection and Advocate Division of the Office of the Attorney General (“Consumer Advocate” or “CPAD”) on March 4, 2016.

POSITIONS OF THE PARTIES

The parties’ arguments are well laid out in the Consumer Advocate’s *Motion to Compel* and Kingsport’s *Response to Motion to Compel Filed by Consumer Protection and Advocate Division* (“*Response*”) filed on March 11, 2016 and those arguments were reiterated in oral argument held during the March 14, 2016 Status Conference. A brief summary of the arguments made by the parties follows.

CONSUMER ADVOCATE

In its *Motion to Compel*, the Consumer Advocate argues that the discovery requested is relevant, not overly broad and reasonably calculated to lead to the discovery of admissible

evidence. The Consumer Advocate points out that it has been over 20 years since Kingsport Power Company d/b/a AEP Appalachian Power (“Kingsport” “Kingsport Power” or the “Company”) has filed a rate case and that the “magnitude of the rate increase that Kingsport Power is requesting and the complexity of the issues in the general rate case (described in Kingsport Power’s *Petition* and in the testimony of its many witnesses) justify substantial discovery by the Consumer Advocate.”¹ According to the Consumer Advocate, it tries to present a complete case to the Authority, meaning “a case that not merely opposes selected parts of a company’s petition, but one that presents a virtually parallel case that sets forth an alternative number for every number presented by the company.”² The Consumer Advocate argues that the data being requested is mostly source and baseline data that almost every other utility in Tennessee files with its petition. According to the CPAD, “the Advocate and the TRA need that baseline data to do a fair amount of analysis before we can even do the more challenging analysis that gets into whether the rate increase is just and reasonable.”³

KINGSPORT POWER

Kingsport Power filed its *Response to Motion to Compel Filed by Consumer Protection and Advocate Division* (“*Response*”) on March 15, 2016. Kingsport states that it has acted in good faith in responding to the Consumer Advocate’s voluminous discovery requests. According to Kingsport, several of the Consumer Advocate’s requests are “overbroad, oppressive, and seek irrelevant information” and some of the documents requested do not exist.⁴ Kingsport recognizes that “the Consumer Advocate and the staff has to have information to develop their position in this case” but argues that some of the Consumer Advocate’s requests

¹ *Motion to Compel*, p. 6 (March 7, 2016).

² *Id.* at 5.

³ Transcript of Proceedings, Kingsport Power Status Conference, p. 10 (March 14, 2016).

⁴ *Response*, p. 10 (March 15, 2016).

are unreasonable, and the Consumer Advocate has failed to try to work out discovery issues prior to filing its *Motion to Compel*.⁵

EETEC’S RESPONSE TO MOTION TO COMPEL

On March 11, 2016, East Tennessee Energy Consumers (“EETEC”) filed its *East Tennessee Energy Consumers’ Response to the Consumer Protection and Advocate Division’s Motion to Compel Kingsport Power Company to Answer its First Round Discovery Requests* (“*EETEC Response*”). EETEC expressed concerns regarding CPAD Discovery Request No. 25, which asked for detailed information from Kingsport regarding some of EETEC’s members. EETEC argues that the information is irrelevant and contains “confidential, highly sensitive and proprietary business information, the disclosure of which could result in substantial damages and business losses.”⁶ EETEC also requests that “any contact with its members by CPAD or other participants in this proceeding be initiated through EETEC’s counsel...”⁷ EETEC requests that the *Motion to Compel* be denied for CPAD Discovery Request No. 25.

The Consumer Advocate argues that the Protective Order in place in this docket is sufficient to address EETEC’s concerns.⁸ According to the Consumer Advocate, the information requested in Discovery Request 25 is “critical to the revenue analysis and the projections.”⁹ Further, the Consumer Advocate states that this information has been received in most other rate cases in which the Consumer Advocate has been involved.¹⁰

At the March 17th Status Conference, EETEC suggested language to be added to the Protective Order that would address its concerns relative to Request 25. The Hearing Officer

⁵ Transcript of Proceedings, Kingsport Power Status Conference, p. 23 (March 14, 2016).

⁶ *EETEC Response*, pp. 2-3 (March 11, 2016).

⁷ *Id.* at 3.

⁸ Transcript of Proceedings, Kingsport Power Status Conference, p. 28 (March 14, 2016).

⁹ *Id.*

¹⁰ *Id.* at 29.

granted the Consumer Advocate's Discovery Request 25, but in an effort to address ETEC's concerns, asked ETEC to email its proposed language for review. The Hearing Officer also encouraged the parties to work out a solution to address ETEC's concerns. On April 14, 2016, the Consumer Advocate and ETEC filed a *Discovery Agreement between the Consumer Advocate and East Tennessee Energy Consumers*, which resolved ETEC's discovery issues regarding CPAD Discovery Request No. 25.

MARCH 14, 2016 AND MARCH 17, 2016 STATUS CONFERENCES

A *Notice of Status Conference* was issued on March 7, 2016. As stated in the notice, the Status Conference was held to consider issues regarding discovery and to hear oral arguments on the Consumer Advocate's *Motion to Compel*. As noticed, the Status Conference was held in the Hearing Room G.201 on the Ground Floor of the Andrew Jackson State Office Building and the following parties attended:

Kingsport – William C. Bovender, Esq. and John B. Harvey, Esq., Hunter, Smith & Davis, LLP, P.O. Box 3704, Kingsport, TN 37664.

Consumer Advocate – Wayne Irvin, Esq. and Vance Broemel, Esq., Office of the Attorney General, P.O. Box 20207, Nashville, TN 37202.

ETEC (by phone) – Michael J. Quinan, Esq., Christian & Barton, LLP, 909 East Main Street, Suite 1200, Richmond, VA 23219.

Tennessee Solar Energy Industries Association (“TenneSEIA”) - Henry W. Walker, Esq., Bradley Arant Boult Cummings LLP, 1600 Division Street, Suite 700, Nashville, TN 37203.

The Alliance for Solar Choice (“TASC”) - Henry W. Walker, Esq., Bradley Arant Boult Cummings LLP, 1600 Division Street, Suite 700, Nashville, TN 37203.

Energy Freedom Coalition of America (“EFCA”) – Charles B. Welch, Jr., Esq., Farris Bobango PLC, 414 Union Street, Suite 1105, Nashville, TN 37219.

During the March 14th Status Conference, the Consumer Advocate, Kingsport, and ETEC

presented oral arguments on the *Motion to Compel*. During discussions held at the Status Conference, it became clear that there was some miscommunication and misunderstanding regarding some of CPAD's discovery requests. In order to give the parties and their experts an opportunity to discuss the discovery disputes and clear up some confusion regarding some of the requests, the Status Conference was continued to March 17, 2016.

The March 17, 2016 Status Conference, was held in the Executive Conference Room of the TRA, and the same parties listed above were present and on the phone. The parties reported they had made some progress to clarify some of the discovery requests, and a number of the discovery matters were resolved. Discovery Requests 5, 44, and 45 had been resolved. Requests 18, 19, 20, 27 were resolved subject to the Consumer Advocate's expert reviewing the information provided by Kingsport. During the March 17, 2016 Status Conference, the Hearing Officer reviewed and ruled on the remaining Discovery Requests in the *Motion to Compel*.

FINDINGS AND CONCLUSIONS

I. GENERAL DISCOVERY PRINCIPLES

Pursuant to Authority Rule 1220-1-2-.11, 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. The Rules of Civil Procedure permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.¹¹ 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

¹¹ Tenn. R. Civ. P. 26.01.

claim or defense of the party seeking discovery or to the claim or defense of any other party.”¹²

The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.¹³ 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 encompass any matter that bears on or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”¹⁴

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.¹⁵ 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.¹⁶ In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).¹⁷

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.¹⁸ “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”¹⁹

¹² *Id.* at 26.02(1).

¹³ *Id.*

¹⁴ *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)).

¹⁵ Tenn. R. Civ. P. 26.02(1).

¹⁶ *Id.* at 26.02 & .03.

¹⁷ *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

¹⁸ Tenn. R. Civ. P. 37.01(2).

¹⁹ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

II. HEARING OFFICER RULING AT MARCH 17, 2016 STATUS CONFERENCE

At the March 17, 2016 Status Conference, after considering the arguments of the parties and the law governing discovery, the Hearing Officer ruled on the Consumer Advocate's *Motion to Compel*. The Hearing Officer found that much of the information requested by the Consumer Advocate is consistent with information requested in most other utility rate cases. In addition, the Hearing Officer found that TRA Staff required most of the information requested by the Consumer Advocate and in the format requested in order to evaluate Kingsport's *Petition* and advise the panel regarding the *Petition*. Further, the Hearing Officer was persuaded by the fact that Kingsport Power has not had a rate case in over 20 years, and the information requested is necessary to establish a baseline and to evaluate the rate increase requested by Kingsport in its *Petition*. This method of evaluating a petition for a rate increase is consistent with the process that has been used by the Authority for setting rates in virtually every other large utility rate case. Based on these findings, at the March 17th Status Conference, the Hearing Officer ruled on the *Motion to Compel* as follows:

- **Request 1** (Copies of the Accounting Policies): **GRANTED**. Kingsport provided a complete list of its accounting and finance policies, and will look for any other rate-oriented policies. Kingsport will provide a list of any additional rate-oriented policies to the Consumer Advocate, and the Consumer Advocate can determine if it needs copies of any of those policies.
- **Request 5** (Monthly Trial Balance 1/2009 - 12/2012 and 1/2015 - 12/2015): **RESOLVED – Kingsport has responded**.
- **Request 6** (Monthly Trial Balance 1/2009-12/2015): **GRANTED**.
- **Request 7** (Monthly Trial Balance 1/2009-12/2015): **GRANTED**.

- **Request 8** (Segment reconciliation for certain items form AEP stockholder's annual report from all state jurisdictions including TN) **GRANTED.** Kingsport does not maintain this information by state jurisdiction but will provide it by subsidiary.
- **Request 9(c)** (Update tabs in spreadsheet to include footnotes to source files): **GRANTED.**
- **Request 10(c)** (Update tabs in spreadsheet to include footnotes to source files): **GRANTED.**
- **Request 11(c)** (Update tabs in spreadsheet to include footnotes to source files): **GRANTED.**
- **Request 12(c)** (Update tabs in spreadsheet to include footnotes to source files): **GRANTED.**
- **Request 13(d) and (e)** (Update tabs in spreadsheet to include footnotes to source files): **GRANTED.**
- **Request 14(c) and (d)** (Update tabs in spreadsheet to include footnotes to source files): **GRANTED.**
- **Request 18** (Billing demand data from 1/2009 through 12/2015 in Microsoft Excel format): **RESOLVED--Kingsport has responded.**
- **Request 19** (Customer billing data from 1/2009 through 12/2015 in Microsoft Excel format): **RESOLVED--Kingsport has responded.**
- **Request 20** (Monthly tariff summaries from 1/2009 through 9/2015): **RESOLVED--Kingsport has responded.**
- **Request 23** (Copy of Street Lighting contracts currently in effect or terminated in the last 24 months): **DENIED.** In its *Response*, Kingsport states that it provided the

currently existing 1995 contract with the City of Kingsport and that there are no additional contracts. At the Status Conference, Kingsport stated that it will attempt to find the document regarding its agreement for street lighting for Mount Carmel and provide it to the CPAD.

- **Request 25** (Information on Kingsport's 25 largest customers): **GRANTED.** Kingsport will contact its large customers who are not members of ETEC to let them know that they may be contacted by CPAD and the TRA Staff.
- **Request 26** (monthly NOAA reports): **DENIED.** This information is publicly available.
- **Request 27** (monthly information by company class, by tariff and by rate block from 1/2009 - 12/2015): **RESOLVED –Kingsport has responded.**
- **Request 32** (monthly accumulated depreciation by subaccount 1/2009 – 12/2015): **GRANTED.**
- **Request 42** (monthly balance in Contributions in Aid of Construction by subaccount 1/2009 – 12/2015): **GRANTED.**
- **Request 44** (monthly balance in Accumulated Deferred FIT 1/2009 - 12/2015): **RESOLVED –Kingsport has responded.**
- **Request 45** (monthly balance in Accumulated Deferred ITC 1/2009-12/2015): **RESOLVED –Kingsport has responded.**
- **Request 54** (Internal accounting manuals and policies in effect or terminated in the last 24 months): **GRANTED.** Kingsport argued that the manuals are voluminous and it would be onerous to provide them to CPAD. However, Kingsport stated that the manuals were available electronically. Kingsport shall provide the manuals in an

electronic format.

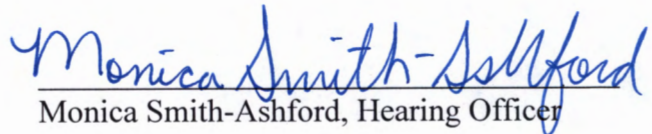
- **Request 57** (All jurisdictional operating budget variance reports for 2012, 2013, 2014, 2015, and 2016): **GRANTED.**
- **Request 60** (Monthly labor data for 2012, 2013, 2014, 2015, and 2016): **DENIED.**
In its *Response*, the Company states it has responded to the request and submitted information to clarify the information that had been provided.
- **Request 61** (Employee levels): **DENIED.** In its *Response*, Kingsport states that the CPAD is asking a new question in the *Motion to Compel* than was asked in the initial request. Kingsport states that it does not maintain records regarding the number of employees for each Kingsport affiliate in the regular course of business.
- **Request 68** (Company compensation studies used for compensation for test year attrition year or rate year): **GRANTED.**
- **Request 69** (All compensation studies the company has relied on or will rely on for rate case): **GRANTED.**
- **Request 76** (monthly level of each separate benefit cost for 2012, 2013, 2014, 2015, and 2016 to date): **GRANTED.**
- **Request 79** (monthly level of each benefit cost for 2012, 2013, 2014, 2015, and 2016): **GRANTED.**
- **Request 84** (Level of contributions and donation by the Company by payee with description and purpose): **DENIED.** Kingsport states it has provided the name of the entities receiving contributions and the amount given to each entity. Providing a description and purpose for all of the entries is unduly burdensome.

- **Request 86** (Level of dues included in cost of service by payee with description and purpose): **DENIED.** Kingsport states it has provided the name of the entities receiving contributions and the amount given to each entity. The Company states that the description and purpose for the contribution is self-explanatory.
- **Request 87** (Payments made to industry organizations other than membership dues included in cost of service): **DENIED.** In its *Response*, the Company clarified its response to the request.
- **Request 100** (Annual jurisdiction data related to uncollectible accounts for 2012, 2013, 2014, 2015, and 2016 to date): **DENIED.** The Company states it has responded to the request. With respect to the 2016 data, the data is only available on an annual basis so 2016 data is not available.
- **Request 105** (Amounts included in cost of service during the test year): **DENIED.** The Company states it has responded to part of the request, and it would be unduly burdensome for it to provide the information regarding employee memberships.
- **Request 121** (Supplemental Executive Retirement Plan –SERP): **DENIED.** In its *Response*, Kingsport states it has responded fully and accurately to the request.
- **Request 130** (AEP Board of Directors’ Meeting minutes since 1/1/2014): **GRANTED.** Kingsport is required to make the information available to CPAD in Nashville.
- **Request 138** (Studies relied on by Company to support Wright testimony regarding TRS costs): **DENIED.** In its *Response*, Kingsport states it has provided a complete and accurate response to the request.

- **Request 151** (Reports relied on to support Buck testimony on Rate Realignment Rider): **DENIED**. In its *Response*, Kingsport states it has provided a complete and accurate response to the request.
- **Request 154** (Reports to support Caudill testimony regarding demand charges): **DENIED**. In its *Response*, Kingsport states it has provided a complete and accurate response to the request.
- **Request 155** (Admission regarding demand charges): **DENIED**. In its *Response*, Kingsport states it has provided a complete and accurate response to the request.
- **Request 159** (Copy of net metering bills form 1/2013 – 12/2015 and *pro forma* calculation under proposed tariff): **GRANTED**. The parties will work to resolve any remaining issues regarding this request.
- **Request 172** (Copies of all documents distributed concerning Net Metering): **DENIED**. The Company has sufficiently responded to the request.
- **Request 179** (Criteria for determining who qualifies as high-usage, low-income residential customer and the number who meet the criteria): **DENIED**. The Company has sufficiently responded to the request.
- **Request 183** (Bases for estimated number in each DSM program and copies of reports for underlying bases): **DENIED**. In its *Response*, Kingsport states it has provided a complete and accurate response to the request.
- **Request 184** (Bases for estimated DSM program costs and copies of reports for underlying bases): **DENIED**. In its *Response*, Kingsport states it has provided a complete and accurate response to the request.

- **Request 200** (Identify all persons assisting in answering requests): **DENIED.** The request is overbroad and unduly burdensome.
- **Request 201** (All expert witnesses expected to call at the hearing): **DENIED.** In its *Response*, the Company named one expert witness and should supplement if there are any additional witnesses or experts.
- **Request 202** (All persons having knowledge of discoverable matters in this docket): **DENIED.** Kingsport has sufficiently responded to the request.
- **Request 203** (Copies of all documents referred to or relied on in responding to discovery requests): **DENIED.**
- **Request 204** (Copies of all hearing exhibits to be used at the hearing): **DENIED.** The request is premature. A date for the parties to exchange Exhibit Lists will be established at the Pre-hearing Conference.
- **Request 205** (Copies of all documents relied on by witnesses): **DENIED.** The request is overbroad and unduly burdensome.
- **Request 206** (Identify all documents in the docket record which Kingsport plans not to stipulate to authenticity): **DENIED.**

IT IS HEREBY ORDERED.


Monica Smith-Ashford, Hearing Officer