BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 9, 2016

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

ORDER DENYING JOINT MOTION OF SOLAR INTERVENORS TO SEVER AND DISMISS KINGSPORT'S PROPOSED NET METERING TARIFF

This matter came before Vice Chairman David F. Jones, Director Robin L. Morrison and Director Kenneth C. Hill of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on June 20, 2016, to hear and consider the *Joint Motion of Solar Intervenors to Severe (sic) and Dismiss Kingsport's Proposed Net Metering Tariff* ("*Joint Motion*") filed on May 6, 2016.

BACKGROUND

On January 4, 2016, Kingsport Power Company d/b/a AEP Appalachian Power ("Kingsport," "KPC" or the "Company") filed a *Petition* to increase rates, which initiated KPC's first general rate case in more than 20 years. As part of this general rate case, KPC has proposed to close its current Net Metering Service Rider ("N.M.S.-1") to new customers at the end of 2016.[1] Beginning January 1, 2017, Kingsport proposes that new solar or net metering customers

[1] *Direct Testimony of Teresa A. Caudill on Behalf of Kingsport Power Company d/b/a AEP Appalachian Power*, Exhibit 3, p. 33 (January 4, 2016).

be required to take service under Net Metering Service Rider 2 ("N.M.S.-2" or the "Rider").[2] Under N.M.S-2, residential and small commercial net metering customers will be required to pay a demand charge as part of their monthly bill.[3] The demand charge, as proposed, will be based on the customer's "single highest 15-minute integrated peak" demand during each billing period.[4]

Due to the substantial differences between the current N.M.S.-1 and N.M.S.-2, several entities representing the interests of solar power, including *The Energy Freedom Coalition of America (EFCA), the Alliance for Solar Choice (TASC), and the Tennessee Solar Energy Industries Association (TenneSEIA)* (collectively referred to as the "Solar Intervenors"), petitioned to intervene as parties to the rate case proceeding.[5] Thereafter, the Solar Intervenors were granted full intervention, and each has participated in discovery and in the proceedings generally as the matter has progressed for a hearing before the panel.[6]

On May 6, 2016, the Solar Intervenors filed the *Joint Motion.* On May 18, 2016, the Company filed its *Response to Joint Motion of Solar Intervenors to Sever and Dismiss Kingsport's Proposed Net Metering Tariff* ("*Response*"). Finally, on May 25, 2016, the Solar Intervenors filed a *Reply of the Solar Intervenors* ("*Reply*").

---

[2] *Id.* at 33 and 38. The Company's N.M.S-2 would apply to all customers who generate their own electricity, no matter whether the source is solar, wind, or another. For the purpose of convenience, and because the arguments and participation have come almost exclusively from solar interests, this Order will refer to future customers that would be affected by N.M.S.-2 as "solar" or "net metering" customers, even though it could be any customer who generates his or her own electric power.

[3] *Id.* at Exhibit 3, p. 11 and 16.

[4] *Id.*

[5] *The Energy Freedom Coalition of America Petition to Intervene, Petition to Intervene Filed on Behalf of the Alliance for Solar Choice (TASC)*, and *Petition to Intervene Filed on Behalf of Tennessee Solar Energy Industries Association (TenneSEIA)* (February 4, 2016).

[6] Kingsport objected to the Solar Intervenors' full intervention in the case and argued instead that their participation should be limited to solar-related issues. *See Objection to Petitions to Intervene*, pp. 4-6 (February 8, 2016). Full intervention was granted by the Hearing Officer. *See Order on Status Conference*, pp. 8-10 (April 28, 2016).

POSITIONS OF THE PARTIES

Solar Intervenors

In the *Joint Motion,* the Solar Intervenors assert that KPC, in its rate case *Petition* and subsequent filings, has admitted that through the implementation of its new N.M.S.-2, it intends to charge a separate demand charge to solar customers which will not be applicable to non-solar customers.[7] The Solar Intervenors argue that N.M.S.-2 is illegal on its face because it contradicts the requirements of Tenn. Code Ann. § 65-4-105(d), which provides, in pertinent part:

> When any public utility regulated by the authority supplies its services to consumers who use solar or wind-powered equipment as a source of energy, such public utility shall not discriminate against such consumers by its rates, fees or charges or by altering the availability or quality of energy.

Further, the Solar Intervenors assert that there is a distinction between Tenn. Code Ann. § 65-4-105(d) and two other utility rate regulation statutes which prohibit discrimination, namely, Tenn. Code Ann. § 64-4-122 and Tenn. Code Ann. § 65-5-104.[8] The Solar Intervenors contend that case law has confirmed that both of these statutes specifically prohibit unjust discrimination.[9] Further, they point out that absent from the statute here at issue is the word "unjust." The Solar Intervenors argue that this omission is intentional.[10] Because "unjust" is included in other rate statutes, but not in Tenn. Code Ann. § 65-4-105(d), the Solar Intervenors contend that the legislature intended to prohibit any sort of discrimination as relates to solar power users.[11]

Accordingly, they contend that the Company has admitted to differentiating between solar and non-solar customers because the Company is proposing a demand charge on solar customers, a charge that the Solar Intervenors claim would not apply to customers who do not

---

[7] *Joint Motion*, p. 4 (May 6, 2016).
[8] *Reply*, pp. 2-3.
[9] *Consumer Advocate Division v. TRA*, 2002 WL 1579700 (Tenn. Ct. App. 2002).
[10] *Reply*, p. 6.
[11] *Id.*

generate their own electricity.[12] Therefore, they conclude that the N.M.S.-2 proposal is, on its face, contrary to the statute and should be dismissed.[13]

Kingsport Power Company

In its Response, Kingsport explains that, in 2011, its N.M.S.-1 was developed and approved at the urging of the TRA as an alternative to individual special contracts with customers who wished to pursue net metering services ("NMS").[14] Under Kingsport's proposal, N.M.S.-1 would be closed to new customers and its proposed N.M.S.-2 will be open to all customers who wish to install their own alternative forms of electric generation, and not simply limited to solar and wind power only. KPC argues that NMS customers continue to rely on the Company's infrastructure to deliver power when their own generating facilities are insufficient and to export excess power generated to the grid. While NMS customers can reduce or eliminate monthly kWh charges by netting the energy they purchase against the energy they produce, they continuously rely on the Company's infrastructure which has fixed costs.[15]

Under N.M.S.-1, KPC recovers fixed costs related to its infrastructure through the kWh charge in the Company's RS and SGS tariffs. According to KPC, its proposed RS-D and SGS-D tariffs do not impose new or different costs on its NMS customers, but are simply other mechanisms to recover the same types of costs from its NMS customers that it recovers from its non-net metering customers.[16] KPC asserts that proposed N.M.S.-2 would alleviate an improper subsidization of fixed costs.[17] The Company asserts that this unjust and improper subsidization

---

[12] *Id.*
[13] *Id.*at 2-4.
[14] *Response*, p. 2 (May 18, 2016), citing TRA Docket No. 11-00111, Order Approving Net Metering Tariff.
[15] *Id.* at 3.
[16] *Id.* at 2-3.
[17] *Id.* at 3.

has been acknowledged and observed by the industry in general and has been an issue considered and resolved in rate case proceedings across the country.[18]

The Company argues that what Tenn. Code Ann. § 65-4-105(d) disallows is unjust discrimination towards solar users.[19] KPC notes that "discrimination" is not defined as the term relates to the statute. The Company asserts that a claim of discrimination in a rate-making setting requires a factual inquiry to determine if similarly situated customers are being treated differently and, if so, whether there is sufficient justification for such treatment.[20] KPC argues that there is not sufficient evidence in the record to suggest that they do not have justification for proposing the demand charge and that N.M.S.-2 is not discriminatory if it is justified.[21] They argue that the demand charge is justified because it is meant to account for solar customers' economic impact on the grid and prevent non-solar customers from subsidizing solar customers' usage of the grid.[22]

Whether or not this demand charge is justified, KPC argues, is a factual inquiry which must be decided by the facts presented, and the record is not yet complete in order to make such a determination.[23] Accordingly, they assert that there is no evidence that N.M.S.-2 is not invalid on its face as the Solar Intervenors have suggested, or that customers who install solar or wind generation equipment will be treated differently than customers that use other forms of alternative generation.[24] They also cite to the history of the TRA's approval of creating different

[18] *Id.*
[19] *Id.* at 8.
[20] *Id.* at 7.
[21] *Id.* at 7-9.
[22] *Id.* at 2-3.
[23] *Id.* at 6-9.
[24] *Id.* at 7.

customer classes and argue that such differentiation is allowed and, accordingly, should be allowed in the case of N.M.S.-2.[25]

Finally, Kingsport argues that judicial economy weighs in favor of keeping all of the rate issues together and deciding on all of them together.[26] KPC notes that the Company and the intervening parties have reached several procedural milestones, including extensive discovery related to the N.M.S.-2. KPC argues that to grant the motion would render much of that work meaningless, while carving out the issue from the rate case detracts from a comprehensive examination of the Company's expenses and revenues for purposes of setting just and reasonable rates.[27]

FINDINGS AND CONCLUSIONS

In the *Joint Motion*, the Solar Intervenors asked that the Authority sever and dismiss Kingsport's proposed N.M.S.-2 from the Company's pending general rate case proceeding. During the regularly scheduled Authority Conference held on June 20, 2016, the panel deliberated the Solar Intervenor's *Joint Motion*. Upon consideration of the record, a majority of the panel voted to deny the *Joint Motion* based on the following findings and conclusions:[28]

Standard of Review

Pursuant to Tenn. Code Ann. § 4-5-102, the Authority conducts contested case proceedings in accordance with the provisions of the Uniform Administrative Procedures Act ("UAPA") located at Tenn. Code Ann. § 4-5-101 *et seq.* Tenn. Code Ann. § 4-5-308(a) allows the Hearing Officer to give the parties an opportunity to file motions, including Motions to

[25] *Id.* at 8.
[26] *Id.* at 4-5.
[27] *Id.* at 4-5.
[28] Director Hill did not vote with the majority, and he stated that he would instead support dismissal of the N.M.S-2 tariff.

Dismiss. [29] In addition, TRA Rule 1220-1-2-.03(2)(e) allows parties to seek relief through a motion to dismiss for failure to state a claim upon which relief can be granted.[30] The standards for reviewing such motions are well established:

> When considering a motion to dismiss for failure to state a claim upon which relief can be granted, we are limited to an examination of the complaint alone. *See Wolcotts Fin. Serv., Inc. v. McReynolds,* 807 S.W.2d 708, 710 (Tenn. Ct. App. 1990). The basis for the motion is that the allegations in the complaint, when considered alone and taken as true, are insufficient to state a claim as a matter of law. *See Cornpropst v. Sloan,* 528 S.W.2d 188 (Tenn. 1975). Although allegations of pure legal conclusion will not sustain a complaint, *see Ruth v. Ruth,* 213 Tenn. 82, 372 S.W.2d 285, 287 (1963), a complaint "need not contain in minute detail the facts that give rise to the claim," so long as the complaint does "contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial." *Donaldson v. Donaldson,* 557 S.W.2d 60, 61 (Tenn. 1977); *White v. Revco Discount Drug Centers,* 33 S.W.3d 713, 718, 725 (Tenn. 2000); *accord, Givens v. Mullikin ex rel. McElwaney,* 75 S.W.3d 383, 391, 399, 403-404 (Tenn. 2002). In short, a Tennessee Rule of Civil Procedure 12.02(6) motion to dismiss seeks only to determine whether the pleadings state a claim upon which relief can be granted, and such a motion challenges the legal sufficiency of the complaint, not the strength of the plaintiff's proof. *Bell ex rel. Snyder v. Icard,* 986 S.W.2d 550, 554 538*538 (Tenn. 1999). In considering such a motion, the court should construe the complaint liberally in favor of the plaintiff, taking all the allegations of fact therein as true. *See Cook ex. rel. Uithoven v. Spinnaker's of Rivergate, Inc.,* 878 S.W.2d 934, 938 (Tenn. 1994). However, we are not required to accept as true factual inferences or conclusions of law. *Riggs v. Burson,* 941 S.W.2d 44, 47-48 (Tenn. 1997). An appellate court should uphold the grant of a motion to dismiss only when it appears that the plaintiff can prove no set of facts in support of a claim that will entitle him or her to relief. *Young v. Barrow,* 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003).[31]

---

[29] *Hardy v. State of Tennessee, Department of Health, Division of Health Related Boards*, 2010 WL 175107, *3 (Tenn. Ct. App. Jan. 19, 2010) (quoting *Yokley v. State Board of Education*, 305 S.W.3d 523, 526 (Tenn. Ct. App. 2009)).

[30] TRA Rule 1220-1-2-.03(2)(e) provides "[e]very defense, in law or fact, to an order or notice commencing a contested case or to an initial petition, shall be asserted in an answer, except that the following defenses may, at the option of respondent, be made by motion in writing . . . (e) failure to state a claim upon which relief can be granted."

[31] *PNC Multifamily Capital Institutional Fund XXVI Limited Partnership v. Bluff City Community Development Corporation*, 387 S.W.3d 525, 537-38 (Tenn. Ct. App. 2012).

Dismissal & Severance

First, as to the request to dismiss N.M.S.-2, a majority of the panel finds that the Solar Intervenors have not met the burden necessary to grant a motion to dismiss for failure to state a claim upon which relief can be granted. Case law and prior practice dictate that rate discrimination is a fact-based inquiry.[32] Furthermore, there is nothing in the case law to suggest that a separate charge for solar customers is *per se* rate discrimination as the Solar Intervenors have argued. Whether or not KPC can prove that its N.M.S.-2 is not discriminatory is a fact-based inquiry that cannot be decided upon at this point and requires full development of the record.

While the motion of the Solar Intervenors has narrowly focused on the specifics of the proposed tariff and its compliance with Tenn. Code Ann. § 65-4-105(d), they assert any changes to the net metering tariff in effect should be determined "in a collaborative process" outside the context of a general rate case. Thus, the scope of the Solar Intervenors *Joint Motion* is not solely to preclude the proposed N.M. Service Rider 2 tariff, but rather to preclude the issue of net metering from examination by the Authority in this docket. This argument ignores the claims of Kingsport that the present net metering tariff in effect is "flawed" and in need of modification.

When a public utility files for a rate increase, it files proposed tariffs to replace existing tariffs approved by the Authority.[33] With the filing of the *Petition*, the Company claims changes are needed to the present tariff.[34] In a rate case, when a public utility files proposed tariffs to revise rates and terms of service, the Authority is not limited to approving or rejecting a specific

---

[32] *See Mansfield Municipal Electric Dept. and North Attleborough Electric Dept. v. New England Power Co.*, 94 FERC 63, 023 (2001) and *Consumer Advocate Division v. TRA*, 2002 WL 1579700 (Tenn. Ct. App. 2002).
[33] *Consumer Advocate v. Tennessee Regulatory Authority*, 2012 WL 1964593*2 (Tenn. Ct. App.2012).
[34] *William K. Castle*, Pre-filed Direct Testimony, pp. 5-6 (June 21, 2016).

tariff. [35] Rather, the Authority may order the filing of revised tariffs with different terms and rates as determined by the Authority based upon an evidentiary record.

Net metering is an emerging issue the public service commissions of this nation are expected to contend with and develop. The potential for growth in the number of net metering customers is illustrated by the intervention of interested parties such as the Solar Intervenors and the number of public comments made with respect to the issue. While other states have multiple electric public utilities that may be better served by examining net metering issues within the confines of a generic docket, Tennessee is unique in that the Authority's electric rate regulation extends primarily and most substantively to one utility, Kingsport Power.

While the General Assembly has enacted provisions applicable to solar and wind energy customers, it also directed the Authority in 2009 to examine and seek to implement effective energy conservation policies.

> The general assembly declares that the policy of this state is that the Tennessee regulatory authority will seek to implement, in appropriate proceedings for each electric and gas utility, with respect to which the authority has rate making authority, a general policy that ensures that utility financial incentives are aligned with helping their customers use energy more efficiently and that provides timely cost recovery and a timely earnings opportunity for utilities associated with cost-effective measurable and verifiable efficiency savings, in a way that sustains or enhances utility customers' incentives to use energy more efficiently.[36]

Kingsport has experimented with a net metering tariff approved by the Authority and claims changes are necessary to address cross-subsidies.[37] This rate case is an appropriate proceeding to examine the existing net metering tariff in place, its impact on customers and Kingsport Power and, whether changes should be made in the manner as suggested by Kingsport, by intervening parties or imposed by the Authority after hearing from all parties.

---

[35] *Consumer Advocate v. Tennessee Regulatory Authority*, 2012 WL 1964593*2 (Tenn. Ct. App.2012).
[36] Tenn. Code Ann. § 65-4-126.
[37] *William K. Castle*, Pre-filed Direct Testimony, p. 6 (June 21, 2016).

Furthermore, the majority of the panel finds that it would, at this time, be detrimental to the general rate case and against judicial economy to sever the N.M.S.-2 and consider it separately from the case as filed. As was asserted by at least one of the Solar Intervenors,[38] the N.M.S.-2 or any sort of proposed charge for solar, is properly included in a general rate case and considered as part of the larger picture when determining the overall rate design. If it were removed from the already pending rate case proceeding, it would be unclear whether or not this revenue and associated costs would need to be accounted for somewhere else and, if so, in what amount. In addition, significant resources have already been devoted to this matter and it would be against judicial economy to undo those efforts by severing the net metering issue from the rest of the rate case. Accordingly, at this point, the N.M.S.-2 should not be severed or disposed of separately from the Company's general rate case.

In conclusion, the Authority declines to grant the Solar Intervenors request to strike the proposed tariff and consider the issue in a separate docket. The Authority will hear and determine whether the net metering tariff currently in effect is in need of modification or replacement based on an evidentiary record after the hearing on the merits. To the extent the Solar Intervenors argue that the tariff itself is illegal on its face, at this time the Authority has ruled that the proposed tariff and the accompanying supporting testimony present a claim that the net metering tariff in place is in need of modification or replacement. The Authority will consider whether any changes to the existing net metering tariff are necessary and determine the legality of the proposed tariff of Kingsport, if necessary, after a hearing on the merits. As to judicial economy, in seeking to shape the State's net metering policy, the parties, including the Solar Intervenors, have already invested considerable time and resources in this matter which

[38] *See Energy Freedom Coalition of America, LLC's Response to Kingsport Power's Objection to Petition to Intervene,* pp. 5-6 (February 12, 2016).

may only be duplicated or increased in another proceeding if the *Joint Motion* were granted. Accordingly, the *Joint Motion* is denied.

IT IS THEREFORE ORDERED THAT:

1. The *Joint Motion of Solar Intervenors to Severe (sic) and Dismiss Kingsport's Proposed Net Metering Tariff* filed on May 6, 2016 by the Alliance for Solar Choice, Tennessee Solar Energy Association, and the Energy Freedom Coalition of America, is denied.

2. The Hearing Officer is directed to continue to prepare this matter for a hearing before the Panel.

3. Any person who is aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen days from the date of this Order.

4. Any person who is aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty days from the date of this Order.

Vice Chairman David F. Jones and Director Robin L. Morrison concur. Director Kenneth C. Hill respectfully dissenting.

ATTEST:

Earl Taylor

Earl R. Taylor, Executive Director