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October 10, 2017

VIA EMAIL (Sharla.Dillon@tn.gov) & FEDEX

Mr. David Jones, Chairman
c/o Sharla Dillon, Dockets & Records Manager
Tennessee Public Utilities Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243

Filed Electronically in TPUC Docket Room on
10/10/2017

Re: Resolution of Boundary Dispute Between Kingsport
Power Company d/b/a AEP Appalachian Power and
Bristol Tennessee Essential Services
Docket No. 17-00087

Dear Chairman Jones:

On behalf of Kingsport Power Company, we transmit herewith the following:

Response of Kingsport Power Company d/b/a AEP Appalachian Power to
Motion to Dismiss or Suspend of Bristol Tennessee Essential Services

The originals and four (4) copies are being sent via Federal Express.

Very sincerely yours,

HUNTER, SMITH & DAVIS, LLP



William C. Bovender

Enclosure: As stated

cc: Henry Walker, Esq. (w/enc.)
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BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

IN RE:)	
)	
RESOLUTION OF BOUNDARY DISPUTE)	
BETWEEN KINGSPORT POWER COMPANY)	DOCKET NO.: 17-00087
d/b/a AEP APPALACHIAN POWER AND)	
BRISTOL TENNESSEE ESSENTIAL SERVICES)	
AS AUTHORIZED BY T.C.A. § 65-34-105)	

**RESPONSE OF KINGSPORT POWER COMPANY d/b/a AEP APPALACHIAN POWER
TO MOTION TO DISMISS OR SUSPEND OF
BRISTOL TENNESSEE ESSENTIAL SERVICES**

Comes Petitioner, Kingsport Power Company, d/b/a AEP Appalachian Power (“KPC”) and submits the following response to the Motion to Dismiss or Suspend filed in the Docket by Bristol Tennessee Essential Services (“BTES”):

A. PRELIMINARY STATEMENT

KPC filed its Petition seeking the convening of a contested case pursuant to TPUC Rule 1220-1-2-.02 and T.C.A. § 4-5-301, et seq. so that the Tennessee Public Utility Commission (“TPUC”) can exercise its statutory duty to resolve a boundary dispute between two public electric systems – KPC and BTES – that will determine which system is empowered to provide electric service to the new Sullivan County High School, which is yet to be built. KPC’s Petition sets forth in detail the basis of its assertions that the school site was within the “Current geographic territory” where KPC was providing electric service on February 16, 1989. See, T.C.A. § 65-34-102(1).

In 1989, the General Assembly enacted a statute, T.C.A. § 65-34-101 – T.C.A. § 65-34-108, which placed restrictions on the ability of KPC to expand its service territory into areas

served by municipal and cooperative electric systems, such as BTES. However, that Act and a corresponding Letter Agreement entered into by KPC, BTES, and the Johnson City Power Board gave protection to KPC's then existing service territory. See, EXHIBIT 10 to KPC's Petition. Indeed, in that Letter Agreement, BTES, KPC and the Johnson City Power Board agreed "not to extend service beyond the Current Geographic Territories as defined in said Bill...". EXHIBIT 10, p. 2. BTES, in its Motion filed in the Docket, has conveniently chosen to ignore the language of that Agreement, which directly negates its argument that it has or is entitled to have service rights to the school site or that it can move into KPC's territory.

It is also important to note that service to the school site by KPC would not constitute an expansion by KPC into an area already served by BTES – the "evil" which BTES sought to prevent by pushing the 1989 Act. There is no dispute that BTES has never provided electric service to the property at issue, and until recently had no poles, lines, or equipment on or near the property.

As set forth in KPC's Petition, unlike BTES, KPC was granted a utility franchise by Sullivan County, Tennessee in 1931 (EXHIBIT 1 to the Petition). KPC was granted a utility easement by the former owners of the entire tract (and more) on which the school will be built. This easement runs with the land, as recognized by reservations in the deeds conveying real property to the Sullivan County Board of Education, said deeds being submitted as part of the EXHIBITS to the Petition. (See, EXHIBITS 2, 3, 4, 5, 6, 7, 8, and 9 to the Petition). KPC's franchise and utility easement affecting this property are significant factors in determining the boundaries of KPC's service territory as of February 10, 1989.

BTES, by its own admission, has never provided any electric service to any portion of the school site. (Motion of BTES, p. 3). BTES has now set a pole on a portion of the site and, with significant bravado, has announced it intends to provide service to the school because the Sullivan County School Board desires that BTES provide it service. The preference of the School Board has no legal significance in this boundary dispute. To the contrary, by statute, only the TPUC can resolve this dispute. The 1989 Act grants to TPUC the jurisdiction "...to hear and resolve any dispute concerning the boundaries of the current geographic territories of non-consumer owned electric systems." T.C.A. § 65-34-105, "Jurisdiction." (Emphasis added). This jurisdiction is not assigned to the Circuit Court or the Chancery Court; and, even if it had been, as discussed herein below, the doctrine of exhaustion of administrative remedies dispossesses subject matter jurisdiction from the Circuit Court and places same squarely in the hands of TPUC. That language of T.C.A. § 65-34-105 is particularly telling:

A.) "the boundaries of current geographic territories" relates back to the Definitions set out in T.C.A. § 65-34-102(1); and

B.) "Non-consumer owned electric systems" also relates back to said Definitions and means KPC.

When the Definitions of T.C.A. § 65-34-102 and the Letter Agreement among BTES and KPC and the Johnson City Power Board are read together, as they must be, also taking into account KPC's franchise, utility easement, and the fact KPC has provided electric service to the school tract since 1947, the only logical conclusion that can be reached is that the area in question was part of KPC's service territory on February 16, 1989. KPC provided electric service to the School Board's property beginning in 1947; and, BTES has no right to serve the

school site: “Maintenance of previously established geographic territories, as modified by statutorily authorized agreements, continues to be in the public interest and promotes the public health, safety and welfare...,” T.C.A. § 65-34-101(4); as “[d]uplication of electric system facilities leads to excessive consumer costs and adverse environmental and aesthetic impacts...,” T.C.A. § 65-34-101(1); and “...the public health, safety, and welfare require that electric service to a particular geographic area be provided by a single electric system...”, T.C.A. § 65-34-101(2), i.e., the one there first-and in this case, KPC was there first, as discussed at length in Paragraphs 3-6, 9, 14-18 of KPC’s Petition, including EXHIBITS, same being incorporated herein by reference.

It must also be noted that in describing “Current geographic territory” in T.C.A. § 65-34-102(1), the legislature specified that “parcels are defined or designated by the assessor of property of the county.” This means tax parcels; and, if the school property is located in tax parcels served by KPC on February 16, 1989, KPC has the exclusive right to serve the school site. Id. KPC believes the proof in this proceeding will establish this.

B. TPUC SHOULD DECIDE THIS BOUNDARY DISPUTE

As discussed, T.C.A. § 65-34-105, reads:

“The Tennessee public utility commission has jurisdiction to hear and resolve any disputes concerning the boundaries of the current geographic territories of nonconsumer owned electric systems. The commission may promulgate and enforce appropriate rules not inconsistent with this chapter.”

This statute specifically assigns to TPUC the duty to decide boundary disputes of the very nature seen in this Petition. Indeed, Tennessee law requires that if an administrative remedy exists, a petitioner must attempt to resolve his grievance through agency procedure before seeking judicial review. Davis v. Sundquist, 947 S.W. 2d 155, 156 (Tenn. Ct. App. 1997). This is precisely the reason KPC filed its Petition with TPUC – It was required to:

“[T]he exhaustion of administrative remedies doctrine dictates that,

if a claim is ‘first cognizable by an administrative agency... the courts

will not interfere ‘until the administrative process has run its course’ ”.

Bailey v. Blount Co. Bd. of Education, 303 S.W. 3d 216, 235 (Tenn. 2010).

T.C.A. § 65-34-105 is specific; and, the doctrine which requires that administrative remedies be exhausted before a party may seek review by the Circuit or Chancery Court, mandates that TPUC is the forum of first resort relative to the resolution of the dispute between KPC and BTES. “The courts will not interfere at intermediate stages of an administrative proceeding”. Bracy v. Woods, 571 S.W. 2d 828, 829 (Tenn. 1978).

These principles are particularly viable when the type of procedural intervention attempted by BTES requests a declaratory judgment that asks the Circuit Court, instead of TPUC, to decide the boundary dispute:

“A declaratory judgment shall not be rendered concerning the

validity or applicability of a statute, rule or order unless the complainant

has petitioned the agency for a declaratory order and the agency has

refused to issue a declaratory order.”

T.C.A. § 4-5-225(b); Davis v. Sundquist, supra. In Chattanooga – Hamilton County Hospital Authority v. United Healthcare Plan of the River Valley, Inc., 475 S.W. 3d 746, 758-59 (Tenn. 2015), the Tennessee Supreme Court ruled as follows:

[T.C.A. § 4-5-22(b)] then prohibits a court from rendering a declaratory judgment “concerning the validity or applicability of a statute, rule or order unless the complainant has petitioned the agency for declaratory order.” Id. § 4-5-225(b). Thus, when a court is called upon to render a declaratory judgment “concerning the validity or applicability of” either a statute or regulation, it is without jurisdiction to do so unless the complainant has first exhausted its administrative remedies. Subsection (b) of Section 4-5-225 is a clear proscription; it states that a court “shall not...render[]” a declaratory judgment before administrative remedies have been exhausted.

The Circuit Court in Sullivan County, where BTES filed its civil action, must defer adjudicating the dispute put before TPUC by T.C.A. § 65-34-105 under the requirement that administrative remedies provided by statute be decided by the administrative agency. Bracy v. Woods, supra; Tennessee Enamel Mfg. Co. v. Hake, 194 S.W. 2d 468 (Tenn. 1946); Elliott v. Equalization Board, 372 S.W. 2d 181 (Tenn. 1963) 2 Am Jur 2d Administrative Law 595 (1962).

Indeed, TPUC is the better forum in which the boundary dispute should be decided given the expertise of TPUC in regulating utilities in general and electric utilities in particular.

C. BTES'S CONDEMNATION CLAIM IN CIRCUIT COURT IS NOT AND SHOULD NOT BE A FACTOR WHICH NECESSITATES A REFUSAL BY TPUC TO COMPLY WITH T.C.A. § 65-34-105

BTES's Complaint in the Circuit Court combines the alleged declaratory judgment question of who was serving the school site on February 16, 1989, with an alternative claim that asserts BTES may condemn KPC's service territory by virtue of the language of T.C.A. § 65-34-106, which reads as follows:

“Electric and community service cooperatives and municipal electric systems may in the exercise of their powers of eminent domain acquire facilities, equipment, and service areas of non-consumer owned electric systems, notwithstanding the fact that such facilities and equipment shall be dedicated to utility use following their acquisition.”

BTES, then, opines, that, because it can condemn KPC's service territory, there is no reason for TPUC to decide, as KPC asserts, that the school site was in KPC's service territory on February 16, 1989 under the section of the Act discussed in KPC's Petition and the Letter Agreement, signed by BTES, which establishes the site was in KPC's service territory as of the determinative date.

This BTES argument should be wholly disregarded by TPUC for the following reasons:

1.) It presumes the ultimate outcome of the condemnation action will be a taking by BTES. This Honorable Commission need not and should not engage in speculation as to the outcome of a condemnation case in order to avoid its duty under T.C. A. § 65-34-105.

2.) Without going into great detail relative to the power of eminent domain, suffice it to say a “taking” is not automatic. For example, the Circuit Court must apply a three part test to a taking because “...the power of eminent domain is to be strictly construed and the procedure prescribed by statute must be followed.” Vinson v. Nashville, Chattanooga & St. Louis Ry, 321 S.W. 2d 841 (Tenn. App. 1959). TPUC should not presume BTES can meet the three part test that is applied to takings: (a) “whether the condemning authority has the right to take...” (b) “whether the taking is for a public or private issue...”, and (c) would the taking constitute “...clear and palpable abuse of power, fraudulent, arbitrary or capricious action.” Pickles v. Parr, 138 S.W. 3d 210, 213 (Tenn. Ct. App. 2003).

(3) Tennessee Courts have not automatically upheld condemnation, even by cities within their city limits. City of Chattanooga v. Classic Refinery, Inc., 1998 WL 881862 (Tenn. Ct. App. 1998).

TPUC should neither assume BTES’s condemnation will be successful nor suspend its determination of the boundary dispute per T.C.A. § 65-34-105 pending the outcome of the condemnation count of the BTES Complaint. That is not what the Legislature intended. It should also be noted that the assertion of the condemnation claim in Circuit Court amounts to an admission by BTES that KPC is correct as to the fact that the school site is in its service territory even though BTES pleads it in the alternative.

The Motion filed by BTES in Docket No. 17-00087 is predicated on the notion that BTES will prevail on all claims in the Circuit Court. This notion is unsupported by law or facts. Suffice it to say that, in the Circuit Court proceeding, KPC will be filing dispositive motions predicated on failure to exhaust administrative remedies, ripeness, improper use of the condemnation statute and other defenses. The primary issue that must first be determined is the boundary dispute and that determination must be made by TPUC.

D. TPUC SHOULD NOT “SUSPEND” KPC’S PETITION PENDING ACTION

BY THE CIRCUIT COURT

KPC has hereinabove discussed and provided ample authority for the proposition that the Circuit Court must require BTES to exhaust its administrative remedies relative to its claim that it has the right to serve the school site. See Chattanooga-Hamilton County Hospital Authority v. United Healthcare Plan of the River Valley, Inc., 475 S.W. 3d 746, 758-59 (Tenn. 2015); see also Davis v. Sunquist, *supra.*, Bailey v. Blount Cty. Board of Education, *supra.* KPC has also addressed BTES’s assertion that the KPC Petition should be dismissed or the adjudication of same should be “suspended” pending the outcome of BTES’s, in the alternative, condemnation claim.

BTES also seeks to rely upon Docket No. 04-00335, “Petition of King’s Chapel Capacity, LLC for Certificate of Convenience and Necessity to Serve an Area in Williamson County, Tennessee Known as Ashley Community”, in arguing TPUC should “suspend” action on KPC’s Petition. The King’s Chapel Petition and issues surrounding it provide no authority supporting the dismissal or suspension of KPC’s Petition.

The King's Chapel Petition asked for a Certificate of Convenience and Necessity ("CCN") to serve an area of Williamson County, Tennessee. Tennessee Wastewater Systems, Inc. ("TWS") intervened into the Docket and also filed a breach of contract, a civil conspiracy claim, and a declaratory judgment action relative to who owned the sewer system for which King's Chapel sought the CCN. Eventually the Hearing Officer and TPUC granted the "stay" awaiting (a) administrative rulings by the Tennessee Department of Environment and Conservation ("TDEC") (one administrative agency deferring to another that had sole jurisdiction over operating permits, which is not the situation here) and (b) a determination by Chancery Court as to who owned the sewer system.

This is not the situation which exists in this Docket because there is no TDEC permit issue; and, as noted, TPUC has no jurisdiction or authority over TDEC operating permits. As to the deferral to a decision by the Chancery Court regarding the determination of the ownership of the sewer system, there was no explicit state statute (i.e., T.C.A. § 65-34-105) which directed TPUC to decide a sewer ownership dispute. A review of the filings in the King's Chapel docket reveals the issue of deferral to the administrative agency ("TPUC") under the exhaustion of administrative remedies was never raised by King's Chapel. That doctrine and T.C.A. § 65-34-105 trump any deferral or suspension arguments BTES might assert. It is not the same situation, factually or legally; and, as asserted earlier, TPUC should, respectfully, adhere to the 1989 Act and decide the boundary dispute.

CONCLUSION

The Motion of BTES to dismiss or suspend action on the Petition of KPC should be summarily denied. It is wholly without merit, and ignores the principles of law discussed herein which mandate this Docket No. 17-00087 move forward.

Respectfully submitted this the 10th day of October, 2017

**KINGSPORT POWER COMPANY d/b/a AEP
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Response of Kingsport Power Company d/b/a AEP Appalachian Power to Motion to Dismiss or Suspend of Bristol Tennessee Essential Services** has been served upon the following by mailing a copy of same by United States mail, postage prepaid, as follows, on this the 10th day of October, 2017.

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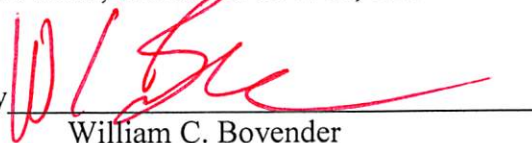
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