

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE**

IN RE:

**RESOLUTION OF BOUNDARY DISPUTE
BETWEEN KINGSPORT POWER COMPANY
d/b/a AEP APPALACHIAN POWER AND
BRISTOL TENNESSEE ESSENTIAL SERVICES
AS AUTHORIZED BY T.C.A. § 65-34-105**

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DOCKET NO.: 17-00087

**RESPONSE OF BRISTOL TENNESSEE ESSENTIAL SERVICES
TO KINGSPORT'S MOTION FOR A TEMPORARY INJUNCTION**

Bristol Tennessee Essential Services ("BTES" or "Bristol") files this response to the motion of Kingsport Power Company ("KPC" or "Kingsport") requesting a temporary injunction. The motion asks the Tennessee Public Utility Commission ("the Commission" or "the agency") to enjoin Bristol "from taking any further action to provide electric power to the site of the new Sullivan County, Tennessee high school" until the Commission determines the boundaries of Kingsport's service area pursuant to T.C.A. § 65-34-105. Memorandum in Support of Motion, at 1. Kingsport argues that unless the Commission enjoins Bristol from supplying power to the site during construction, Kingsport "will be irreparably harmed because the electric system design and electric infrastructure will have been put in place by BTES as construction on the school progresses." Affidavit of Andrew Shaffron, at 1-2.

On November 3, 2017, the Hearing Officer informed the parties that the Commission intends to make a decision regarding the boundaries of Kingsport's service area on December 12, 2017. Even though that date is only one month away, Kingsport has not withdrawn its request asking that Bristol be enjoined during this period.

**I. The Commission has no authority
to issue an injunction against BTES**

The Tennessee Public Utility is an administrative agency, not a court, and it therefore has no inherent powers but only “that authority given it expressly by statute or arising by necessity implication from an express grant.” BellSouth BSE, Inc. v. Tennessee Regulatory Authority, 2003 WL 354466 (Tenn. Ct. App.). This point has been repeatedly reiterated by the courts of Tennessee over the years. As the Supreme Court wrote in 1948, the agency “can exercise no authority that is outside or beyond the express provision of the statute.” Pharr v. Nashville, Chattanooga and St Louis Railway, 208 S.W.2d 1013, 1016 (Tenn. 1948). In 1960, the Court put it more bluntly: “The powers of the Commission must be found in the statutes. If they are not there, they are non-existent.” Tennessee-Carolina Transportation, Inc. v. Pente Cost, 334 S.W.2d 950, 953 (Tenn. 1960). The Court said again in 1977, “Any authority exercised by the Public Service Commission must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power,” Tennessee Public Service Commission v. Southern Railway Company, 554 S.W.2d 612, 613 (Tenn. 1977). See also, BellSouth Advertising and Publishing Corp. v. Tennessee Regulatory Authority, 79 S.W.3d 506, 512 (Tenn. 2002).

What statute authorizes the agency the issue an injunction against Bristol? Kingsport’s brief in support of the utility’s motion for an injunction does not identify any statute giving the Commission the power to issue an injunction nor does Kingsport cite to any Commission decision in which the agency has ever issued an injunction. To counsel’s knowledge, no such precedent exists . . . for the simple reason that the Commission has no authority to do it.

The Commission's regulatory and enforcement powers are set forth in various chapters of Title 65 of the Tennessee Code. The only reference to "injunction" found in these statutes is in T.C.A. § 65-3-105. That statute states in its entirety:

The department of transportation is to perform all duties imposed upon it by this chapter and chapter 5 of this title, and see that such companies shall comply with all such regulations and orders as it may reasonably and lawfully make. If any such company fails or refuses to comply with such reasonable and lawful regulations and orders, it shall be the duty of the department of transportation to enforce the same. Power is given the department of transportation to enforce the same by mandamus or mandatory injunction, or by other summary proceedings provided by law. In all such proceedings, the orders, regulations, rates and tariffs made and fixed by the department of transportation pursuant to this chapter and chapter 5 of this title shall be taken and treated as prima facie reasonable and valid. It is made the duty of the courts having jurisdiction in such proceedings to hear and determine all such summary causes as speedily as practicable, giving preference or priority thereto as in revenue causes.

This statute give the Tennessee Department of Transportation the power to enforce its orders issued pursuant to Chapter 3 and Chapter 5 of Title 65 by asking a court to issue a writ of "mandamus^[1] or mandatory injunction^[2]." The statute instructs the courts "having jurisdiction in such proceedings" to treat the "orders, regulations, rates and tariffs" issued by the Department

¹ A writ of mandamus may be issued by a circuit judge or Chancellor. See T.C.A. §29-25-101. Mandamus "grants a higher court supervisory authority to command an inferior court, tribunal, board, corporation or person to perform a particular duty required by law." 52 Am.Jur.2d "Mandamus" § 1. See Meighan v. U.S. Sprint Communications Co., 942 S.W.2d 476 (Tenn. 1997).

² A mandatory injunction is a court order directing the defendant to undertake a positive act in order "to undo an existing wrongful condition." UWTAR Radio-TV Corp. v. City Council, 216 Va. 892, 894-95 (1976). Because a mandatory injunction requires the court to order the defendant to take a particular action "mandatory injunctions are rarely issued." W.A. Mack, Inc. v. General Motors Corp., 260 F.2d 886, 890 (7th Cir. 1958). By contrast, the purpose of a prohibitory injunction is to maintain the status quo. Tom Doherty Associates v. Saban Entertainment, 60 F.3d 27, 34 (2d. Cir. 1995). See also Meghrig v. KFCW, Inc., 516 U.S. 479, 484 (1996) describing the difference between a mandatory and prohibitory injunction. Kingsport's request that the Commission enjoin Bristol "from taking any further action to provide electric power to the site" appears to be a request for a prohibitory injunction.

pursuant to Chapter 3 and Chapter 5 as “prima facie reasonable and valid” and to “determine all such summary causes as speedily as practicable.”

A second statute, T.C.A. § 65-4-105(a), gives the Tennessee Public Utility Commission the same power “with reference to all public utilities within its jurisdiction” as the Department of Transportation has been given over railroads and transportation companies “by chapters 3 and 5” of Title 65. In other words, the second statute gives the Commission exactly the same enforcement authority over public utilities that the first statute gives to the Department of Transportation over transportation companies.

Read together, these two statutes, § 65-3-105 and § 65-4-105(a), give the Commission power to ask a court to issue a writ of “mandamus or mandatory injunction” against a “public utility” in order to enforce “orders, regulations, rates and tariffs” issued by the Commission pursuant to Chapter 3 or Chapter 5 of Title 65. If, for example, the Commission set rates for a utility pursuant to T.C.A. § 65-5-103 and the utility refuses to comply with the agency’s decision, the Commission could ask a Chancellor or circuit judge to issue a mandatory injunction requiring the utility to begin charging the rates fixed by the Commission. In such a proceeding, the court must treat the Commission’s rate order as “prima facie reasonable and valid” and resolve the matter “as speedily as practicable.”

These two statutes provide the only basis for the issuance of an injunction to enforce a decision by the Commission. Clearly, they do not authorize the agency to grant Kingsport’s motion.

First, as explained, the Commission itself has no power to issue an injunction. It may, however, request a court to issue a writ of mandamus or mandatory injunction in an appropriate

case. Second, the Commission may request an injunction only to enforce an agency decision issued under Chapter 3 or Chapter 5 of Title 65. This docket arises under Chapter 34, not Chapter 3 or Chapter 5. Third, the Commission may only exercise its authority against a “public utility” regulated by the agency under Chapter 3 or Chapter 5. T.C.A. § 65-4-101 defines those public utilities which are subject to the Commission’s regulatory jurisdiction and expressly excludes a “municipal corporation,” declaring such entities to be “non-utilities.” T.C.A. § 65-4-101(6)(A)(ii). Bristol is a municipal corporation and therefore a “non-utility.” It is not subject to the agency’s jurisdiction under Chapter 3 or Chapter 5. For each and all of these reasons, the agency does not have the authority to issue an injunction against Bristol in this proceeding.

II. Kingsport has not met any of the other criteria for the issuance of an injunction

Even if the Commission had the power to issue a temporary injunction, there is no reason to do so in this case. Kingsport has presented no evidence that it will suffer irreparable harm prior to December 12, 2017, the date when the Commission will issue a decision on the merits of Kingsport’s petition. There is no evidence that construction has even started, much less that “concrete [will be] poured” or “walls [will be] going up” by December 12. See KPC Memorandum, at 5. Moreover, Kingsport’s assertion that decisions made during construction would preclude either utility from providing service to the completed school is unfounded. As explained in the attached affidavit from Bristol’s Director of Engineering, Mr. Clayton Dowell, either utility can run wires to the transformer pad and provide the voltage load needed by the school. The only difference would be that one utility would approach the school from one side and the other utility would approach it from a different side. As Mr. Dowell said, “In fact, the only reasonable difference between either BTES or Kingsport Power providing the electric service [to the new school] is the approach path that either utility would make from existing electric facilities

to the point outside the building where the transformer pad would be poured and transformer placed for such service.”

Second, it is more likely that Bristol, not Kingsport, will ultimately prevail in this litigation and provide service to the new school. In light of Bristol’s statutory right to take Kingsport’s service territory by condemnation (T.C.A. § 65-34-106) and Bristol’s pending condemnation action in Sullivan County Circuit Court, Kingsport cannot carry its burden to show that it is likely to win. Other than asking the Circuit Court to delay the condemnation action pending a ruling by the Commission, Kingsport’s principal defense is that the state law giving Bristol the power to take KPC’s service area by eminent domain is unconstitutional. The odds against winning that argument are long.³

Finally, to the extent the “public interest” favors either utility, the Sullivan County Board of Education has already made that decision, selecting Bristol over Kingsport as the provider of electric service and broadband internet access to the new high school. If the Commission is weighing the public interest, the agency should support the Board’s choice and take no action that would interrupt Bristol’s service to the site and possibly delay construction of the school.

III. Conclusion

The Commission must deny Kingsport’s request for a temporary injunction. An injunction, like a writ of mandamus, is a form of equitable relief and must be granted by a court or by an

³ Kingsport has filed a two-page motion to dismiss or delay the condemnation suit. The motion asserts that the condemnation statute is unconstitutional, that Bristol’s suit is “a clear and palpable abuse of power,” that Bristol’s condemnation suit violates a 1989 “Letter Agreement” between the parties, and that Bristol cannot file this suit until after the Commission has determined the location of KPS’s service territory. Since KPC devotes only a sentence or two to each argument, it is difficult to judge the merits of the utility’s motion. In any event, if KPC believes that it is likely to prevail on any of these issues, the utility should be seeking an injunction from the court, which has the power to grant one, rather than from this Commission, which clearly does not.

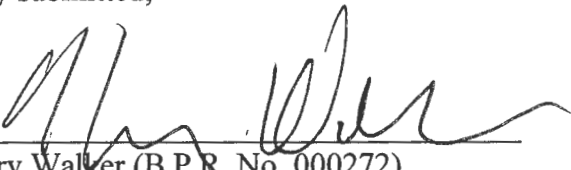
agency which has been expressly authorized by statute to do so. There is no such statute in Title 65. Moreover, even if the agency had such authority, Kingsport has met none of the criteria for issuing an injunction. KPC is unlikely to prevail on the merits of the condemnation litigation and, therefore, Bristol – the utility selected by the Sullivan County Board of Education – will ultimately provide electric and broadband service to the new high school. To the extent the public interest favors either utility, that decision has been made by the Board. Finally, neither utility will suffer “irreparable harm” by awaiting the outcome of this docket and the condemnation suit. At the end of the day, the new school is looking for a source of power that either utility can readily supply.

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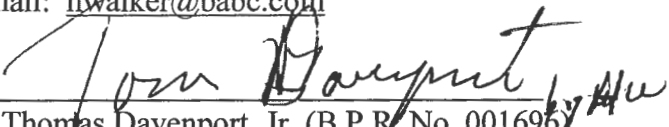
For these reasons, Kingsport's request if a temporary injunction should be denied.

Respectfully submitted,

By: _____


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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of November, 2017, a copy of the foregoing document was served on the parties of record, via electronic delivery and U.S. Mail, postage prepaid, addressed as follows:

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AFFIDAVIT OF CLAYTON DOWELL, P.E.

State of Tennessee

County of Sullivan

I am Clayton Dowell, Director of Engineering for BTES. I have read the affidavit of Andrew Shaffron, Jr. in which he states, "If BTES is not enjoined from going forward with construction and other activities, KPC will be irreparably harmed because the electric system design and electric infrastructure for the school will have been put in place by BTES as construction on the school progresses." I disagree with his statement.

The electric service that either Bristol Tennessee Essential Services ("BTES") or Kingsport Power would provide to serve the new Sullivan County High School would be determined by the customer's (Sullivan County Department of Education) needs for electric service. Specifically, the customer will specify the amount of load to be served by the electric service provider, and identify a proposed delivery point on the property. BTES understands that it will be several months before their engineering process to make that determination is completed.

In nearly every case, for an electric load that would approximate the size of a high school of this nature, the electric service would be a standard 480Y/277V service, with a padmount transformer that is sized to the appropriate kVA, based on the amount of load for that facility. This factor is essentially no different whether BTES or Kingsport Power were to be the electric service provider.

In fact, from an engineering, design and construction standpoint, the only reasonable difference between either BTES or Kingsport Power providing the electric service is the approach path that either utility would make from existing electric facilities to the point outside the building where the transformer pad would be poured and transformer placed for such service.

Currently, BTES serves Sullivan East and Sullivan Central high schools. Both of these locations have 480Y/277V electric services. Kingsport Power serves Sullivan North and Sullivan South high schools. Both of these locations also have 480Y/277V electric services. Typical electrical design would indicate that the electric service would be the same voltage at the new high school. Thus, there is essentially no difference in the electric service requirements that would cause Kingsport Power to be "irreparably harmed" by not being involved in any considerations at this point.


Clayton Dowell, P.E.

Sworn to and subscribed before me this day of 9th November 2017.


Notary Public

My Commission expires: 12-19-17

