

HUNTER·SMITH·DAVIS

SINCE 1916

LLP

Kingsport Office
1212 North Eastman Road
P.O. Box 3740
Kingsport, TN 37664
Phone (423) 378-8800
Fax (423) 378-8801

Johnson City Office
100 Med Tech Parkway
Suite 110
Johnson City, TN 37604
Phone (423) 283-6300
Fax (423) 283-6301

Leslie Tentler Ridings
Christopher D. Owens
Chad W. Whitfield
Jason A. Creech
Meredith Bates Humbert
Joseph B. Harvey
Rachel Ralston Mancl
Caroline Ross Williams
Marcy E. Walker
Karen L. Kane
Matthew F. Bettis
Teresa Mahan Lesnak *
Michael A. Eastridge *
Jeannette Smith Tysinger*

*Of Counsel

S. Morris Hadden
William C. Bovender
William C. Argabrite
Jimmie Carpenter Miller
Mark S. Dessauer
Gregory K. Haden
Michael L. Forrester
Stephen M. Darden
Edward J. Webb, Jr.
James N. L. Humphreys
Suzanne Sweet Cook
Michael S. Lattier
Scott T. Powers
Respond to:
Kingsport Office
William C. Bovender
423-378-8858
bovender@hdsdlaw.com

KPOW.94403

November 15, 2017

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

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

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:

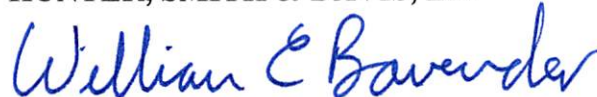
On behalf of Kingsport Power Company, we transmit herewith the following:

Reply Brief in Support of Motion for Temporary Injunction on Behalf of Petitioner
Kingsport Power Company d/b/a AEP Appalachian Power

The original 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.)
C. Thomas Davenport, Jr., Esq. (w/enc.)
Mark W. Smith, Esq. (w/enc.)
Larry L. Cash, Esq. (w/enc.)
Kelly Grams, General Counsel (w/enc.)

Via U.S. Mail and Email: hwalker@babco.com
Via U.S. Mail and Email: tom@ctdlegal.com
Via U.S. Mail and Email: Mark.Smith@millermartin.com
Via Email: larry.cash@millermartin.com
Via U.S. Mail and Email: Kelly.Grams@tn.gov

Mr. David Jones, Chairman

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November 15, 2017

Monica L. Smith-Ashford, Esq. (w/enc.)
James R. Bacha, Esq. (w/enc.)
Noelle J. Coates, Senior Counsel (w/enc.)
Phillip A. Wright (w/enc.)
William K. Castle (w/enc.)
Brian K. West (w/enc.)
Andrew Shaffon, Jr. (w/enc.)
Robert W. Arnold (w/enc.)
Joseph B. Harvey, Esq. (w/enc.)

Via U.S. Mail and Email: monica.smith-ashford@tn.gov
Via Email: jrbacha@aep.com
Via Email: njcoates@aep.com
Via Email: pawright@aep.com
Via Email: wkcastle@aep.com
Via Email: bkwest@aep.com
Via Email: ashaffron@aep.com
Via Email: rwarnold@aep.com
Via Email: jharvey@hsdlaw.com

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)	

**REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION ON
BEHALF OF PETITIONER KINGSPORT POWER COMPANY d/b/a AEP
APPALACHIAN POWER**

Petitioner, Kingsport Power Company d/b/a AEP Appalachian Power (“KPC”), has moved for a temporary injunction pursuant to Rule 65.04 of the Tennessee Rules of Civil Procedure and the rules, regulations and procedures of the Tennessee Public Utility Commission (“TPUC” or the “Commission”). Bristol Tennessee Essential Services (“BTES”) filed an initial Response to KPC’s Motion on October 30, 2017, which Response did not address the merits of KPC’s request for temporary injunctive relief. BTES filed a second Response to KPC’s Motion on November 10, 2017. KPC now replies to the arguments of BTES and explains why KPC’s Motion for a brief -- but critically important -- temporary injunction should be granted:

I. TPUC Has The Authority to Issue Injunctive Relief and Has Done So Previously

A. TPUC Has Ruled That It Has Authority To Issue Injunctions

The most obvious evidence that the Commission has the authority to issue injunctive relief is that *the Commission has ruled that it has the authority to issue injunctive relief*. In *In Re: Show Cause Proceeding Against Minimum Rate Pricing, Inc.*, Docket No. 98-00018, 1999 WL 35495762 (April 16, 1999 Tenn. P.S.C.), the Hearing Officer specifically stated that “[i]t

should be noted that these cases . . . hold that *the TRA may issue injunctions . . .*” (emphasis added.) The hearing officer noted that “[t]he Tennessee Regulatory Authority [now the TPUC], is a governmental unit endowed by the Tennessee General Assembly with police and regulatory powers.” *Id.* Thus, there is legal support for the position that the Commission has the authority to issue injunctive relief, and has done so.

B. TPUC Has Issued Injunctive Relief

Pursuant to its “police and regulatory powers,” the Commission has issued injunctive relief in the form of prohibitory injunctions and cease and desist orders. *Id.* For example, In *In Re: Generic Docket Addressing Rural Universal Service*, Docket No. 00-00523, 2001 WL 1910434 (May 9, 2001 Tenn. R.A.), the hearing officer issued an order “enjoin[ing] BellSouth ‘from taking any measures to unilaterally terminate the existing intraLATA toll settlement arrangement/ mechanism currently in effect between BellSouth and the Rural Carriers.’” *Id.*; see also *In Re: Generic Docket Addressing Rural Universal Service*, Docket No. 00-00523, 2000 WL 33906477 (December 29, 2000 Tenn. R.A.) (decision of hearing officer issuing injunction).

Furthermore, the Consumer Advocate Division, on multiple occasions, has sought injunctive relief in its Complaints against public utilities. See, e.g., *Consumer Advocate Division v. BellSouth Communications, Inc.*, Docket No. 99-00574, “Complaint, Or Alternatively, Petition To Intervene And Petition of Injunctive Relief” (August 31, 1999 Tenn. R.A.); *Consumer Advocate Division v. BellSouth Communications, Inc.*, Docket No. 99-00391, “Petition for Declaratory Order; Complaint and Petition for Injunctive Relief” (June 15, 1999 Tenn. R.A.). In Docket No. 99-00574, the Consumer Advocate pled in its Complaint that “Tenn. Code Ann. 65-3-105 empowers the TRA to enjoin the BellSouth tariff and said tariff should be enjoined.”

C. TPUC Has Authority To Issue Injunctive Relief By Necessary Implication

BTES acknowledges in its Response Brief that the Commission may exercise authority given it expressly by statute “*or arising by necessary implication from an express grant.*” *Bellsouth BSE, Inc. v. Tennessee Regulatory Auth.*, No. M200000868COAR12CV, 2003 WL 354466, at *10 (Tenn. Ct. App. Feb. 18, 2003). As the Supreme Court of Tennessee articulated in *Consumer Advocate Division v. Greer*, 967 S.W.2d 759, 761-62 (Tenn. 1998), “the General Assembly has charged the [TPUC] with the ‘general supervisory and regulatory power, jurisdiction and control over all public utilities.’” (*citing* TENN. CODE ANN. § 65-4-104). The Court went on to state that “[i]n fact, the Legislature has explicitly directed that the statutory provisions relating to the authority of the [TPUC] shall be given ‘a liberal construction’ and has mandated that ‘any doubts as to the existence of a power conferred on the [TPUC] ...shall be resolved in favor of the existence of the power, to the end that the [TPUC] may effectively govern and control the public utilities placed under its jurisdiction. ...’” *Id.* (*citing* TENN. CODE ANN. § 65-4-106). According to the Supreme Court, the legislature has “signaled its clear intent to vest in the [TPUC] practically plenary authority over the utilities within its jurisdiction.” *Tennessee Cable Television Ass’n v. Tenn. Public Serv. Comm’n*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992).

In this case, the state legislature also “expressly granted” TPUC the authority and jurisdiction to “hear and resolve any disputes concerning the boundaries of the current geographic territories of nonconsumer owned electric systems.” TENN. CODE ANN. § 65-34-105. This same statute gives the Commission the power to “promulgate and enforce appropriate rules not inconsistent with this chapter.” *Id.*

What use is the jurisdiction to decide boundary disputes if the Commission has no authority to prohibit violations and protect the integrity of its decisions? A “liberal construction” and resolving “any doubts as to the existence of a power conferred on the [TPUC] ... in favor of the existence of the power” leads to the conclusion that TPUC has the authority to grant injunctive relief that is necessary to support the Commission’s expressly granted authority to decide boundary disputes.

Finally, BTES’s argument that TPUC may issue injunctive relief only after TPUC has issued an order “[i]n order to enforce” that order is a narrow and constrained interpretation that is contrary to the Tennessee Supreme Court’s instruction that TPUC’s powers must be liberally construed. In this case, a temporary injunction is necessary “in order to enforce” TPUC’s order because without temporary injunctive relief, the Commission’s final order could be undermined or rendered ineffective. In other words, temporary injunctive relief is necessary “to enforce” the Commission’s order by preserving the efficacy of the Commission’s final ruling.

D. TPUC Can Issue Preliminary Orders Regardless of What They Are Called

Although BTES claims that the Commission does not have the authority to issue injunctive relief, there is no dispute that the Commission can issue pre-hearing orders. And BTES has not cited any authority suggesting that there are any statutory limitations on what the Commission can include in its pre-hearing orders. Therefore, if the Commission determines that it is appropriate to issue a pre-hearing order that maintains the status quo for the short time until the Commission considers the merits of KPC’s claims, the Commission can certainly do so, regardless of what such an order is called. Again, BTES has not cited any authority indicating that there are limits on prehearing Orders issued by the Commission.

E. BTES's Argument That It Is Not Subject To TPUC's Authority Is Portentous

In its second Response Brief, BTES argues that “the Commission may only exercise its authority against a ‘public utility’ regulated by the agency under Chapter 3 or Chapter 5,” and then asserts that BTES is not a “public utility” under TENN. CODE ANN. § 65-4-101. (BTES Response at p.5.) BTES’s suggestion that it is not subject to the TPUC’s regulatory jurisdiction would eviscerate the Legislature’s grant of authority to the TPUC to decide boundary disputes. *See* TENN. CODE ANN. § 65-34-105. BTES’s argument also portends BTES’s intent not to comply with any decision issued by the Commission on the merits. A refusal by BTES to comply with an Order of the Commission, either before or after the hearing, would directly flout the Commission’s statutory authority to decide boundary disputes of this nature. This further supports the grant of injunctive relief to preserve the authority of the Commission and the efficacy and validity of its orders.

II. KPC Has Demonstrated The Need For Injunctive Relief

Contrary to BTES’s argument, temporary injunctive relief is appropriate in this case and each of the relevant factors weighs in favor of issuing an order to maintain the status quo until the Commission addresses this issue on the merits of KPC’s claim.

A. KPC Will Suffer Irreparable Harm

BTES’s claim that KPC will suffer no irreparable harm because “there is no evidence that construction has even started” misses the mark. In fact, later in its Response Brief, BTES raises the possibility that injunctive relief could “possibly delay construction of the school.” (Compare Response Brief p.5 and p.6.) Either construction activities for the new school have started (or will start) before the Commission issues its final decision or they have not (or will not). BTES cannot have it both ways. Logically, if BTES had no intention of engaging in construction

activities between now and the issuance of Commission's final ruling, there would be no reason for BTES to oppose KPC's requested temporary injunction that would simply maintain the status quo pending the Commission's ruling. But BTES refused to agree to a temporary injunction, which suggests that construction activity may take place before the Commission issues its final ruling and such construction activity would prejudice KPC for the reasons explained herein.

Before construction can begin, temporary electric service to the site must be established. KPC already has facilities on the school site that are available to provide electric service for construction purposes. (Affidavit of Robert Arnold ("Arnold Aff.") ¶ 3.) KPC's existing facilities are within approximately 100 feet of where the new school will be built. (*Id.*) KPC could provide temporary electric service with minimal work on the property by simply installing a service drop. (*Id.*) In contrast, BTES's recently installed pole is over 500 feet from the actual school building site. (*Id.*) To provide temporary construction service, BTES would have to extend its facilities at an expense to the Board of Education that would not be required by KPC's electric service. (*Id.*)

Furthermore, KPC's and BTES's systems are not as interchangeable as BTES suggests. It is more complicated than simply plugging into a different electrical outlet. The equipment and electrical engineering for the new school could be different depending on which power company ultimately provides electrical service. As stated in the attached Affidavit of Robert Arnold, Primary Distribution Voltages typically range from 12,470 volts to 34,500 volts phase-to-phase (7,200 volts to 19,900 volts phase-to-neutral). (Arnold Aff. ¶ 4.) Most utility customers are connected to a transformer that reduces the Primary Distribution Voltage to the lower Secondary Voltage, such as 120/240 volts, 120/208 volts, or 277/480 volts. (*Id.*) The Secondary Voltage is used by the customer for lighting and interior wiring systems. (*Id.*) The affidavit of Clayton

Dowell attached to BTES's Response does not distinguish between Primary Distribution Voltage and Secondary Voltage and does not address the significance of Primary Distribution Voltage at all. (*See* Affidavit of Clayton Dowell ("Dowell Aff.") attached to BTES's Response.)

The Dowell Affidavit acknowledges that service to the new school site would be accomplished with "a padmount transformer that is sized to the appropriate kVA." (Dowell Aff. ¶ 3.) But, Mr. Dowell fails to mention that KPC's and BTES's systems operate at different Primary Voltage (kV) levels and the transformers might not be interchangeable between systems. (*See* Arnold Aff. ¶¶ 5-6, 8.) KPC's electric system serving the site of the new school operates at 12,470 volts (12.47kV) phase to phase. (*Id.* at ¶ 5.) It is Mr. Arnold's understanding that BTES's electric system in the area of the new school site operates at 13,200 volts (13.2kV). (*Id.* at ¶ 6.) This difference in Primary Distribution Voltage is significant because it means that the transformers, which are voltage specific for both Primary Distribution Voltages as well as Secondary Voltage, might be different depending on which company provides electric service to the new school site. (*See* Dowell Aff. ¶ 3, Arnold Aff. ¶ 8.) Although some transformers have built in devices that allow adjustments for different Primary Distribution Voltages, transformers installed by BTES for use with its system that do not allow for such adjustments could not be used with KPC's electric system. (*Id.* at ¶ 7.) Therefore, a transformer installed by BTES might or might not work on KPC's Primary Distribution system, and any transformer BTES installed might have to be replaced if KPC took over the electric service to the school site later. Accordingly, any work done by BTES for the Sullivan County Board of Education ("BOE") might have to be modified, redone, or even undone to allow KPC to serve the new school site.

BTES's brief attempted to downplay KPC's reference to "pouring concrete," but "padmount" transformers are specifically mentioned in Dowell's Affidavit. And, of course,

“padmount” means the transformer(s) will be mounted on a concrete pad. The size of the concrete pad is based on the specific dimensions of the transformer installed and is determined by the utility providing the electric service. (Arnold Aff. ¶ 9.) Thus, it is possible that concrete pads installed for BTES’s transformers would have to be removed and redone by the customer to allow KPC to serve the new school site.

Yet another difference, recognized in Mr. Dowell’s Affidavit, is the “approach path” of electric service. (Dowell Aff. ¶ 4.) The approach path is significant because it could impact grading and other site preparation work that occurs during the initial stages of construction. The primary underground conductor from BTES’s Distribution Riser Pole placed on the school site would not be in a suitable location for KPC’s Distribution Riser Pole. (Arnold Aff. ¶ 10.) This means the underground facilities placed for one utility may not be useable for the other utility. (*Id.*) And underground utilities and approach paths impact site grading and earthmoving activities. Any site preparation work could have to be redone or undone based on entrance roads or structures around the school building.

For these reasons, it is important for the Commission to maintain the status quo to prevent BTES from later arguing that construction work that has already been performed at the new school site makes it impractical, costly, or even impossible for KPC to provide electric service to the new school site. If BTES is not enjoined from taking further steps toward providing electric service to the new school site, it will tend to render any final judgment ineffectual. *See Medtronic, Inc. v. Nu Vasive, Inc.*, 2003 WL 21998480 (Tenn. Ct. App. 2003). To the extent BTES’s construction activities have begun or will begin before the Commission’s final ruling in this matter, which is a factual question that BTES has been equivocal about, the construction activities of BTES must be stopped.

B. KPC Has Demonstrated A Likelihood Of Success On The Merits

BTES's argument on the likelihood of success deals exclusively with BTES's *condemnation claim*, which is pending in another forum and has nothing to do with merits of KPC's claims *in this case*. BTES likely chose to focus on its condemnation claim rather than KPC's claims in this case because the undisputed facts prove that the new school site is in KPC's current geographic territory as that term is defined in TENN. CODE ANN. § 65-34-102(1).

KPC's claims against BTES in this case turn on whether the new school site is within KPC's "current geographic territory" as defined by TENN. CODE ANN. § 65-34-102. This section defines "current geographic territory" as "the parcels of land, as such parcels are defined or designated by the assessor of property of the county in which the parcels are located, to which a public electric system was providing electric service on February 16, 1989." *Id.* Accordingly, the relevant question for this dispute is whether KPC was providing electric service to customers on the new school site on February 16, 1989.

An architectural rendering of the new Sullivan County High School prepared by CLH Design, P.A., which is dated February 6, 2017, was attached to KPC's Petition as EXHIBIT 9. The architectural rendering includes lines delineating the tax parcels and certain structures existing on the property at the time of the drawing. The architectural rendering indicates that the bulk of the new school building will be built on property known as Parcel 79-036.00.

KPC served Parcel 79-036.00 on February 16, 1989 (which, at that time, included Parcel 79-036.15). Specifically, KPC served Jenelle M. Carroll, a residential customer on Parcel 79-036.00, in a home located at 899 Henry Harr Road, Blountville, Tennessee, 37617, from the transformer on pole 37821130C00059. Notably, this appears to be the same Jenelle M. Carroll who was a grantor in the deed conveying Parcel 79-036.00 to the BOE. (See EXHIBIT 8 to

KPC's Petition.) According to publically available tax records, the house located at 899 Henry Harr Road was built in 1900 and has been there ever since. Indeed, this home is shown on the architectural rendering attached to KPC's Petition as EXHIBIT 9. According to KPC's billing records, Jenelle M. Carroll has been a KPC customer continuously since at least February 23, 1973, when the existing account was created. KPC likely provided electric service to the home at 899 Henry Harr Road long before February 23, 1973 because KPC's records indicate the transformer on pole 37821130C00059 was manufactured in 1960 and pole 37821130C00059 was set in 1947.

In addition to the equipment KPC had on Parcel 079-36.00 to serve the home at 899 Henry Harr Road, KPC had other equipment on that parcel as of February 16, 1989. Specifically, KPC had Pole No. 37821130C00343 set in 1981; conductors attached to Pole No. 37821130C00343; Pole No. 37821130C00055 set in 1947 and replaced in 1991, which is near the border with the property shown in Tax Map 064, Parcel No. 023.00; and conductors attached to Pole No. 37821130C00055.

Therefore, it is indisputable that on February 16, 1989, KPC was serving a residential customer, Jenelle M. Carroll, who lived in a home located at 899 Henry Harr Road, which is located on Parcel 79-036.00. Therefore, Parcel 79-036.00 is within KPC's "current geographic territory" as that term is defined in TENN. CODE ANN. § 65-34-102 because KPC was providing electric service to a residential customer on that parcel on February 16, 1989.

In the interest of brevity, KPC will not address in this Reply Brief why the other parcels of property making up the new school site are within its geographic territory. But KPC respectfully refers the Commission to, and incorporates by reference herein, KPC's responses to BTES's discovery requests, which responses explain in detail with supporting documentation

why the new school site is within KPC's geographic territory and BTES's resistance in this case is completely futile.

In short, KPC is likely to succeed on the merits of its claim that the school site is in its geographic territory. This factor weighs heavily in favor of granting injunctive relief to maintain the status quo pending the Commission's final decision.

C. Public Interest Favors Granting Temporary Injunctive Relief

With respect to the "public interest" factor, BTES argues only that "the Sullivan County Board of Education has already made that decision." (*See* Response Brief, p. 6.) This argument misses the mark because the issue is not which entity the BOE prefers, but rather whether the public interest is advanced by granting temporary injunctive relief. Furthermore, the BOE's decision is irrelevant because the BOE's decision has no bearing on whether the school site is within KPC's geographic territory and the statute gives the TPUC, not the BOE, the authority and jurisdiction to decide boundary disputes.

Addressing the relevant question in this situation, granting temporary injunctive relief is in the public interest because modifying, redoing, and/or undoing construction work and earthmoving would impose potentially unnecessary costs on Sullivan County Taxpayers, not to mention the cost savings the Sullivan County BOE could receive on an annual basis as a result of KPC's beneficial electric rates, which are significantly lower than BTES's rates and would likely result in meaningful savings to Sullivan County's Taxpayers for many years in the future. (*See* Affidavit of Andy Shaffron, ¶ 4, attached to KPC's Motion for Temporary Injunction.)

The balance of harms also weighs heavily in favor of granting injunctive relief. *See Zion Hill Baptist Church v. Taylor*, 2004 WL 239760 (Tenn. App. 2004). BTES has not pointed to any harm it would suffer from the granting of a brief temporary injunction that maintains the

status quo pending the Commission's final decision. In contrast, KPC has shown the harm that would result to it from BTES's construction in defiance of KPC's rights.

III. Conclusion

For the reasons stated above and in KPC's initial Memorandum In Support of Its Motion For Temporary Injunctive relief, KPC respectfully requests that the Commission issue the modest and reasonable temporary injunction requested in KPC's Motion.

Respectfully submitted this the 15th day of November, 2017

**KINGSPORT POWER COMPANY d/b/a AEP
APPALACHIAN POWER**

By: 

William C. Bovender, Esq. (BPR #000751)

Joseph B. Harvey (BPR #028891)

HUNTER, SMITH & DAVIS, LLP

1212 N. Eastman Road

P. O. Box 3740

Kingsport, TN 37664

(423) 378-8858; Fax: (423) 378-8801

Email: bovender@hsdlaw.com

Email: jharvey@hsdlaw.com

OF COUNSEL:

James R. Bacha, Esq.
American Electric Power Service Corporation
1 Riverside Plaza
Columbus, OH 43215
Ph: (615) 716-1615; Fax: (614) 716-2950
Email: jrbacha@aep.com

Noelle J. Coates, Senior Counsel
Appalachian Power Company
Three James Center
Suite 1100 1051 E. Cary Street
Richmond, VA 23219-4029
Ph: (804) 698-5541
Email: njcoates@aep.com

*Attorneys for Kingsport Power Company
d/b/a AEP Appalachian Power*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Reply Brief in Support of Motion for Temporary Injunction on Behalf of Petitioner Kingsport Power Company d/b/a/ AEP Appalachian Power** has been served upon the following by mailing a copy of same by United States mail, postage prepaid, and by Email, as follows, on this the 15th day of November, 2017.

Henry Walker, Esq.
Bradley Arant Boult Cummings, LLP
1600 Division St., Ste 700
Nashville, TN 37203
Email: hwalker@babbc.com
Attorney for BTES

C. Thomas Davenport Jr., Esq.
Attorney at Law
615 Shelby St.
Bristol, TN 37620
Email: tom@ctdlegal.com
Attorney for BTES

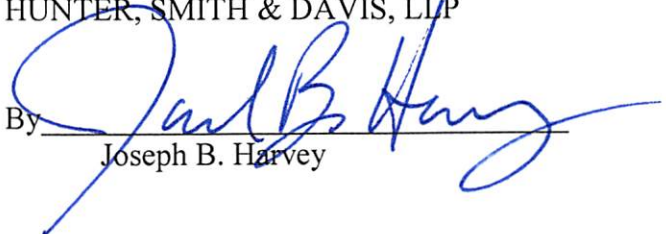
Mark W. Smith, Esq.
Miller & Martin PLLC
Volunteer Building Suite 1200
832 Georgia Avenue
Chattanooga, TN 37402-2289
Email: Mark.Smith@millermartin.com
Attorney for BTES

Kelly Grams, General Counsel
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
Email: Kelly.Grams@tn.gov

Monica L. Smith-Ashford
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
Email: monica.smith-ashford@tn.gov

HUNTER, SMITH & DAVIS, LLP

By


Joseph B. Harvey

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)	

State of Tennessee)
County of Sullivan)

AFFIDAVIT OF ROBERT W. ARNOLD

Robert W. Arnold, after first being duly sworn, deposes and says:

1. I am Robert W. Arnold, Supervisor of Customer Design for the Kingsport District of Appalachian Power Company. In this capacity, I represent Petitioner, Kingsport Power Company d/b/a AEP Appalachian Power (“KPC”). This Affidavit is being submitted in connection with the above-referenced matter.
2. I have worked for 22 years for operating companies of the American Electric Power Company system, including KPC.
3. Before construction for the new school can begin, temporary electric service must be established. KPC already has facilities on the school site that are available to provide electric service for construction purposes. KPC’s existing facilities are within approximately 100 feet of where the new school will be built. KPC could provide temporary electric service with minimal work on the property by simply installing a service drop. BTES’s recently installed pole is over

500 feet from the actual school building site. BTES would have to extend its facilities to provide construction power in a manner that KPC necessarily would not.

4. Primary Distribution Voltages typically range from 12,470 volts to 34,500 volts phase-to-phase (7,200 volts to 19,900 volts phase-to-neutral). Most utility customers are connected to a transformer, which reduces the Primary Distribution Voltage to the lower Secondary Voltage, such as 120/240 volts, 120/208 volts, or 277/480 volts, that is used by lighting and interior wiring systems.

5. Kingsport Power Company's Primary Distribution Voltage is typically 12,470 volts (12.47kV) or 34,500 volts (34.5kV). The Indian Springs/Airport Road Circuit which would feed the new school operates at 12,470 volts (12.47kV) phase to phase and 7,200 volts phase to ground.

6. It is my understanding that Bristol Tennessee Essential Services' circuit in the area operates at 13,200 volts (13.2kV).

7. With a project the size of the new school and the athletic fields, there will be multiple transformers installed on the property to serve the facilities.

8. A transformer installed by BTES for BTES's 13.2kV system may or may not work on KPC's 12.47kV Primary Distribution system, and any transformer BTES installed might have to be replaced if KPC took over the electric service to the school site later. Although some transformers have built in devices that allow adjustments for different Primary Distribution Voltages, transformers installed by BTES for use with its system that do not allow for such adjustments could not be used with KPC's electric system because of the difference in Primary Distribution Voltages.

9. Transformers for this type of project are mounted on concrete pads. The size of the concrete pad is based on the specific dimensions of the transformer installed and is determined by the utility providing the electric service.

10. Transformers must be placed in locations accessible to the power company's distribution power lines.

11. The primary underground conductor from BTES' Distribution Riser Pole placed on the school site would not be in a suitable location for KPC's Distribution Riser Pole. This means the underground facilities placed for BTES may not be useable for KPC because of the different locations required to connect to the particular utility's system.

FURTHER AFFIANT SAYETH NOT


Robert W. Arnold

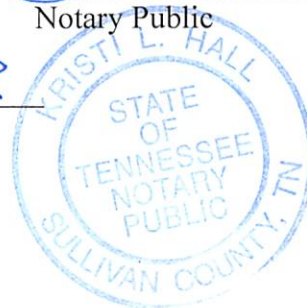
STATE OF TENNESSEE:
COUNTY OF SULLIVAN:

Sworn to and subscribed before me, the undersigned authority, a Notary Public, in and for the State and County aforesaid.

This, the 15th day of November, 2017.


Notary Public

My Commission Expires: 4/25/18



CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Affidavit of Robert W. Arnold** has been served upon the following by mailing a copy of same by United States mail, postage prepaid, and by Email, as follows, on this the 15th day of November, 2017.

Henry Walker, Esq.
Bradley Arant Boult Cummings, LLP
1600 Division St., Ste 700
Nashville, TN 37203
Email: hwalker@babco.com
Attorney for BTES

C. Thomas Davenport Jr., Esq.
Attorney at Law
615 Shelby St.
Bristol, TN 37620
Email: tom@ctdlegal.com
Attorney for BTES

Mark W. Smith, Esq.
Miller & Martin PLLC
Volunteer Building Suite 1200
832 Georgia Avenue
Chattanooga, TN 37402-2289
Email: Mark.Smith@millermartin.com
Attorney for BTES

Kelly Grams, General Counsel
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
Email: Kelly.Grams@tn.gov

Monica L. Smith-Ashford
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
Email: monica.smith-ashford@tn.gov

HUNTER, SMITH & DAVIS, LLP

By


Joseph B. Harvey