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RE: ***Bristol Tennessee Essential Services v. AEP Appalachian Power, d/b/a Kingsport Power Company*, Circuit Court for Sullivan County, Tennessee, Second Judicial District at Bristol, No. C 15545(R)**

Dear Counsel:

Enclosed please find your service copy of the Attorney General's Response in Support of the Constitutionality of Tenn. Code Ann. §§ 65-34-103 and 65-34-106, which was fax-filed today in the above-referenced matter.

Sincerely,

Jonathan N. Wike

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JNW/tc
Enclosure

cc: (w/enclosure)
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IN THE CIRCUIT COURT FOR SULLIVAN COUNTY, TENNESSEE
SECOND JUDICIAL DISTRICT
AT BRISTOL

BRISTOL TENNESSEE ESSENTIAL SERVICES,	)	
Plaintiff,	)	
v.	)	**No. C 15545(R)**
AEP APPALACHIAN POWER, d/b/a KINGSPORT POWER COMPANY,	)	
Defendant.	)	

ATTORNEY GENERAL'S RESPONSE IN SUPPORT OF THE CONSTITUTIONALITY OF TENN. CODE ANN. §§ 65-34-103 AND 65-34-106

The Defendant in this eminent domain action, Kingsport Power Company (KPC), has given notice to the Attorney General that it asserts that Sections 65-34-103 and 65-34-106 of the Tennessee Code Annotated, which govern the service territories of electric utility systems, violate the Equal Protection Clause of the United States Constitution and Article 11, Section 8 of the Tennessee Constitution. For the reasons stated below, the challenged statutes violate neither of these constitutional provisions.

KPC is a "non-consumer owned electric system" as defined in Section 65-34-102(4) and is thus subject to the provisions in Section 65-34-103 that limit any "non-consumer owned electric system" to providing electric power in "its current geographic territory." The Plaintiff, Bristol Tennessee Essential Services (BTES), is a "municipal electric system" as defined in Section 65-34-102(3) and is thus authorized by Section 65-34-106, "in the exercise of [its] powers of eminent domain[, to] 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."

The Equal Protection clause states that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Am. XIV, § 1. The Tennessee Constitution similarly prohibits the Legislature from "suspend[ing] any general law for the benefit of any particular individual . . . [or] pass[ing] any law for the benefit of individuals inconsistent with the general laws of the land." Tennessee Const. Art. XI, § 8. The Tennessee Supreme Court has "consistently held that the state equal protection guarantee is co-extensive with the equal protection provisions of the . . . U.S. Constitution." *Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005). Since this case does not involve a suspect or quasi-suspect class, or a fundamental right, a "rational basis" test applies under which "the burden of showing that a classification is unreasonable and arbitrary is placed upon the individual challenging the statute; and if any state of facts can reasonably be conceived to justify the classification or if the unreasonableness of the class is fairly debatable, the statute must be upheld." *Harrison v. Schrader*, 569 S.W.2d 822, 826 (Tenn. 1978). "[A]ny plaintiff seeking to challenge the constitutionality of a tax statute bears a heavy burden." *Nolichuckey Sand Co., Inc. v. Huddleston*, 896 S.W.2d 782, 788 (Tenn. Ct. App. 1994).

Equality between differently situated classes is neither guaranteed nor necessary, since the equal protection clause requires only "that persons similarly situated be treated alike." *Posey v. City of Memphis*, 164 S.W.3d 575, 579 (Tenn. Ct. App. 2004). Thus, as a threshold determination, a court must first consider whether classes are "similarly situated so as to warrant application of the protection of the equal protection clause." *Id.* Though any two categories of persons or entities may have some common characteristics, they may still not be similarly situated for purposes of

equal-protection analysis. *See id.* (police and firefighters held not similarly situated despite commonality of emergency work).

As a private, investor-owned electric company, KPC is a "public utility" as defined in Section 65-4-101(6)(A), and it is regulated by the Tennessee Public Utility Commission. Thus, although it is a private company, KPC sells electricity subject to any limits the State may place on its territory, rates, or terms of service. BTES is a substantially different type of entity. It is a "municipal electric system" as defined in Section 65-34-102(3). It exists through the State's broad grant of powers to its political subdivisions in Title 6.[1] As a "nonutility" under Section 65-4-101(6)(A)(ii), it is exempt from regulation by the Commission.

BTES also operates as part of the unique federal-state system that commits nearly all of Tennessee, along with parts of six surrounding states, to the sale of power generated by the Tennessee Valley Authority (TVA), a federal entity. TVA's municipal and cooperative distributors, all of which are creatures of state law, sell TVA-generated power in a region that includes nearly all of Tennessee. The TVA Act of 1933 laid the groundwork for that arrangement, which replaced the pre-existing system of publicly-owned electric utilities that still prevails in the surrounding states. Some of the history of this public-power system is captured in the United States Supreme Court's opinion in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939).

Thus, KPC and BTES are very different types of entities. KPC is a private company in the business of turning a profit for its owners. While it provides a vital service to the public in its area, it is at its core a private business. On the other hand, BTES is a public entity, a part of the City of Bristol. It is owned by the City and, therefore, by the citizens of Bristol whom it serves. It does

[1] Especially Section 6-2-201.

not depend on the profit motive as KPC does. BTES is part of the government, just like the many other municipal electric departments in Tennessee.

Since entities like BTES and those like KPC are not similarly situated, the threshold described in *Posey* has not been met in this case. Even if those entities were deemed to be similarly situated, however, the differential treatment of them in Sections 65-34-103 and 65-34-106 does not violate the constitutional guarantees of equal protection. If classes of entities are similarly situated, but differently treated, the court must then determine whether a rational basis exists for such treatment. *Dr. Pepper Pepsi-Cola Bottling Co. of Dyersburg, LLC v. Farr*, 393 S.W.3d 201, 209–10 (Tenn. Ct. App. 2011). Under rational basis scrutiny, a statutory classification will be upheld if some reasonable basis can be found for the classification or if any state of facts may reasonably be conceived to justify it. *Riggs v. Burson*, 941 S.W.2d. 44, 53 (Tenn. 1997).

Here, the Legislature had a clear and well-articulated rational basis with a long history behind it for treating publicly- and privately-owned entities differently. The Legislature stated one aspect of its rationale in Section 65-34-101:

> The general assembly hereby finds that:
>
> (1) Duplication of electric system facilities leads to excessive consumer costs and adverse environmental and aesthetic impacts;
>
> (2) The public health, safety, and welfare require that electric service to a particular geographic area be provided by a single electric system;
>
> (3) The general assembly has heretofore established the geographic territories of electric systems as those geographic areas in which a particular electric system maintained facilities to provide electric service on March 6, 1968, except as those geographic areas have been modified by statutorily authorized agreements among adjacent electric systems, all as provided by § 6-51-112;
>
> (4) Maintenance of the 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;

(5) The consumer owners of municipal and cooperative electric systems have invested large sums in facilities and equipment necessary to provide electric service within areas served by those electric systems; and

(6) It would be contrary to the public interest to permit utilities that are not consumer owned to expand service into areas already served by consumer owned municipal and cooperative electric systems, as such expansion would result in a duplication of service facilities and the loss of consumer investment in displaced facilities.

Avoiding duplication of facilities is thus one sound and well-defined basis for differential treatment—indeed, it is one of the original rationales for state regulation of utilities. Another is the promotion of public power over private power. With respect to rural electric cooperatives, which Sections 65-34-103 and 65-34-106 treat the same as municipal electric systems, the Legislature has stated its strong preference for public power:

(b) (1) The general assembly finds that rural electric cooperatives, since their inception fifty (50) years ago, have proved to be ideal business organizations in providing adequate and reliable electric services at reasonable rates throughout the rural communities of Tennessee. There are growing needs and demands for other comparable utility services in Tennessee's rural communities, including the need for television reception and programming services which are already available, for the most part, in the state's urban areas. As proved to be the case in providing electric service in rural communities, it is vital that the area coverage principle be applied in providing other utility services in the more sparsely settled areas of the state. It is, therefore, in the public's best interest that rural electric cooperatives be empowered to provide such services and that new cooperatives may be organized for such purposes.

(2) The general assembly finds that unfair and unwelcomed efforts may be made in Tennessee, as they recently have in other states, whereby absentee-owned profit power companies will attempt the acquisition of properties and the take-over of the businesses of rural electric cooperatives, and thereby disrupt Tennessee's long-standing and successful policy of providing rural electric services through nonprofit, cooperative organizations. It is, therefore, in the public's best interest that laws affecting such efforts will provide fair and equitable due process procedures and standards so as to ensure that such acquisitions will not be accomplished if inimical to the best interests of the rural citizens who will be affected.

Section 65-25-101.

These statements reaffirm the State's longstanding support for public power, which is generated in this region by TVA and distributed by municipal power systems like BTES and the electric cooperatives. Tennessee's support for this arrangement began just after TVA's creation in 1933, as the Supreme Court recognized in *Tennessee Electric Power*. To illustrate the willingness of Tennessee and its neighbors to use TVA power as well as the necessity of federal-state cooperation, the Court listed several enactments by which legislatures in the region, including Tennessee, paved the way in the 1930s for TVA to serve the region. *See* 306 U.S. at 141-42.[2] The Court also restated a principle that is of overarching importance in the context of this case: "Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy. That policy is subject to alteration at the will of the legislature." 306 U.S. at 141.

The challenged statutes, in essence, give publicly-owned electric systems priority and preference over privately-owned ones. The Legislature has determined that Tennessee is best served when electric power is provided through public systems rather than for-profit systems. That is clearly a rational choice. It is not the only possible choice, but that determination is consistent with Tennessee's longstanding commitment to public power and its history of cooperation with TVA, and it is borne out by the experience of more than three quarters of a century during which nearly all electric power in Tennessee has been provided by municipal systems and cooperatives. The Legislature exerts ultimate control over both privately- and publicly-owned utilities, and it can enact legislation favoring or disfavoring either type of entity as it deems fit. This being the

[2] Just as the legislatures of Tennessee, Alabama, Kentucky, and Mississippi enacted laws facilitating the distribution of TVA power through public entities, *see* 306 U.S. 141-42, Congress enshrined a preference for service through municipal and cooperative entities in the TVA Act, which states that "in the sale of such [electric] current by the [TVA] Board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members." 16 U.S.C.A. § 831i.

case, the statements of public policy quoted above come even more clearly into focus, and the provisions being contested here pass the rational basis test by a wide margin.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response has been served by email and by U.S. Mail, postage prepaid, on the following:

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on this the 29th day of November 2017.

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