

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

December 5, 2017

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

ORDER CONVENING A CONTESTED CASE AND DENYING THE MOTION TO
DISMISS OR SUSPEND PROCEEDING

This matter came before Chairman David F. Jones, Vice-Chairman Robin L. Morrison and Commissioner Keith Jordan of the Tennessee Public Utility Commission (the “Commission” or “TPUC”), the voting panel assigned to this docket, during a regularly scheduled Commission Conference held on October 23, 2017, to hear and consider whether to convene a contested case proceeding concerning the *Petition of Kingsport Power Company d/b/a AEP Appalachian Power Requesting the Tennessee Public Utility Commission Commence a Contested Case to Resolve in Kingsport’s Favor a Boundary Dispute with Bristol Tennessee Essential Services Pursuant to T.C.A. § 65-34-105 and Grant Declaratory and Injunctive Relief (“Petition”)* filed on August 30, 2017 by Kingsport Power Company d/b/a AEP Appalachian Power (“KPC”, “Kingsport” or the “Company”).

During the Conference, the voting panel also considered the *Motion to Dismiss or Suspend Kingsport’s Petition Pending the Outcome of Condemnation Suit in Sullivan County Circuit Court (“Motion to Dismiss”)* filed on September 28, 2017, by Bristol Tennessee Essential Services (“BTES”).

THE *PETITION*

On August 30, 2017, Kingsport filed its *Petition* requesting the convening of a contested case and, ultimately, a declaratory judgment finding that Kingsport has the service rights to the proposed new Sullivan County high school, which the Company alleges is within its service area.¹ The Company invokes the Commission's jurisdiction to resolve boundary disputes pursuant to Tenn. Code Ann. § 65-34-105. The *Petition* claims that in the previous two months before the filing of the *Petition*, BTES entered Kingsport's service area and installed an electric pole with the intent to provide electric service. Kingsport describes and references an agreement from 1989 between Kingsport, BTES and Johnson City Power in which the parties agreed not to extend service beyond the geographic territories as they existed on February 16, 1989.²

THE *MOTION TO DISMISS*

In response, BTES filed its *Motion to Dismiss* on September 28, 2017. In the motion, BTES claims that on September 15, 2017, the Sullivan County Board of Education selected BTES over Kingsport as its preferred provider of both electric and internet service.³ BTES argues that the site of the school is within an unincorporated area of Sullivan County. BTES asserts the site of the new school is composed of four tracts of land, including two tracts that BTES claims Kingsport has never served.⁴

On September 27, 2017, BTES filed a condemnation petition with the Sullivan County Circuit Court. In the condemnation petition, BTES requests the Circuit Court to issue a declaratory judgment that BTES is the sole owner of the service rights to the two larger

¹ *Petition*, pp. 10-11 (August 30, 2017).

² *Id.* at 7-10.

³ *BTES's Motion to Dismiss*, p. 3 (September 28, 2017).

⁴ *Id.* at 2-3.

parcels of land where the new school and athletic fields will be built and to enter an order condemning the two smaller parcels now served by Kingsport.⁵

In the *Motion to Dismiss* filed with the Commission, BTES asserts that the Commission should either dismiss Kingsport's *Petition* or hold it in abeyance pending the outcome of the action that BTES filed in Sullivan County. BTES cites a 2004 Commission decision to hold a matter before it in abeyance concerning two wastewater service utilities that were involved in litigation in a chancery court.⁶ BTES claims the Commission has no authority to determine which utility may serve the new school on the site and that any decision the Commission makes may be rendered moot by the action of the Sullivan County Circuit Court.⁷

ADDITIONAL FILINGS

In response to the *Motion to Dismiss* filed on October 10, 2017, Kingsport argues that the TPUC has jurisdiction for resolving a boundary dispute presented before the Commission. Kingsport also claims any administrative remedy must be exhausted before a party can take a dispute to the circuit court. Kingsport states it intends to file a response to the Circuit Court proceeding seeking a delay or dismissal of the condemnation matter.⁸

On October 13, 2017, BTES filed a sur-reply asserting that the matter before the Commission should be held in abeyance until the Circuit Court hears Kingsport's arguments, which the Company intends to file.⁹ BTES contends that the Commission should do nothing until the Circuit Court decides to hear the matter or determines the Commission should hear the matter first.¹⁰

⁵ *Id.*

⁶ *Id.* at 6.

⁷ *Id.* at 5.

⁸ *Response of Kingsport Power Company d/b/a Appalachian Power to Motion to Dismiss or Suspend of Bristol Tennessee Essential Services*, p. 9 (October 10, 2017).

⁹ *Motion and Reply of Bristol Tennessee Essential Services* (October 13, 2017).

¹⁰ *Id.* at 2.

FINDINGS AND CONCLUSIONS

Chapter 230 of the 1989 Tennessee Public Acts (“the Act”) addresses the geographic territory of electric utility systems and was enacted to resolve a boundary dispute between Kingsport, BTES and Johnson City Power.¹¹ According to the *Petition*, the dispute that preceded the Act came about when the city limits of the City of Kingsport expanded and Kingsport extended service to an area which was served to some extent by BTES. The *Petition* includes an attached letter indicating Kingsport, BTES and Johnson City Power subsequently came to an agreement and expressed support for the ultimate passage of the Act. Under the Act, the legislature has charged the Commission with the jurisdiction to:

...hear and resolve any disputes concerning the boundaries of current geographic territories of nonconsumer owned electric utilities. The commission may promulgate and enforce appropriate rules not inconsistent with this chapter.¹²

The *Petition* filed by Kingsport invokes the Commission’s jurisdiction to resolve a boundary dispute concerning Kingsport’s service area.

There is no legal basis to dismiss Kingsport’s *Petition*. The panel found that the *Petition* is filed pursuant to Tenn. Code Ann. § 65-34-105, and the Commission has jurisdiction to hear this matter. Thus, the question before the Commission is whether to convene a contested case or hold the matter in abeyance pending the outcome of BTES’s petition filed with the Sullivan County Circuit Court. The reasons put forth by BTES for holding Kingsport’s *Petition* in abeyance include general notions of judicial economy and to prevent any delay in the construction of the school. BTES’s argument for the Commission to remain idle assumes the matter in the Sullivan County Circuit Court will proceed quickly and that the outcome is certain. These assumptions, however, are not certain in the face of the Company’s announced intention to challenge every aspect of the condemnation matter filed

¹¹ *Petition*, 5-6.

¹² Tenn. Code Ann. § 65-34-105.

in Sullivan County. The panel is not convinced that inaction by the Commission on a matter within its jurisdiction will prevent a delay in the construction of a Tennessee school.

The Act is clear. In the event of a boundary dispute, the Commission has the jurisdiction to hear and resolve any disputes concerning the boundaries of Kingsport.¹³ The Commission recognizes that a successful condemnation suit pursuant to Tennessee Code Ann. § 65-34-106 might render moot any proceeding or decision of the Commission with respect to this matter. Nevertheless, the panel expressed concern about a possible disruption in the construction of the school caused by an unresolved dispute between the parties. Therefore, the panel was not convinced that holding the *Petition* in abeyance helps resolve this matter quickly.

Based on these findings, the panel voted unanimously to deny the *Motion to Dismiss*. Further, the panel voted unanimously to convene a contested case proceeding and appoint General Counsel or her designee as hearing officer to prepare the matter for hearing before the panel. The hearing officer has authority to handle all preliminary decisions, including but not limited to, establishing a procedural schedule, requests for interventions and discovery, and considering any motions holding the matter in abeyance should the condemnation action filed in Sullivan County progress quickly.

The panel directed the parties to keep the Commission docket updated as to the status of the Sullivan County Circuit Court proceeding. Finally, the panel urged the parties to work together toward a resolution.

IT IS THEREFORE ORDERED THAT:

1. The *Motion to Dismiss or Suspend Kingsport's Petition Pending the Outcome of Condemnation Suit in Sullivan County Circuit Court* filed on September 28, 2017, by Bristol Tennessee Essential Services is denied.

¹³ Tenn. Code Ann. § 65-34-105.

2. A contested case is convened, and the Commission's General Counsel, or her designee, is appointed to act as Hearing Officer with authority to handle all preliminary matters and to prepare this matter for a hearing before the panel.

3. The parties shall keep the Commission docket file updated with the status of the Sullivan Circuit Court condemnation proceedings filed by Bristol Tennessee Essential Services.

Chairman David F. Jones, Vice-Chairman Robin L. Morrison, and Commissioner Keith Jordan concur.

ATTEST:

A handwritten signature in cursive script, appearing to read "Earl Taylor", is written above a horizontal line.

Earl R. Taylor, Executive Director