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February 18, 2020

Via Hand Delivery and Email

20-00024

The Honorable Earl Taylor
Executive Director
c/o Tory Lawless
Tennessee Regulatory Authority
502 Deaderick Street, Fourth Floor
Nashville, Tennessee 37243

Re: ***Petition For Declaratory Order By Engie Development, LLC***

Dear Mr. Taylor:

Enclosed please find an original and five (5) copies of Engie Development, LLC's Petition For Declaratory Order to be filed. Also enclosed is this firm's check in the amount of $25 for the filing fee.

This material is also being filed by way of email to the Tennessee Public Utility Commission Docket Manager, Tory Lawless. Please file the original and four copies of this filing and stamp the additional copy as "filed." Then please return the stamped copies to me by way of our courier.

Thank you for your assistance with this matter. Should you have any questions concerning this matter, please do not hesitate to contact me at the email address or telephone number listed above.

Very truly yours,

Paul S. Davidson

PSD:cdg
Enclosure

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

February 18, 2020

IN RE:	)	
	)	
PETITION FOR DECLARATORY ORDER BY ENGIE DEVELOPMENT, LLC	)	Docket No. **20-00024**
	)	
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PETITION FOR DECLARATORY ORDER

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Pursuant to Tennessee Annotated Code § 65-2-104 and Rule 1220-01-02-.05, ENGIE Development, LLC, (the "Petitioner"), submits this petition requesting a declaratory order from the Tennessee Public Utility Commission ("Commission") that private ownership of the Metro Nashville District Energy System ("Metro DES") does not render it a "public utility" within the meaning of Tennessee statutes. *See* Tenn. Ann. Code § 65-4-101(6).

As background, the downtown Nashville district energy system historically has been owned by the Metropolitan Government of Nashville and Davidson County ("Metro"). Metro is currently considering implementing a transaction process whereby 100% of the assets comprising the Metro DES and the related energy supply contracts will be transferred to a newly established affiliate ("ENGIE Nashville") of ENGIE Development, LLC (the "Transaction"). Previously there has been no question as to whether or not Metro DES should be considered a public utility within the statutory meaning, as the statute explicitly exempts any "corporation owned by or any agency or instrumentality of the state." *Id.* The Commission does not currently regulate any district energy systems. But because the definition of "public utility" mentions the word "heat," the question arises whether, once the Transaction has been consummated, Metro DES should be considered a public utility.

As explained further below, the TPUC can determine whether or not Metro DES should be regulated under the statute. Petitioner submits that under a plain reading of the face of the statutory "public utility" definition, it simply would not apply to the Metro DES system under private ownership. The system is not "dedicated to the public use," its service is not provided pursuant to a franchise, and the mere presence of the word "heat" in that definition does not change the non-utility nature of the service.

Further, if the Commission decides to look beyond the plain meaning of the statute on its face, it should similarly reach the conclusion that Metro DES should not be regulated. As shown below there are a number of district energy systems across the United States which are not regulated as public utilities despite the presence of the word "heat" or "steam" in the relevant statutory public utility definition. As noted, Metro DES does not hold itself out to the public as provider of district energy services to any interested party, and it has no franchise granted by the state to exclude competitors from a service territory or to require that any entity wherever located become a customer. Most importantly, ENGIE Nashville and a host of current Metro DES customers do not desire the imposition of public utility regulation upon the services provided by Metro DES. *See* Attachment A, Customer Support Letters.

Petitioner respectfully requests that the Commission either (i) pursuant to Rule 1220-01-02-.02(5), decide not to open a contested case hearing and determine on its own motion that private ownership of Metro DES would not render it a "public utility" within the meaning of Tennessee statutes or (ii) appoint a Hearing Officer and establish a 15-day notice period prior to an initial status conference and determine through a contested case process that private ownership of Metro DES would not render it a "public utility" within the meaning of Tennessee statutes.

I. BACKGROUND ON METRO DES AND DISTRICT ENERGY

A. Contacts

Petitioner requests that the following persons receive service of all filings in this proceeding:

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B. District Energy Overview

A district energy system provides heating and/or cooling services to multiple users, essentially taking the place of each building's self-contained HVAC unit. District energy plants can be restricted to a single customer such as on a university or hospital campus but are often located, as with Metro DES, in large urban areas and supply multiple downtown customers.

District heating is an underground infrastructure asset where thermal energy is provided to multiple buildings from a central energy plant or plants. Steam or hot water produced at the plant is transmitted 24/7 through highly insulated underground thermal piping networks. The thermal energy is transferred to the building's heating system, avoiding the need for boilers in individual buildings.

District cooling is an efficient way to air condition a network of buildings. Central cooling plants house large, highly efficient, industrial-grade equipment that produces chilled water for supply to customer buildings through an insulated underground piping network. Cold supply water enters the building and flows through a heat exchanger, absorbing heat from the building space before recirculating back to the central plant through a closed loop return line.

As compared to buildings each opting to provide their own heating systems, district heating generally improves energy efficiency, reduces emissions, simplifies building operations and maintenance, and decreases costs. Because thermal energy is delivered to buildings in a usable form, customers avoid installing expensive boilers and avoid costs for operations, maintenance, repair and replacement. District heating service simplifies building operations and allows customers precise control over heating. A critical advantage is that connecting multiple buildings to a district system creates economies of scale that enable the deployment of more efficient, resilient local energy resources.

Similarly, district cooling is integral energy infrastructure that can often serve the purposes of many customer buildings more efficiently than self-providing such service. By aggregating the cooling need of a network of buildings, district cooling creates an economy of scale that drives efficiency and reduces fuel costs. Central plants can sometimes avoid the costs of oversized, individual chiller plants and the capital costs of installing chillers and cooling towers, freeing up valuable rooftop and building space.

A central plant serving multiple customers is generally more efficient than individual small plants, thereby reducing overall energy consumption. Virtually 100% of the steam and chilled water energy delivered to the customer is available for use within a building facility whereas smaller in-building boilers and air-cooled chiller systems can require more energy to deliver the same heating or cooling benefit. A district energy system also removes the need for combustion and refrigerant equipment in buildings, saving space for other uses and removing a possible source of indoor air quality contamination.

At the Metro DES facility, natural gas and electricity are used to produce steam and chilled water. The steam and chilled water is then distributed through a series of underground pipes to about 42 individual buildings in the downtown area whose owners have voluntarily opted to be served by the Metro DES pursuant to individually negotiated long-term contracts.

C. History of Metro DES

Metro DES has provided heating and cooling to buildings in downtown Nashville for over four decades. The original Metro DES plant was constructed, after a long Metro study process, by the Nashville Thermal Transfer Corporation ("NTTC"), a not-for-profit organization, established to build, own, and operate the $16.5 million district energy system. Construction was financed by energy bonds and began operation in 1974. Nashville thus became the first city in the world to use solid waste as an energy source for both heating and cooling. The plant was capable of burning 1,000 tons of trash per day. The energy created by this waste-burning process was used to generate steam, which was then used to heat downtown buildings, or to produce

chilled water to cool the buildings. Over the decades, there were significant upgrades and expansions of the Metro DES. By 2001, due primarily to economic challenges with meeting pollution restrictions, Metro decided to modify the Metro DES from a solid waste-fired system to a fossil fuel system. In January 2004, the new energy generation facility became fully operational. NTTC operations were phased out and the NTTC plant was torn down to make way for urban development on the riverfront property.

Today, there is approximately 91,100 feet of piping in the Metro DES system. Of the 91,100 feet, approximately one-fourth is chilled water supply, one-fourth is chilled water return, one-fourth is steam (supply) and one-fourth is condensate (return). These four pipes are run parallel through most of the system in approximately one and a half miles of tunnels and two and one half miles of direct buried trenches. Some chilled water piping also hangs from the Woodland Street bridge. The facility operates nine chillers and four boilers, and has the capacity to provide 23,400 tons of chilled water for cooling and 260,000 pounds of steam for heating. Metro DES circulates chilled water at a rate of up to 42,000 gallons per minute. Steam travels through the pipes to downtown buildings at an average rate of 70 miles per hour. Nearly 100 percent of the chilled water supplied to customers for cooling is returned and recycled, while 70 percent of the water used for steam is returned and recycled.

D. ENGIE Nashville

ENGIE Nashville will be a special purpose entity created for the sole purpose of owning and operating the Nashville DES and a sister company of ENGIE Development, LLC.

ENGIE Development, LLC is, and when established ENGIE Nashville will be, each a wholly owned indirect subsidiary of ENGIE S.A., a French company with worldwide energy operations in 70 countries headquartered in Paris, France. ENGIE S.A. is a French société anonyme listed on the Brussels and Paris stock exchanges. Among other things, ENGIE S.A. holds ownership interests in a number of energy-related subsidiaries which, internationally, engage in the production, transmission, and distribution of electricity; power marketing; production, transportation and distribution of natural gas; the transport and distribution of LNG; and the development and ownership of energy projects. ENGIE S.A.'s energy-related subsidiaries operate in Europe, North America, South America, Asia, Australia, and the Middle East. Through its various subsidiaries (collectively "ENGIE"), ENGIE S.A. participates in the U.S. energy industry.

ENGIE operates over 320 district energy heating and cooling systems around the world for both public and private sectors. It has been a European market leader for three decades, and has been expanding its presence in Asia, the Middle East and North America. ENGIE is currently the world's largest independent provider of urban cooling networks.

E. The Transaction and Current Status

The Metropolitan Government of Nashville and Davidson County conducted an open and competitive solicitation/procurement process, RFQ# 1044673, to identify options for the future of Metro DES. Metro asked respondents to identify and propose how best-in-class DES services can be provided in Nashville. The RFQ explained how Metro would decide about

entering into an agreement with a partner, but, generally, that decision will take into account what is best for all users of the system to include employees, the environment, and the budget. The scope of services requested would require operation of the entire system as provided in the proposed agreement issued with the RFQ. The final scope of services would be identified and negotiated through the procurement and contracting processes, subject to approval from the Department of Finance and the Metropolitan Council.

In a public statement dated January 19, 2019, Metro stated the reasons for issuing the RFQ as follows:

> Metro no longer wishes to provide the financial resources necessary to maintain or grow the DES nor does Metro wish to continue providing the financial subsidies (Metro Funding Amount (MFA)) currently required for the operation of the DES. Additionally, Metro does not have the subject matter expertise to operate a best-in-class DES, where technology and best practices will continue to rapidly evolve. Entering into an operations agreement or selling the DES presents Metro with the best opportunity to achieve its goals.[1]

After receipt and evaluation of nine responses to the RFQ, Metro's purchasing arm determined its intent to sell Metro DES to an ENGIE subsidiary. Metro's intent to award notice of March 22, 2019, identified the following "strengths" and weaknesses of the ENGIE submission:

> Strengths: Firm provided a detailed demonstration of their technical and financial capacity. Firm provided a detailed demonstration of their ability to deliver cost-effective service to customers while achieving high levels of environmental performance and reliability. Firm provided a detailed brief testimonial as to why their firm should be short-listed for the project. Firm provided a detailed description of their firm's background and profile including their corporate mission, vision, values, and number of years in business. Firm provided detailed resumes of key personnel of their proposed team. Firm provided detailed relevant past projects. Firm provided a detailed description of relevant experience. Firm provided detailed references of current district energy clients. Firm has a gross margin of 30%, which is high relative to other Offerors. (Rd2)- Firm provided a detailed transition plan. The purchase offer is promising for Metro and falls within the higher estimated sale price range established as a result of the financial analysis of the Metro District Energy System (Metro DES) and industry experience. A sale of Metro DES at the higher estimated sale price range would free bonding

[1] *See* https://www.nashville.gov/News-Media/News-Article/ID/8283/Metro-Pursues-the-Best-Economic-and-Technically-Feasible-Future-for-the-Metro-DES.aspx.

> capacity for Metro, and Metro would no longer be required to provide funds for the operations of the Metro District Energy System. Continuation of Strengths & Weaknesses for RFQ# 1044673 – Implementation Scenarios for Metro's DES Program Options Weaknesses: Firm's explanation of their familiarity with Metro and the local planning and energy context lacked specific details. Firm has 71% leverage, which is high relative to other Offerors. Firm has an interest expense coverage ratio of 1.8, which is low relative to other Offerors. (Rd2)- Firm's demonstration of knowledge of Metro agencies and other resources available for coordination and planning, and strategic initiatives aimed toward system growth lacked specific details. Firm's explanation of experience with reaching out to and engaging with customers to ensure their support lacked specific details. Firm's approach to customer engagement during acquisitions lacked specific details. Firm took exceptions to Purchase Agreement.[2]

Since announcement of the intent to award, ENGIE has engaged in extensive outreach to each of the customers of Metro DES, and 100% of the customers have now provided their consent to the Transaction. A protest from an unsuccessful competing bidder, Constellation New Energy, Inc. ("Constellation") was rejected on May 23, 2019. On May 29, 2019 Constellation appealed the protest determination to the Procurement Appeals Board of Metropolitan Government of Nashville and Davidson County. The hearing on that appeal was postponed shortly after the Mayor's election on September 12, 2019 but is expected to be rescheduled. In addition, the Mayor's office has asked the Director of Water Services to evaluate the proposed transaction in the context of looking at all of Metro's options for operating the Metro DES. The Director of Water Services' report and recommendation to the Mayor's Office is expected to be completed in March 2020. ENGIE and the City have remained in communication to ensure that, if the Transaction is approved, there will be a seamless transfer of 100% of the assets comprising Metro DES and the related energy supply contracts from Metro to ENGIE Nashville. Concurrent Commission review and approval of this Petition would aid the parties in achieving a timely closing of the Transaction.

The Transaction requires approval of the Metropolitan Council. When the Purchase Agreement has been executed and approved by the Metropolitan Council, Petitioner will file a copy of the document in this docket.

II. COMMISSION AUTHORITY TO ISSUE DECLARATORY ORDER

Pursuant to the Tennessee Annotated Code, the Commission has the authority to issue declaratory rulings.[3] The relevant statute reads in part:

> On the petition of any interested person, the commission may issue a declaratory ruling with respect to the applicability to any person,

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[2] *See* https://www.nashville.gov/Portals/0/SiteContent/Finance/Purchasing/2019%20Files/Intend%20to%20Award/1044673.pdf.

[3] *See* Tenn. Ann. Code § 65-2-104 and Rule 1220-01-02-.05.

> property, or state of facts of any rule or statute enforceable by it or with respect to the meaning and scope of any order of the commission.[4]

Similarly, the Commission rules state in part that:

> any affected person may petition the Authority for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the Authority.[5]

Here Petitioner is an interested and affected person. Pending Metropolitan Council approval, ENGIE Nashville will soon become the owner of the Metro DES. There is a practical need for the declaratory order, as it will resolve uncertainty that may exist as to whether or not Metro DES has suddenly become a regulated public utility subject to rules, regulations, and ratemaking authority of the Commission. While Petitioner believes that, in the absence of a declaratory order, Metro DES would not automatically become a regulated utility, removal of uncertainty on this point will allow ENGIE Nashville and Metro DES customers to conduct business in the ordinary course. The lack of a declaratory order on this point, for example, could hamper ENGIE Nashville's relations with the financial community and any financing that may become needed at any point in the future for capital projects.

III. STATEMENT OF FACTS

Petitioner expects that there will be no issues of material fact (*see* Rule 1220-01-02-.21(1)), and that the only issue for Commission determination is a question of law. Petitioner presents the following proposed statement of facts[6] and intended to be sufficient for framing the question of law before the Commission:

1. Metro DES is a district energy system providing heating and cooling services to 42 buildings in downtown Nashville.

2. Metro DES serves its public and private customers pursuant to privately negotiated long-term contracts. Metro DES serves its public and private customers pursuant to privately negotiated contracts. Two of these contracts will not expire until 2043, and the rest run until at least 2033.

3. Metro DES is currently owned by the Metropolitan Government of Nashville and Davidson County ("Metro").

4. Subject to Metropolitan Council approval, Metro DES will be sold to a private entity referred to in this Petition as ENGIE Nashville.

5. The Commission does not currently regulate any district energy system.

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[4] Tenn. Ann. Code § 65-2-104.

[5] Rule 1220-01-02-.05, Tenn. Comp. R. & Regs.

[6] *See* attached Verification.

6. Metro DES does not have an open offer to provide service to any requesting customer, and instead requires that terms and conditions of an individual contract be negotiated before it would extend service to a new customer or location.

7. Metro DES does not have a franchise issued by the Commission or Metro, does not have a proscribed service territory in which it is required to provide service, and has no government-granted monopoly or other analogous authority to prevent competitors from providing similar services in downtown Nashville.

8. Petitioner has requested that the Commission determine whether, upon closing of the sale by which it will become the owner of Metro DES, ENGIE Nashville would be regulated as a "public utility" pursuant to Tennessee statutes and the Commission's regulations.

IV. STATUTORY ANALYSIS: "PUBLIC UTILITY" DEFINITION AND DISTRICT ENERGY

A. Statutory Interpretation Principles

The question of law before the Commission is whether Metro DES, under ENGIE Nashville ownership, would be a "public utility" as defined in Tenn. Ann. Code § 65-4-101(6). The question arises for two reasons: first, once Metro DES is no longer owned by a governmental entity, a clear exemption from the definition will no longer be relevant[7]; and second, because heating is one of the two services provided by Metro DES to customers (cooling service being the other) and the word "heat" is mentioned in the public utility definition. The definition reads in relevant part as follows:

> Tennessee Definition:
>
> **(6)** "Public utility" means every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof. "Public utility" as defined in this section shall not be construed to include the following nonutilities:

[7] Tenn. Ann. Code § 65-4-101(6)(B) and (C).

> **(B)** Any county, municipal corporation or other subdivision of the state of Tennessee;
>
> **(C)** Any corporation owned by or any agency or instrumentality of the state;[8]

Tennessee courts have outlined the applicable principles that apply to questions of statutory interpretation, depending on whether the statute is clear enough on its face to resolve the issue or whether there is ambiguity.

> First, when a statute is clear on its face:
>
> When dealing with statutory interpretation ... our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. When a statute is clear, we apply the plain meaning without complicating the task. Our obligation is simply to enforce the written language.[9]

As described further below, Petitioner submits that the statute is clear on its face and should not apply to Metro DES after the Transaction.

Second, to the extent a statute is not clear on its face, it is a long-recognized principle of Tennessee law that agencies have discretion in interpreting the statutes they are charged with enforcing. *See, e.g., Najo Equip. Leasing, LLC v. Comm'r of Revenue*, 477 S.W.3d 763, 769–70 (Tenn. Ct. App. 2015) ("a state agency's interpretation of a statute that the agency is charged to enforce is entitled to great weight in determining legislative intent") (citing *Consumer Advocate Div. v. Greer,* 967 S.W.2d 759, 761 (Tenn.1998); *H & R Block E. Tax Servs., Inc. v. State, Dep't of Commerce & Ins., Div. of Ins.,* 267 S.W.3d 848, 854 (Tenn. Ct. App. 2008) ("interpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts") (citing *Riggs v. Burson,* 941 S.W.2d 44, 51 (Tenn.1997)); *Profill Dev., Inc. v. Dills,* 960 S.W.2d 17, 27 (Tenn.Ct.App.1997) (stating that administrative agencies' decisions "concerning the applicability of technical terms of the statute are entitled to deference" where the agency "has the knowledge, expertise and experience" needed to administer such "technical details"). As described further below, even if the Commission reaches this second step of statutory interpretation, Petitioner submits that the Commission can and should conclude that Metro DES will not be regulated as a public utility after the Transaction.

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[8] Tenn. Ann. Code § 65-4-101(6).

[9] *Estate of French v. Stratford House,* 333 S.W.3d 546, 554 (Tenn.2011) (internal citations omitted).

B. First Step Statutory Interpretation: "Public Utility" Definition's Plain Meaning not Applicable to Metro DES

The most straightforward reading of the statutory public utility definition is that on its face it does not apply to Metro DES. There are two key qualifications in the statute which, when read simply on their face, dictate that Metro DES should not be considered a public utility. The mere presence of the word "heat" in the statute does not control the analysis.

1. System Is Not "Dedicated to the Public Use"

First, the statutory public utility definition requires that an entity's system must be "dedicated to the public use."[10] That is not the case with Metro DES today, as it serves customers only via privately negotiated contracts. It would remain so after the Transaction, as customers would be served only via privately negotiated contracts

Note that even the business Metro DES conducts with public entities (*e.g.* for state government buildings) is done via negotiated contracts. No individual customer or building has the right to require that Metro DES provide it service. The Metro DES system will not be used to provide service unless such a prospective customer and Metro DES enter into a negotiated contract. That is true today and will continue to be true after closing of the Transaction.

This "public use" test is described further below in Section IV.C.2 in connection with analysis under the second step of statutory interpretation. For purposes of a facial reading of the statute, it may be helpful to be aware of the following formulation by the Court of Appeals of Tennessee of the public use test:

> Whether a business operation may be classed as that of a public utility is controlled by the facts of a particular case. Generally, the question *depends upon whether the operation has been held out as a public service*, upon whether the service is in fact of a public character *and whether it may be demanded on a basis of equality and without discrimination by all members of the public or obtained by permission only.*

(Emphasis added, internal citations omitted).[11] Here, the historic and future planned operations of Metro DES make it unquestionably clear that no member of the public may *demand* district energy service at any set price. Service has been and will only be provided if in a particular situation it makes economic sense for Metro DES to provide such service under a privately negotiated contract that is agreeable to the customer as well.

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[10] Tenn. Ann. Code § 65-4-101(6).

[11] *Johnson City v. Milligan Utility District,* 38 Tenn. App. 520, 531, 276 S.W.2d 748, 753 (1954).

2. Service is Not Provided Under Franchise

Second, the statutory public utility definition requires that the service must be provided "under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision ...."[12] That is not the case today, and it would not change after the Transaction.

Metro DES has no franchise, license, privileges or agreements to provide public utility service. Crucially, Metro DES has no protected service territory in which the state or any other political subdivision has given it the right to be the sole provider; such monopoly protection being the hallmark of a regulated public utility. A competitive district energy provider could begin service in downtown Nashville at any time. Whether under current municipal ownership or under ENGIE Nashville ownership, Metro DES could not prevent such competition by asserting rights over a government-protected monopoly service territory.

One might torture this statutory language by arguing the private contracts through which Metro DES provides service to customers are somehow "agreements" with a political subdivision (*i.e.* with Metro). But that is clearly not the intent of the statute, as those agreements have not been "granted"[13] by any governmental entity to Metro DES.

A franchise is granted when an agency of government confers upon an entity "the right to use the streets and the right within the city to sell its [services] to the inhabitants." [14] "This is the granting of a franchise and a franchise always comes from the sovereign or from the government." [15] The traditional justification for granting a franchise to a public utility is that its existence will bestow a public benefit by virtue of legal obligation to serve impartially all the members of the public.[16] Metro DES has received no such franchise and has never been considered as having such an obligation. Because its service is not provided under a franchise and because it has never had an obligation to serve impartially all members of the public, Metro DES is not and after the Transaction will not be a Tennessee public utility.

3. The Word "Heat" is Not Dispositive

Third, the statutory public utility definition was enacted in 1919,[17] an era when similar statutes were being adopted across the country and happens to include the word heat. District heating systems were already present in the United States. Indeed their origins can be traced to ancient Rome, where warm water was circulated through open trenches to provide heat for buildings and baths. Nonetheless there appears to be little history of widespread regulation of district energy systems, as few of the 5,800 reported US district energy systems are regulated as

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[12] Tenn. Ann. Code § 65-4-101(6).

[13] *See* Merriam-Webster dictionary definition of "grant" as a transitive verb: "to permit as a right, privilege, or favor."

[14] *Kentucky-Tennessee Light & Power Co. v. City of Paris*, 173 Tenn. 123, 114 S.W.2d 815, 817 (1938).

[15] *Id.*

[16] 31 A.L.R. 333.

[17] 1919 Pub. Acts. Ch. 49, § 3.

public utilities, and some early electric utilities also included what would today be called district heating systems. Thus the simple fact that the statute includes the word "heat" in the list of potentially regulated services is not dispositive. For example, it could be argued that Metro DES distributes "steam" not heat.

Thus, on a purely facial reading, the public utility definition should not be considered as encompassing Metro DES.

C. Second Step Statutory Interpretation: "Public Utility" Definition As Interpreted Should Not Apply to Metro DES

Despite the plain reading of the statute on its face, should the Commission reach the second step and proceed with statutory interpretation, it should reach the same conclusion that Metro DES should not be subject to regulation as a public utility. With a statute this old and broad, a deeper reading of the terms and phrases of the statute leads to the same conclusion.

The definition of public utility in Tennessee statutes is similar to the way that term is defined throughout the United States. Consideration of how other state utility regulatory bodies have applied – or more specifically refrained from applying – the statute in the context of district energy should provide confidence to the Commission that it can exercise its knowledge, expertise and experience to conclude that Metro DES need not and should not be regulated as a public utility. This can be seen, for example, by recognizing that a district energy system's regulatory status cannot be determined simply by considering the words of the applicable public utility definition. It can further be seen by considering specific examples and the consistent reasoning behind decisions not to regulate where an entity's service is not dedicated to or for the public.

1. Other States and the "heat" or "steam" Public Utility Definition

A review of other states' treatment of district energy system supports the position that public utility commissions have, and use, the discretion as to whether or not to regulate district energy systems. According to Petitioners' research, 27 states besides Tennessee have comparable multi-customer district energy systems like Metro DES. It appears that in 15 of those states district energy systems are regulated by the applicable state public service commission, in 10 states district energy systems are subject to state commission jurisdiction, and 2 states (Michigan and Wisconsin) have both regulated and unregulated district energy systems. The following below portrays the state regulatory status of comparable district energy systems, distinguishing between states where, similarly to Tennessee, the word "heat" or "steam" is present in the relevant public utility definition from those where it is not.[18]

	Regulated	**Unregulated**
"heat" or "steam" included in public	California	Illinois[20]

[18] In the following 22 states, Petitioner has not identified the presence of a comparable district energy system: Alabama, Alaska, Arkansas, Delaware, Hawaii, Iowa, Kansas, Kentucky, Maine, Mississippi, Montana, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, Virginia, West Virginia, and Wyoming. *See* https://www.districtenergy.org/resources/resources/system-maps.

	Regulated	Unregulated
utility definition	Colorado Indiana *Michigan*[19] Missouri New Hampshire New York Ohio Pennsylvania South Carolina *Wisconsin*	*Michigan* Nebraska Nevada *Wisconsin* Louisiana
"heat" or "steam" not included in public utility definition	Florida	Arizona Connecticut Georgia Idaho Maryland Massachusetts Minnesota New Jersey Oklahoma Texas Washington

Thus a number of states refrain from regulating district energy systems despite the presence of the term "heat" or "steam" in the applicable public utility definition. For example, the Nebraska definition of public utility includes "any person or entity lawfully operating ... for the purpose of supplying electricity, gas, water, *including steam*, or any combination thereof, to the public ...."[21] Clearway Energy operates a district energy system that provides steam heating and chilled water to a number (according to Clearway Energy, at least 70%) of public and commercial buildings in Downtown Omaha.[22] The system does not appear to be regulated by the Nebraska Public Service Commission. Similarly, the Nevada definition of public utility includes "any plant or equipment ... for the production, delivery and furnishing to other persons ... *heat*, gas, coal slurry, light, power in any form ...."[23] Enwave operates a district energy in Nevada

[20] The Illinois definition of a public utility includes any entity providing "*heat, cold,* power, electricity, water or light ...." 220 ILCS 5/3-105. Notably Enwave Chicago operates a district energy system in downtown Chicago providing cooling service (*i.e.* "cold") from five interconnected plants to nearly 120 customers. *See* https://enwavechicago.com/about-enwave-chicago/. Petitioner has not found any evidence of Enwave Chicago being regulated by the Illinois Commerce Commission.

[19] Note that, as discussed below, Michigan and Wisconsin have both unregulated and regulated district energy systems.

[21] R.R.S. Neb. § 25-21,275(6).

[22] *See* https://www.clearwaythermal.com/projects/omaha/.

[23] Nev. Rev. Stat. § 704.020(2).

which provides heating and chilling services in Las Vegas, Nevada.[24] The system does not appear to be regulated by the Nevada Public Utilities Commission.

Michigan and Wisconsin provide further interesting examples. The Michigan Public Service Commission ("MPSC") has jurisdiction over the rates of a "steam utility" which is in turn is defined as "a steam distribution company regulated by the [Michigan Public Service] commission."[25] There are two comparable district energy systems operating in Michigan: Veolia Energy Grand Rapids, LLC ("Veolia") and Detroit Thermal, LLC ("Detroit Thermal"). Despite both systems providing steam services, the MPSC appears to only regulate Detroit Thermal[26] and states on its own website that it regulates only "1 privately owned steam utility."[27] Veolia, on the other hand, is regulated by the City of Grand Rapids pursuant to a local franchise ordinance.[28]

Wisconsin statutes define a public utility to include an entity that may "own, operate, manage or control ... a plant or equipment within the state, for the production, transmission, delivery or furnishing of *heat*, light, water or power ... to or for the public."[29] The Public Service Commission of Wisconsin ("PSCW") regulates the district energy service provided in downtown Milwaukee by the electric utility, We Energies, where such service is associated with the utility-owned Valley Power Plant.[30] Yet the PSCW expressly discontinued and disclaimed jurisdiction over another district energy system (associated with the Milwaukee County Power Plant) where it concluded that it was appropriate to do so.[31] This case is discussed more fully in the subsection below.

2. Metro DES Does Not Pass the "Public Use" Test

When utility commissions and courts examine whether or not an entity should legally be regulated as a public utility, they historically look for the presence of an essential utility definitional attribute: whether the entity holds itself out for or is dedicated "to the public use."[32] As shown below, Tennessee and numerous states rely on this public use test, and service from Metro DES does not pass the public use test.

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[24] *See* https://enwave.com/locations/las-vegas/.

[25] *See* MCL 460.6a(16)(c).

[26] *See, e.g., In the matter of the application of Detroit Thermal, LLC, for authority to redesign and increase rates for steam service and for other relief,* Case No. U-18131 (Oct. 11, 2016).

[27] *See* https://www.michigan.gov/mpsc/0,4639,7-159-16377---,00.html.

[28] Ord. No. 2008-38, Sec. 2. 501(A).

[29] Wis. Stat. § 196.01.

[30] *See* https://www.we-energies.com/pdfs/steam/steamrates_milwaukee.pdf

[31] *See Application of Wisconsin Electric Power Company for Authority to Transfer to Milwaukee County Power Plant and Related Steam Distribution Assets to Wisconsin Regional Medical Center Thermal Service, Inc., Located in the City of Wauwatosa, Milwaukee County, Wisconsin,* Docket No. 6630-BS-101, 2016 WL 233574 (2016).

[32] *See, e.g.,* Tenn. Ann. Code § 65-4-101(6).

As previously noted above, the Court of Appeals of Tennessee describes the public utility question through the following formulation of the public use test:

> Whether a business operation may be classed as that of a public utility is controlled by the facts of a particular case. Generally, the question *depends upon whether the operation has been held out as a public service*, upon whether the service is in fact of a public character *and whether it may be demanded on a basis of equality and without discrimination by all members of the public or obtained by permission only.*

(Emphasis added, internal citations omitted).[33] This principle is as old as the statutory language at issue. In a seminal 1911 case, a court determined that "holding itself out to the public" is an essential element of being a public utility.[34] The court explained in *Cawker* that "[i]t was not the furnishing of heat, light, or power to tenants, or, incidentally, to a few neighbors, that the Legislature sought to regulate, *but the furnishing of those commodities to the public; that is, to whoever might require the same.*"[35] The court also noted that "what does and does not constitute a public utility" in each case "will depend upon its own peculiar facts and circumstances and must be tested by the statute in light of such facts and circumstances."[36]

Similarly, the Alabama Supreme Court found that a company that owned and operated pipelines for sale of natural gas to select customers under private contract was not a "public utility."[37] In that case, Coastal States entered into private gas purchase and sale contracts with large customers, and the court noted that it seemed clear "that Coastal States intended to sell natural gas to whatever customers were available if it could make money doing so."[38] Coastal States stated that it was not operationally equipped to sell natural gas to the public generally or to small commercial customers, and intended to serve only those customers with whom it contracted. Relying upon a similar formulation of the public use test, the court here stated that "[t]he test for determining if a concern is a public utility *is whether it has held itself out as ready, able and willing to serve the public*," and that the "[t]erm [public utility] implies ... the duty of the ... one attempting to furnish the service, *to serve the public and treat all persons alike, without discrimination.*"[39] The court ruled that Coastal States was not a public utility.[40]

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[33] *Johnson City v. Milligan Utility District,* 38 Tenn. App. 520, 531, 276 S.W.2d 748, 753 (1954).

[34] *Cawker v. Meyer*, 147 Wis. 320, 133 N.W. 157, 158–59 (1911) (finding that a plant providing heat, light and power to a building's tenants and a few neighbors was not a public utility as it was not offering services to the public at large).

[35] *Id.* (emphasis added, internal citations omitted).

[36] *Id.* at 159.

[37] *Coastal States Gas Transmission Company, Inc. v. Alabama Public Service Commission, et. al.,* 524 So.2d 237 (1988).

[38] *Id.* at 358.

[39] *Id.* at 361 (internal citations omitted).

[40] *Id.*

In the Wisconsin case mentioned above, the PSCW was faced with a similar question of law as is raised in this petition. There a regulated electric utility also provided regulated steam heating service to two groups of customers from two geographically separated systems; the utility was divesting one of those, the Milwaukee County Power Plant district energy system ("MCPP"), to a new owner.[41] The PSCW noted that the service from the existing MCPP steam distribution system, absent modification, "would be provided to a limited class ... within close proximity ...."[42] In approving the sale and transfer of the operation of the MCPP and in response to a request a for legal determination regarding regulatory status, the PSCW ruled that the new entity's provision of MCPP steam service ownership "*does not constitute a public utility service offered to or for the public*" and thus the new owner would not be regulated as a public utility.[43]

The Missouri Public Service Commission ("MoPSC") similarly disclaimed jurisdiction over the chilled water operations of Trigen-Missouri Energy Corporation ("Trigen-Missouri") where it concluded that Trigen-Missouri did not hold itself out to offer services to the public in general.[44] The MoPSC described its determination as follows:

> Trigen-Missouri provides chilled water service to only six large customers, including several governmental entities. Those customers are served under multi-year, long-term individual contracts. *Trigen-Missouri does not make its services available to the general public and does not offer a set price by which a customer could choose to receive service. Trigen-Missouri will not take on new customers unless it can economically provide service to that customer, and has declined to offer service to potentially interested parties* because the economic [sic] of the situation did not work for Trigen-Missouri.[45]

Noting that "Missouri court[s] have consistently held that a company that supplies power or other service to customers on the basis of individual contracts without offering its services to the public at large is not acting as a public utility and is not subject to regulation by this Commission,"[46] the MoPSC found that Trigen-Missouri did not offer chilled water services to the public at large, and was thus not subject to the Commission's jurisdiction.

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[41] *See Application of Wisconsin Electric Power Company for Authority to Transfer to Milwaukee County Power Plant and Related Steam Distribution Assets to Wisconsin Regional Medical Center Thermal Service, Inc., Located in the City of Wauwatosa, Milwaukee County, Wisconsin,* Docket No. 6630-BS-101, 2016 WL 233574 (2016) ("MCPP Case").

[42] *Id.* at *5.

[43] *Id.* at *2.

[44] *In the Matter of the Joint Application of Trigen Kansas City Energy Corp. and Thermal North America, Inc., for the Authority Necessary of the Transfer of Control, and Sale of All Stock Currently Owned by Trigen Energy Corporation to Thermal North America, Inc.,* Case No. HM-2204-0618 (2004).

[45] *Id.*

[46] *Id.* (emphasis added).

Here, similar to Trigen-Missouri, the MCPP system, Coastal States, and Cawker, Metro DES – both prior to and after the Transaction – provides service only to a discrete number of customers who have entered into private contracts with Metro DES and which make economic sense for Metro DES. Metro DES does not hold itself out to provide service for any interested taker at a previously determined tariff rate. Thus the Metro DES system is not "dedicated to the public use" in terms of the Tennessee statutory definition,[47] and Metro DES is not a "public utility."

3. No Franchise Has Been Issued or is Needed

A public utility is defined by statute in part as an entity providing service "under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision ...."[48] Further, no grant of a privilege or franchise from the State or a political subdivision of the State to a public utility shall be valid until approved by the Commission.[49] Here, the Commission has not approved any franchise, license, privileges or agreements for Metro DES to provide public utility service, and no such approval would be required for any practical reason for service to continue as it has always been provided after the Transaction under ENGIE Nashville ownership.

In this sense, Metro DES should be regarded as not satisfying the franchise requirement to be considered a public utility.

V. POLICY REASONS TO REFRAIN FROM REGULATING ENGIE NASHVILLE / METRO DES

To the extent the Commission wishes to consider broader policy reasons in reaching its conclusion on the legal question before it, Petitioner submits that it should recognize that there are unnecessary costs that would be incurred if regulation were imposed, that Metro DES customers are not asking for regulation to be imposed, that imposition of regulation would be neither simple nor straightforward, the imposition of regulation would require a concomitant restriction of competition, and that there are simply no clear or obvious benefits that would result from regulation.

A. Unnecessary Costs if Regulation Were Imposed

Metro DES is currently unregulated. Adding a layer of regulation to Metro DES service would predictably lead to the following additional costs. Commission staff time and attention would be required for determining rules and specific details of regulation. ENGIE Nashville time and attention and resources would be required, including for counsel and preparation of any reports or compliance materials. Metro DES customers would likely bear such costs indirectly, either through contractual pass through provisions or eventual increased costs of service. Finally Metro DES customers might need to incur costs to participate in any relevant Commission proceedings.

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[47] Tenn. Ann. Code § 65-4-101(6).

[48] *Id.*

[49] Tenn. Ann. Code § 65-4-107.

In short, regulation is not free.

B. Metro DES Customers Do Not Want Regulation

Attached at Attachment A are letters from nine private Metro DES customers expressing support for this petition. While this is not every single Metro DES customer, Petitioner is not aware of any customer who would support regulation, and in fact, Petitioner has obtained the consent of every single customer to the Transaction.

C. Imposition of Regulation Would be Complex

Should the Commission determine that Metro DES should be regulated as a public utility, that would just be the beginning of its work. Currently none of the Commission's regulations directly apply to district energy. What would regulation mean for existing customers and their contracts? What would it mean for potential new customers?

Consider that under the traditional regulatory compact, in exchange for the adequate provision of a necessary public good at just and reasonable prices, a public utility is granted a franchise allowing it to be the sole provider of service in a particular territory and the opportunity to recover all operating costs and a return of and on its capital investment. In this case, there is simply no need to consider the heating and cooling services provided by Metro DES as a limited public good as to which the public would benefit (*e.g.* through lower prices and regulated levels of service) if provision of such a good were limited to a monopoly provider. That was true as to electricity in the early 1900s. But today, heating and cooling can be obtained for a building through a number of private marketplace options. Thus developers considering new construction in Nashville can consider incorporating a boiler and chiller into a building's design, can consider relying on electric and natural gas utilities or solar panels to provide fuel and electricity for heating and cooling needs, and can negotiate with Metro DES for an extension of its system to incorporate the new building. The best economic solution typically prevails.

But if heating and cooling services were to be considered a limited public good worthy of public utility regulation, the Commission would then likely need to begin to interfere with that marketplace. Would the Commission want to determine an appropriate cost of service for Metro DES? What if it determined, after considering of all necessary inputs, that Metro DES is not currently recovering its full and proper revenue requirement and thus is entitled to raise rates? Today Metro DES customers are protected by their contracts, but what would happen to such protections under a newly imposed regulatory regime? Answering such questions would become a new and complex task for the Commission, Metro DES, and customers should the Commission decide to impose regulation.

D. Imposition of Regulation Would Require a Restriction of Competition

Currently, if a new competitor perceives an opportunity to build a competing district energy system in Nashville, Metro DES is powerless to prevent them. But under a traditional regulatory model, if the Commission decided to regulate Metro DES as a public utility, it would need to prescribe a service territory to protect Metro DES and its customers from the costs of competition. While this makes economic sense under utility regulatory models, it does not fit well with the needs and economic realities of 21st century Nashville.

E. No Clear or Obvious Benefits Would Result from Regulation.

What benefits would be derived from the imposition of regulation at this point in the history of Metro DES? With most Metro DES customers currently under negotiated long-term contracts extending to 2033 and beyond, which will not be impacted by the Transaction, there is no customer need for an appeal to a regulator. Petitioner has committed ENGIE Nashville to honoring these contracts and has no need to appeal to a regulator for rate increases or to keep out competitors. And surely the Commission has enough work on its plate and would benefit little from adding a new industry to its regulatory portfolio.

Then who or what benefit would actually be achieved by regulation? Petitioner sees no such benefits.

VI. CONCLUSION

Metro DES and its customers have enjoyed a long history of mutual growth in the absence of utility regulation. With the sale of the system to ENGIE Nashville, a question of statutory interpretation arises as to whether or not Metro DES should now be regulated as a public utility. The statutory definition does not require such public utility regulation, whether read on its face or through statutory interpretation, and, to the contrary, simply does not apply to Metro DES. Neither Metro DES customers nor the prospective new owner ENGIE Nashville desire public utility regulation. Considerable complexities and additional costs would arise should public utility regulation be imposed on Metro DES, all for little or no benefit.

For all these reasons, Petitioner respectfully asks the Commission to issue a declaratory ruling, at its earliest opportunity and preferably by April 30, 2020, that, upon closing of the Transaction, Metro DES under ENGIE Nashville ownership will not become a Tennessee public utility.

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Dated: February 18, 2020

VERIFICATION

I, SANTANU KHAN, being duly sworn, attests and says that: [he/she] is the V.P. of ENGIE Development, LLC that the factual statements contained in this petition, including those in Section III, Statement of Facts, are true and correct to the best my knowledge information and belief.

Subscribed and sworn to (or affirmed) before me on this 18th day of February, 2020, by TEXAS DRIVERS LICENSE, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Notary Public

CLIFTINA LIZMI MAY
Notary ID #128372731
My Commission Expires
August 31, 2022