

IN THE TENNESSEE PUBLIC UTILITY COMMISSION
AT NASHVILLE, TENNESSEE

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

**BRIEF OF THE CONSUMER ADVOCATE SUPPORTING REGULATION AS A
PUBLIC UTILITY OF A PRIVATELY OWNED DISTRICT ENERGY SYSTEM**

Comes now Herbert H. Slatery III, Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General (“Consumer Advocate”), in response to ENGIE Development LLC’s *Petition for Declaratory Order* (“*Petition*”)¹ and as directed by the Hearing Officer in his April 3 *Order Establishing Procedural Schedule*, and hereby submits the Consumer Advocate’s *Brief* supporting the position that private ownership of the Metro Nashville District Energy System (“Metro DES” or “the system”) results in the entity becoming a “public utility” as defined by Tennessee law. As discussed in the following sections, if ENGIE acquires the system, the Tennessee Public Utility Commission (“TPUC” or “Commission”) will have jurisdiction over it as a regulated public utility.

OVERVIEW

Metro Nashville has operated Metro DES, a heating and cooling system, since 1974.² The system generates steam which is then cycled through approximately 91,100 feet of pipes and into

¹ For purposes of the Consumer Advocate’s *Brief*, ENGIE Development, LLC, ENGIE S.A., and ENGIE Nashville are collectively referred to as “ENGIE.” Unless specified otherwise, references to ENGIE also include the Nashville District Energy System, which is the subject of the *Petition*.

² *Petition* at 3.

large buildings for use in either heating or cooling.³ While Metro DES initially generated steam by burning trash, beginning in 2001 the system began to utilize fossil fuels in production.⁴ Currently, the system provides heating and cooling services to 42 large buildings in the downtown area, including several buildings owned by the State of Tennessee and Metro Nashville.⁵ This system is therefore large in scale as these 42 buildings each may contain hundreds of inhabitants along with scores of businesses.

During Mayor David Briley's term, citing budget constraints, Metro Nashville sought bids from private industry through a solicitation/procurement process, RFQ# 1044673, to purchase Metro DES.⁶ After receiving nine bids⁷, Metro Nashville released a notice of its intent to award ENGIE with the contract.⁸ The transaction was delayed during the mayoral interregnum, but ENGIE continues to seek to acquire the system. While most of the terms have been negotiated with the Mayor's Office, the Metro Council must ultimately vote to approve the deal.

On February 18, 2020, ENGIE filed its *Petition* requesting the Commission to issue a declaratory order holding that "private ownership of [Metro DES] does not render it a 'public utility' within the meaning of Tennessee statutes."⁹ ENGIE's proposal would allow it to operate Metro DES without being subject to regulation by this Commission.

For the reasons set forth in this *Brief*, the Commission should reject ENGIE's proposal that TPUC decline jurisdiction over the system and instead should hold that ENGIE is a public utility as contemplated by statute and subject to TPUC's oversight.

³ *Id.* at 3-4.

⁴ *Id.* at 4.

⁵ *Id.* at 7.

⁶ *Id.* at 4-5.

⁷ One of the bidders, Constellation New Energy, Inc., launched a protest to the award to ENGIE, but Metro Nashville rejected the protest on May 23, 2019, and the hearing on the appeal has not yet been rescheduled. *Id.* at 6.

⁸ ENGIE S.A. is a French publicly traded company with energy investments around the world. *Id.* at 4.

⁹ *Id.* at 1.

ANALYSIS

I. ENGIE IS A PUBLIC UTILITY UNDER TENNESSEE LAW.

ENGIE's *Petition* seeks to avoid regulatory oversight by this Commission. But Tennessee law explicitly defines service providers such as ENGIE as public utilities. Additionally, Tennessee courts have determined that systems such as the one ENGIE seeks to operate are in the public use. Therefore, TPUC must regulate ENGIE if the Company takes over Metro DES.

A. ENGIE should be regulated because it provides heat and cooling services to the public.

Tennessee law contemplates that TPUC regulates public utilities. Providers of heat and cooling services, such as ENGIE, fall under the definition of public utilities. Moreover, Tennessee's statutory scheme explicitly lists the types of utility service providers who are exempt from regulation, and ENGIE does not fall under any of these categories. Therefore, ENGIE's request in its *Petition* cannot be granted.

i. The General Assembly tasks TPUC with overseeing public utilities like ENGIE.

The Tennessee Supreme Court has addressed the type of "plenary authority" provided by the General Assembly to TPUC:

[T]he General Assembly has charged [TPUC] with the "general supervisory and regulatory power, jurisdiction and control over all public utilities." In fact, the Legislature has explicitly directed that statutory provisions relating to the authority of [TPUC] shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on [TPUC] . . . shall be resolved in favor of the existence of the power, to the end that [TPUC] may effectively govern and control the public utilities placed under its jurisdiction" The General Assembly, therefore, has "signaled its clear intent to vest in [TPUC] practically plenary authority over the utilities within its jurisdiction."¹⁰

¹⁰ *BellSouth Adver. & Publ'g Corp. v. Tenn. Reg. Auth.*, 79 S.W.3d 506, 512–13 (Tenn. 2002) (internal citations omitted) (quoting *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761–62 (Tenn. 1998)).

The General Assembly has thus required that, when a utility service provider falls under the statutory definition of public utility, this Commission must regulate the entity and ensure that it operates in a manner consistent with the public interest. Neither Tennessee statutes nor the Commission's rules contemplate the ability of this Commission to decline jurisdiction over the organizations it is tasked with regulating. Rather, when an entity is properly classified as a public utility, this Commission has a statutory duty to oversee it, having "general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter [the Regulation of Public Utilities by Commission]."¹¹

ENGIE states that the system provides heat to downtown Nashville, and Tennessee law clearly contemplates TPUC's regulation of providers of heat. Tennessee Code Ann. 65-4-101(6)(A) defines a "public utility" as:

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.¹²

In drafting this rule, the General Assembly envisioned it to be construed broadly, as the law also includes "any other like system" alongside its list of public utilities.¹³ In fact, while providers of heat such as ENGIE are explicitly referred to in the statute, because of the broad nature of this statute intended by the General Assembly, a provider of cooling services would fall under this

¹¹ Tenn. Code Ann. § 65-4-104(a).

¹² (Emphasis added).

¹³ See also Tenn. Code Ann. § 65-2-121 (requiring that "[t]his chapter shall not be construed as in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or the extent of a power conferred shall be resolved in favor of the existence of the power.")

definition as well, as “any other like system” should include such entities as a public utility. Cooling is simply the converse of heat. And while ENGIE also argues in the alternative that it could be considered a provider of steam rather than heat or cooling services, such a distinction would still not eliminate ENGIE from TPUC’s jurisdiction. Steam is simply condensed water, and this Commission regulates many providers of water pursuant to the statute.

For the reasons stated above, a summary view of the definition of public utility demonstrates that ENGIE’s services fall within the confines of the statute. As the Tennessee Supreme Court discussed in *Consumer Advocate v. Greer*:

The role of this Court in construing statutes is to ascertain and give effect to the legislative intent. Whenever possible, legislative intent is to be ascertained from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. We must avoid strained constructions which would render portions of the statute inoperative or void. Instead, we must apply a reasonable construction in light of the purposes and objectives of the statutory provision.¹⁴

Contrary to our Supreme Court’s reasoning in *Greer*, ENGIE argues here that the term “heat” in Tennessee’s statute can be disregarded, and doing so will still comply with the plain reading of the statute.¹⁵ But the General Assembly includes heat and water in the definition of public utility, and to ignore this explicit reference would frustrate the General Assembly’s clear intent. Providers of heat and cooling services, especially those powered by steam, are precisely the entities intended for TPUC to oversee.

ii. ENGIE does not fall under any of the General Assembly’s exceptions to the definition of public utility.

In drafting the statutes addressing utility regulation, the General Assembly expressly included the types of utility service providers that would be exempt from TPUC’s jurisdiction,

¹⁴ *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998) (internal citations omitted).

¹⁵ *Petition* at 11-12.

which are termed nonutilities. Tennessee Code Ann. §§ 65-4-101(6)(A)(i)-(ix) contains a list of forms of service providers that are nonutilities and thus exempt from the Commission's jurisdiction.¹⁶ For instance, Tenn. Code Ann. § 65-4-101(6)(A)(ii) states that utility service providers owned by "[a]ny county, municipal corporation or other subdivision of the state of Tennessee" are nonutilities for purposes of Commission regulation. Historically, and until transfer of Metro DES from Metro Nashville to ENGIE, the system has fallen under this exception. Private ownership of the system, however, will render the exception inapplicable to Metro DES.

The definition of public utility, along with the corresponding exceptions for nonutilities, is especially crucial to the disposition of this case because the listing of specific exceptions means that any utility service provider not so listed cannot argue that it should nonetheless be considered an exception to the broad definition of public utility. This principle is often cited in its Latin form, "*expressio unius est exclusio alterius*," or "the inclusion of one thing means the exclusion of others."¹⁷ By including specific exceptions to what constitutes a public utility, the General Assembly has determined that service providers like ENGIE cannot claim an unlisted exemption. ENGIE does not meet the criteria for any of the General Assembly's exceptions. Accordingly, ENGIE is clearly a public utility under Tennessee law.

B. The Metro DES system is dedicated to the public use.

ENGIE next avers that it is not a public utility as defined by Tennessee's statute because it is not in the public use.¹⁸ ENGIE's argument hinges on its claims that Metro DES serves customers only through privately negotiated contracts and that there is no requirement that Metro DES

¹⁶ Similarly, the General Assembly has carved out exceptions to TPUC's broad jurisdiction in areas that the Commission formerly regulated, including telecommunications (*see* Tenn. Code Ann. § 65-5-109) and railroads (*see* Tenn. Code Ann. § 65-4-102).

¹⁷ *See SunTrust Bank v. Burke*, 491 S.W.3d 693, 697 (Tenn. Ct. App. 2015).

¹⁸ *Petition* at 10.

provide service when requested. This position, however, is inconsistent with statutes and various Tennessee courts' interpretations of the meaning of public use.

The system was established to provide heating and cooling services to a class of large buildings in downtown Nashville, which undoubtedly translates to thousands of individuals' offices and scores of businesses of all kinds. Our Tennessee Supreme Court has discussed when services are in the public use:

The term "public use" is a flexible one. It varies and expands with the growing needs of a more complex social order. Many improvements universally recognized as impressed with a public use were nonexistent a few years ago. The possibility of railroads was not dreamed of in a past not very remote, yet, when they came, the courts, recognizing the important part they were to perform in supplying a public want, did not hesitate to take control of them as quasi governmental agents, and extend to them the right of eminent domain, in order to equip them thoroughly to discharge the duties to the community which followed their grant of franchises. This is equally true as to other appliances which now form important parts of a rapidly widening system of social and commercial intercommunication. So it may be said at the present time that "anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities", and of which the general public, under reasonable regulations, will have a definite and fixed use, independent of the will of the party in whom title is vested, would be a public use.¹⁹

A system in the public use

must in some way enlarge the resources, increase industrial energies, promote the productive powers of or afford increased facilities for the rapid exchange of thought or trade, or otherwise answer the growing needs of the community as such, before the use becomes such and the agency controlling passes under governmental control.²⁰

Here, a public demand for the provision of heating and cooling services constitutes a public use.

Analogous to the *Great Falls Power* Court's decision when it held that electric current was in the public use, the "growing need of a modern community" requires access to heating and cooling

¹⁹ *Memphis Natural Gas Co. v. McCanless, Comm'r of Finance and Taxation, et al.*, 194 S.W.2d 476, 479 (Tenn. 1946) (internal citations omitted) (quoting *Ryan v. Terminal Co.*, 50 S.W. 744, 45 L. R. A. 303)).

²⁰ *Great Falls Power Co. v. Webb*, 133 S.W. 1105, 1107 (Tenn. 1911) (quoting *Ryan v. Terminal Co.*, 50 S. W. 744, 45 L. R. A. 303).

services.²¹ In fact, that Court even referenced the public's need of heat, stating "[t]he furnishing of electricity to the public for light, heat, and power – that is, to such members of the public within a given territory as may desire the current for any or all such purposes – is a public use for which the power of eminent domain may be exercised."²²

The *McCanless* Court was tasked with determining whether a gas company was able to recover inspection fees, paid in protest and incurred over a three-year period. To do so, the Court considered first whether the gas company was a public utility and second whether it was "such public utility as it is within the jurisdiction and control of the Commission."²³ The Court opined that the terms "public use" and "public utility" are synonymous and ruled that the company was, in fact, a public utility subject to the State's jurisdiction.²⁴

The fact that only some buildings in downtown Nashville will benefit from this system does not deprive the system of its public nature. Nor does the fact that only a certain class of the public may benefit from Metro DES's services render it outside of the public use. "An enterprise does not lose the character of a public use because of the fact that its service may be limited by circumstances to a comparatively small part of the public."²⁵ Likewise, as our Tennessee Supreme Court determined:

To constitute a public use of lands, it is not necessary that every inhabitant of the community be benefited by the use which is proposed to be made thereof. Stating the doctrine more specifically, in the case of an electric company seeking to condemn lands for the purpose of generating and transmitting electricity to the inhabitants of a locality, it is not necessary for a constitutional delegation of the power of eminent domain to such company that every person therein should

²¹ *Id.*

²² *Id.* (quoting Lewis on Eminent Domain, § 268).

²³ *McCanless*, 194 S.W.2d 476, at 478.

²⁴ *Id.* at 480.

²⁵ *Tenn. Coal, Iron & R. Co. v. Paint Rock Flume & Transp. Co.*, 160 S.W. 522, 524 (Tenn. 1913) (internal citations omitted); see also *Collier v. Union Ry. Co.*, 83 S.W. 155 (Tenn. 1904) (in which the Tennessee Supreme Court discussed at length how various limiting factors involving the use of a railroad, including that its main business was freight, its most important business was the transportation only of coal, and that passengers rarely, if ever, utilized the line, did not deprive the railroad of its public nature).

actually use or be benefited by the electric current. It is sufficient if each member of the community has an equal right to a portion of the current in common with every other member.²⁶

The most analogous case to our facts was decided by the Tennessee Supreme Court in *Tenn. Coal, Iron & R. Co. v. Paint Rock Flume & Transp. Co.*²⁷ In *Paint Rock Flume*, a railroad company sued to enjoin a flume company²⁸ from occupying land belonging to the railroad and from diverting a portion of water from Paint Rock Creek.²⁹ The Court was tasked with determining whether a flume was in the public use and if it could be considered a public service corporation.³⁰ The Court held that “the fact that only a comparatively small number of people will be benefited by the operations of this flume does not deprive the enterprise of its public nature.”³¹ Moreover, even though a comparatively small part of the public – only those seeking to transport timber and bark from a “rough and sparsely settled country” – would benefit from the flume, it was nonetheless in the public use.³² Those facts translate well to the services provided by Metro DES today. Metro DES supplies heat and power to large buildings in downtown Nashville. That only such buildings may benefit from the provision of heat and cooling services does not take away from their public nature. ENGIE, like the flume company, provides services that are in the public use.

²⁶ *Webb v. Knox County Transmission Co.*, 225 S.W. 1046, 1048 (Tenn. 1920) (emphasis added) (*quoting* Curtis on Electricity, § 66).

²⁷ 160 S.W. 522 (Tenn. 1913).

²⁸ A flume is “an artificial channel or chute for a stream of water.” Flume, WEBSTER’S II, NEW RIVERSIDE UNIVERSITY DICTIONARY, Howard Mifflin Company (1984). They are often used in logging operations but can supply water for other purposes. For instance, in Ocoee, Tennessee, the Eastern Tennessee Power Company constructed a flume to “capture the Ocoee River as it pauses at the Diversion Dam, and then force the waters through the narrow flume to the powerhouse to turn the [electric generation] turbines.” OCOEE FLUME LINE AND DAMS, Tennessee Overhill (accessed April 10, 2020) (publicly available at <https://tennesseeverhill.com/ocoe-flume-line-and-dams/>).

²⁹ *Paint Rock Flume* at 523

³⁰ *Id.* at 524.

³¹ *Id.*

³² *Id.*

ENGIE also contends that because it privately negotiates contracts, its system is not in the public use. But this is incorrect. If ENGIE's argument were accepted, any operator of a utility system could avoid regulation simply because it negotiates contracts with individual customers. How contracts for service are formed is of no consequence in determining whether a system is in the public use. Instead, it is the nature of the service that will determine so.³³

Next, ENGIE claims that the Metro DES system is not in the public use because the system, while under the control of Metro Nashville, has not had an obligation to serve would-be users in the area. ENGIE also avers that when ownership of the system is transferred from Metro Nashville, ENGIE will likewise not have an obligation to serve customers. However, when Metro DES transfers ownership to a jurisdictional utility, necessitating a Certificate of Public Convenience and Necessity ("CCN")³⁴, certain obligations will be triggered, including the provision of service within its territory.³⁵

Again, if ENGIE's argument were accepted in this case, any organization that purchases a utility system, if seeking to avoid regulation, could aver that it would not be bound by an obligation to serve customers and thus is not a public utility because it cannot be used by the whole public. But the refusal to serve customers does not trigger a system's status as a public utility. Rather, systems that are in the public use must comply with the body of law that has developed around this area. As the Tennessee Supreme Court stated in *Nashville Water Co. v. Dunlap*:

As was stated in [the Weymouth case], a corporation, endowed with privileges to be exercised for the public benefit cannot escape the performance of its duties to

³³ 73B C.J.S. Public Utilities § 2 ("Whether the operator of a given business or enterprise is a public utility depends on whether the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case."); A utility is a "business enterprise that performs an essential public service and that is subject to governmental regulation." *Black's Law Dictionary* Utility 4 (11th ed. 2019) (emphasis added).

³⁴ Tenn. Code Ann. § 65-4-201(a).

³⁵ *Black's Law Dictionary* specifies that a public utility is "[a] person, corporation, or other association that carries on an enterprise for the accommodation of the public, the members of which are entitled as a matter of right to use the enterprise's facilities." (emphasis added) (11th ed. 2019).

the public by picking and choosing certain charter provisions, which it deems beneficial to it, and failing or refusing to exercise others, which it deems onerous and non-profitable.³⁶

In the case of ENGIE and Metro DES, ENGIE will be an operator of a public utility system that, as discussed above, is in the public use. This will require a CCN, and there will be an obligation to serve as a public utility provider of an essential service. ENGIE cannot escape TPUC oversight merely because it believes it would be convenient to do so.

Last, ENGIE claims that members of the public do not have to choose its services and could instead choose other methods to heat and cool their buildings. The availability of options for service, however, does not take away the public nature of the provision of an essential service. If it did, no state would regulate natural gas because consumers could choose to heat homes with an electric or propane system. The contention that refusal to serve the public takes away the “public use” of the system is incorrect. Because the system is in the public use, and under the jurisdiction of this Commission as a public utility, an obligation to serve will subsequently arise.

C. When Metro DES becomes privately-owned, it will become a jurisdictional utility company of the Commission and will require a Certificate of Public Convenience and Necessity.

ENGIE concludes that it is not a public utility under Tennessee’s statute because it has not historically operated “under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof.”³⁷ It further contends that this would not change once the system becomes privately owned.³⁸ This is incorrect. Public utilities under the jurisdiction of TPUC must obtain a CCN.³⁹ Therefore, if and when ownership of Metro DES transfers to ENGIE,

³⁶ 138 S.W. 2d 424, 427 (Tenn. 1940).

³⁷ *Petition* at 11.

³⁸ *Id.*

³⁹ See Tenn. Code Ann. § 65-4-201(a) (“No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the commission, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such

the Company must obtain a CCN. ENGIE will thus obtain a “license” from the state to operate the Metro DES system.

That Metro DES never had a defined service territory⁴⁰ while under operation of Metro Nashville is of no consequence. As a nonutility under Tennessee’s statute, Metro Nashville has never been required to comply with rules concerning public utilities assigned by the General Assembly and TPUC. The transfer of ownership from a government-owned utility to a private one creates a new corporate form for Metro DES, and this new form will entail new duties and responsibilities.

TPUC has recently determined two cases that provide guidance for ENGIE’s *Petition*. In the *Expedited Petition of Sontara Old Hickory, Inc.*⁴¹, a water and wastewater system that was operated by DuPont de Nemours, Inc., a large manufacturing company, and served only two other large industrial customers, was being sold to one of the customers.⁴² DuPont had never obtained a CCN or held any “privileges, franchises, licenses, or agreements, granted by the state or any subdivision thereof.” Because of the entity falling squarely into the definition of a public utility, the essential nature of the services provided by the system, and the lack of any exception in Tennessee law to regulation, jurisdiction was never a question, and TPUC granted Sontara Old Hickory a CCN on November 22, 2019.⁴³ ENGIE is no different and is likewise subject to TPUC jurisdiction.

construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system, or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate”).

⁴⁰ See *Petition* at 11.

⁴¹ Tennessee Public Utility Commission, Docket No. 19-00071 (*Petition* filed August 13, 2019).

⁴² *Id.*

⁴³ *Order Approving Asset Purchase Agreement and Granting Certificate of Convenience and Necessity*, Docket No. 19-00071 (November 22, 2019).

Next, in the matter of Laurel Hills Water System⁴⁴, a utility provided water service to a community near Crossville, Tennessee. Laurel Hills did not have a CCN but was eventually required by TPUC to obtain one. One can only imagine how quickly and firmly TPUC would have rejected any argument by Laurel Hills that TPUC could not regulate that system because it had been operating without a CCN or other “privileges, franchises, licenses, or agreements, granted by the state or any subdivision thereof.” In fact, TPUC did act swiftly and definitively in that case by instituting a show cause proceeding against what was without question a jurisdictional public utility.⁴⁵

II. TPUC’S REGULATION OF ENGIE IS SUPPORTED BY PUBLIC POLICY.

It is well-established that state legislatures have the power to oversee the operation of public utilities. “[T]he State has inherent power, within reasonable and proper limits, to regulate and control public utilities operating within its borders.”⁴⁶ This power is broad, stemming from the very power of the legislature, and is often tasked to regulatory agencies, including of course this Commission. TPUC, like its counterparts in other states, ensures that the operations of public utilities in Tennessee maintain within the public interest.

The reasoning behind this Commission’s regulatory oversight does not merely lie within state statutes or principles of long standing. Public utilities are often natural monopolies or

⁴⁴ Some of the issues involved in this dispute continued in *Laurel Hills Condominium Property Owners Ass’n v. Tenn. Regulatory Auth.*, 2014 WL 1494126, No. 2013-01392-COA-R129-CV (Tenn. Ct. App. April 14, 2014) (*perm. app. denied*).

⁴⁵ *Order Requiring Laurel Hills Condominiums Property Owners Association to Appear and Show Cause Why a Cease and Desist Order and Civil Penalties & Sanctions Should Not Be Imposed Against It for Violations of State Law*, TPUC Docket No. 12-00077 (July 17, 2012). Of course, Laurel Hills did not question that it was subject to the Commission’s jurisdiction. *Petition of Laurel Hills Condominiums Property Owners Association for a Certificate of Public Convenience and Necessity*, TPUC Docket No. 12-00030, p. 5, ¶16 (April 12, 2012).

⁴⁶ 73B C.J.S. Public Utilities § 13 (March 2020 Update); *see* Tenn. Code Ann. § 65-4-104(a).

exercise potentially damaging power over consumers. If unchecked, the nature of these businesses is such that an unbalanced power dynamic can emerge to the detriment of a system's users.

In this case, ENGIE provides essential services to consumers. Without regulation by TPUC, there will be no assurance that ENGIE operates in the public interest or sets just and reasonable rates. When service-contract terms expire, ENGIE would be free to demand exorbitant rates for customers to renew them, and consumers would have little recourse other than to give in to ENGIE's demands or undertake the massive expense to convert their large buildings' heating and cooling systems. With regulation, customers could appear before this Commission to seek relief, an important safeguard that, while it will hopefully be unnecessary, will ensure fair treatment by ENGIE of its customers.

While ENGIE claims that all of its customers have consented to the transaction and many have indicated they do not want the system to be regulated by TPUC, some customers cannot speak for every customer of the system, and current customers cannot speak for future customers or other members of the public. It is unnecessary to examine what private opinions some may have concerning regulation of Metro DES as the law in this matter speaks for itself. Not only would it be bad policy to override state statutes based on an entity's opinion, it would be unlawful.

Regulatory oversight for ENGIE will not be overly burdensome for the business. While ENGIE may fairly claim that its business model does not lend itself well to traditional ratemaking methods, these methods are not mandated by TPUC.⁴⁷ The only limit placed on a ratemaking body is the statutory requirement that rates be just and reasonable. No "precise formula or yardstick"

⁴⁷ The Consumer Advocate takes no position in this *Brief* concerning the appropriate regulatory treatment for ENGIE if it takes over control of Metro DES. This *Brief* instead addresses the threshold issue of whether ENGIE is a public utility and thus is under the jurisdiction of TPUC.

has been identified by the legislature or the courts for TPUC to use in determining rates.⁴⁸ In fact, it is expected that TPUC and its supporting staff will draw on its knowledge and expertise in the field of utilities regulation in determining just and reasonable rates.⁴⁹ TPUC itself recognizes that “rate-making is an extremely complex process” which requires more than mathematical formulas and data input.⁵⁰ Accordingly, TPUC is not bound by any specific means by which rates are set so long as the end result produces just and reasonable rates.

When long term contracts expire, ENGIE can appear before the Commission with special contracts, an action in which all large public utilities in this State participate. ENGIE will be able to present its special contract on a case-by-case basis, and due to the long-term nature of the contracts referenced by ENGIE in its *Petition*, the Company may go years without needing to do so.

CONCLUSION

ENGIE, if it takes control of the Metro DES system, will be a public utility, which this Commission is tasked with regulating. The system is dedicated to the public use as defined by numerous Tennessee courts. It is required to obtain a CCN, consistent with other similarly positioned utilities currently regulated by TPUC. And even alongside the overwhelming legal support for this outcome, public policy demands that ENGIE be regulated. Therefore, the Consumer Advocate respectfully requests that this Commission deny ENGIE’s *Petition*.

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⁴⁸ *CF Indus. v. Tenn. Pub. Serv. Comm’n.*, 599 S.W.2d 536, 538 (Tenn. 1980) (citing *Allied Chem. Corp. v. Ga. Power Co.*, 224 S.E.2d 396 (Ga. 1976)).

⁴⁹ *Id.* (citing *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 251 N.W.2d 350 (Minn. 1977)).

⁵⁰ *Id.* (where the Court upheld the holding of the Tennessee Public Service Commission.)

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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