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June 3, 2022

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Dr. Kenneth C. Hill, Chairman
c/o Tory Lawless
Dockets and Records Manager
Tennessee Public Utility Commission
502 Deaderick St., 4th Floor
Nashville, TN 37243

Electronically Filed in TPUC Docket
Room on June 3, 2022 at 3:04 p.m.

Re: PETITION OF KINGSPORT POWER COMPANY d/b/a AEP APPALACHIAN
POWER COMPANY FOR A GENERAL RATE INCREASE
(Docket No. 21-00107)

Dear Ms. Lawless:

Enclosed please find one original and four copies of Motion *in Limine* of the East Tennessee Consumers' with Attachment – Proposed Order, in the above-referenced docket.

Sincerely yours,

/s/ Michael J Quinan
Michael J. Quinan

MJQ
Enclosures

cc: Certificate of Service

TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

In Re:

PETITION OF KINGSPORT POWER
COMPANY d/b/a AEP APPALACHIAN
POWER COMPANY FOR A GENERAL
RATE INCREASE

Docket No. 21-00107

**MOTION *IN LIMINE* OF THE
EAST TENNESSEE ENERGY CONSUMERS**

East Tennessee Energy Consumers (“ETEC”), by counsel, pursuant to Rule 1220-01-02-.06 of the Rules of Practice and Procedure (“TPUC Rules” or “Rules”) of the Tennessee Public Utility Commission (“TPUC” or “Commission”), moves *in limine* for entry of an order allowing ETEC a reasonable opportunity during the conference scheduled to commence on June 20, 2022 (“Hearing”) to present the oral testimony of its witness, Mr. Stephen Baron, rebutting and responding to certain rate-design and other proposals and assertions set forth in the direct testimony of Mr. William H. Novak, whose testimony was filed by the Consumer Advocate Unit in the Financial Division of the Office of the Tennessee Attorney General (“CA” or “Consumer Advocate”). In support of its motion, ETEC states as follows:

INTRODUCTION

To dispose of this motion, the Commission need look no further than its Rules. TPUC Rule 1220-01-02-.16 (the “Hearing Rule”) provides, in part, as follows:

Any party shall have the right to cross-examine witnesses who testify and **shall have the right to submit rebuttal testimony**, subject to the standards of admissibility and such limitations as the Hearing Officer or Chair, whichever is

presiding at the hearing, may reasonably require.¹

RELEVANT PROCEDURAL HISTORY

Pursuant to the Commission's procedural order issued January 6, 2022 (the "Pre-Hearing Schedule"), both ETEC and the Consumer Advocate timely filed their respective witnesses' direct testimonies on March 30, 2022. In that testimony, both ETEC (through Mr. Baron) and the CA (through Mr. Novak) took positions on rate-design and cost-allocation issues; all of those issues are properly before the Commission in this contested electric rate case.²

On May 10, 2022, the Commission confirmed and communicated to the parties that the evidentiary hearing in this case will commence on June 20, 2022.

On May 25, 2022, the Hearing Officer convened a pre-hearing conference during which it was suggested for the first time that ETEC's right to present rebuttal testimony at the hearing would be foreclosed. Counsel for the Consumer Advocate indicated that he would object to any such rebuttal testimony at the Hearing. ETEC's counsel noted ETEC's objection to the suggested limitation on rebuttal testimony. Notwithstanding ETEC's objections, the presiding Hearing Officer suggested that the Commission would adopt such a limitation and not permit such rebuttal testimony but instead would limit a witness's testimony from the witness stand to statements that summarize the witness's own pre-filed testimony. The docket presently does not

¹ TPUC Rule 1220-01-02.-16(5) (emphasis added). *See also* TPUC Rule 1220-01-02.-22(3) ("In any contested case the Commissioner or the Hearing Officer . . . [s]hall afford all parties an opportunity to be heard after reasonable notice before" summarily adjudicating a case or exercising other enumerated powers (emphasis added)).

² ETEC presently intends to rebut only certain portions of CA witness Novak's testimony. However, and consistent with the Rules, ETEC reserves its right to rebut additional evidence as appropriate to protect ETEC's interests, including any evidence that has yet to be offered or otherwise made known to ETEC. ETEC notes the narrow focus of its current plans for presenting rebuttal testimony in the hope of assuaging any logistical or similar concerns about time or Hearing duration that may originally have prompted the suggestion, raised for the first time at the recent pre-hearing conference, to foreclose ETEC's right to present oral rebuttal testimony.

include any transcript of the pre-hearing conference, nor does it include any TPUC order memorializing any procedural rulings made during or after the pre-hearing conference.

ETEC now renews its objections made orally at the pre-hearing conference and again asserts its right to present rebuttal testimony at the Hearing. To assist and inform all parties' preparations for the Hearing between now and June 20, 2022, ETEC respectfully requests expedited consideration of this motion and a pre-Hearing ruling. In the interest of expediency, ETEC requests that any hearing on this motion be conducted remotely.

AUTHORITIES AND ARGUMENT

I. TPUC Rule 1220-01-02-.16(5) (the "Hearing Rule") clearly establishes ETEC's right to present rebuttal testimony at the Hearing.

By operation of the Hearing Rule's mandatory provisions (the controlling language is reproduced in full on page 1 of this motion), presentation of Mr. Novak's direct testimony automatically triggers and confers upon ETEC two general and complementary rights that are central to an interested party's right to due process – namely: (1) the right to cross-examine; and (2) the right to rebut.³ The Hearing Rule subjects these rights to several familiar and narrowly construed limitations, none of which is relevant to this motion.⁴ The Hearing Rule uses unambiguous language with clear and certain meanings that support ETEC's construction of its provisions. The Rule's use of "shall" – *i.e.*, "Any party *shall* have" the specified rights of cross-examination and rebuttal – makes clear that TPUC's discretionary authority in matters of

³ See 1220-01-02-.16(5).

⁴ For example, the Hearing Rule subjects the right to rebut asserted herein to "the standards of admissibility and such limitations as [the presiding Commissioner] may reasonably require." TPUC Rule 1220-01-02-.16(5). The referenced admissibility standards are familiar evidentiary rules and principles set forth in the Tennessee Code. See TPUC 1220-01-02-.16(1) (invoking admissibility standards of T.C.A. §§ 65-2-109 and 4-5-313). ETEC does not seek exemption from these standards; it seeks only a reasonable opportunity to present rebuttal testimony.

procedure and in managing its dockets – however broad it may be – may not be exercised in ways that deprive or impinge upon a party’s due process rights to be heard.

II. The Hearing Rule’s relevant due process protections are echoed and bolstered by the Tennessee Code.

The Rules’ statutory origins, and the Code sections that provide the legal framework within which the Rules are administered, also support this motion. Indeed, Code Section § 65-2-109(3) loudly echoes the Hearing Rule’s controlling language in its declaration that “[e]very party shall have the right of cross-examination of witnesses who testify, *and shall have the right to submit rebuttal evidence.*”⁵

The Commission’s differing degrees of statutory authority – to admit and consider evidence on one hand; and to exclude or reject it on the other – offer further support for this motion. The Commission enjoys broad statutory authority to admit and consider evidence regardless of its admissibility in judicial proceedings.⁶ Conversely, the Commission’s authority to *exclude* evidence is carefully and narrowly limited by statute. Code Section 65-2-109 (entitled “Rules of Evidence”) identifies the four (4) discrete grounds that properly may justify the Commission in its refusal to consider evidence – namely, when the evidence is “incompetent, irrelevant, immaterial or unduly repetitious”⁷ – and, clearly, none of those grounds applies in the current posture of this case or on its current record.

⁵ T.C.A. § 65-2-109(3) (emphasis added).

⁶ See, e.g., T.C.A. § 65-2-109(1) (*relieving* TPUC of admissibility constraints applicable to judicial proceedings and *allowing* TPUC to “admit and give probative effect to any evidence which possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs”).

⁷ T.C.A. § 65-2-109(2).

Indeed, research has identified *no* Code section, Rule, or other legal basis for short-circuiting hearing procedures in the manner proposed, over ETEC's objections, at the recent pre-hearing conference.

III. The Commission cannot ignore or rescind its own Rules without first giving due notice and allowing affected parties a reasonable opportunity to be heard.

As further protection against due process violations, the Code strictly limits the Commission's authority to modify or retreat from its Rules following their due promulgation.⁸ Relevant to this motion, the Commission may not adopt, amend, or repeal any of its Rules (including the Hearing Rule) without first taking reasonable steps to "publish or otherwise circulate notice of its intended action, and afford interested persons opportunity to submit data or argument."⁹ Based on the information available to ETEC, none of these statutory conditions has been fulfilled and the Rules protecting ETEC's right to present rebuttal testimony remain in full force and effect as of the date of this motion. Accordingly, in observance of those Rules and ETEC's attendant rights to be heard, the Commission should grant this motion.

CONCLUSION

Adoption of the proposed Hearing procedure suggested for the first time at the recent pre-hearing conference would violate ETEC's due process rights to be heard, thereby potentially undermining the validity of the final order in this case. Accordingly, and because this motion asserts only those rights to be heard that are expressly reserved to ETEC as a party to this contested case, ETEC respectfully requests that the Commission enter an order granting this motion and affording ETEC a reasonable opportunity, consistent with the Rules and applicable

⁸ See T.C.A. § 65-2-102.

⁹ TPUC Rule 1220-01-02.-102(1)(4).

evidentiary standards, to present at the Hearing of this case the limited rebuttal testimony of Mr. Baron as described herein. A proposed form of order is attached for the Commission's consideration.

By Counsel:

/s/ Michael J. Quinan

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TPUC Dkt. No. 21-00107

June 3, 2022

Motion *in Limine* of the East Tennessee Energy Consumers –

Attachment:

PROPOSED ORDER

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

June __, 2022

IN RE:)	
)	
PETITION OF KINGSPORT POWER)	Docket No. 21-00107
COMPANY d/b/a AEP APPALACHIAN)	
POWER COMPANY FOR A GENERAL)	
RATE INCREASE)	

ORDER GRANTING *MOTION IN LIMINE*
OF THE EAST TENNESSEE ENERGY CONSUMERS

This matter is before the Hearing Officer upon the Motion *in Limine* (“Motion”) of East Tennessee Energy Consumers (“ETEC”). In the Motion, ETEC seeks leave to present rebuttal testimony at the conference to hear evidence in this case commencing June 20, 2022 (“Hearing”).

Upon consideration of the Motion and related authorities and arguments of counsel, and based on the current record, procedural history, and posture of this case, the Hearing Officer hereby finds that ETEC’s Motion should be **GRANTED**. ETEC shall have a reasonable opportunity to present rebuttal testimony at the Hearing, consistent with applicable Rules of Practice and Procedure of the Tennessee Public Utility Commission and standards of admissibility therein by reference.

IT IS SO ORDERED.

Monica Smith-Ashford, Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that, on June 3, 2022, the attached was served by email and/or first class mail, postage prepaid, to all parties of record at their addresses shown below.

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