

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

March 29, 2023

IN RE:)	
)	
KINGSPORT POWER COMPANY D/B/A AEP)	DOCKET NO.
APPALACHIAN POWER 2022 REVISED FUEL)	22-00111
AND PURCHASED POWER ADJUSTMENT RIDER)	
TARIFF FILING)	

**ORDER DENYING KINGSPORT POWER’S MOTION TO DISMISS AND GRANTING
PETITIONS TO INTERVENE FILED BY CONSUMER ADVOCATE AND EAST
TENNESSEE ENERGY CONSUMERS**

This matter is before the Hearing Officer of the Tennessee Public Utility Commission (“Commission” or “TPUC”) for consideration of the Petitions to Intervene filed in the docket by the Consumer Advocate Division of the Office of the Tennessee Attorney General (“Consumer Advocate”) and the East Tennessee Energy Consumers (“ETEC”) and the *Motion to Dismiss Petitions to Intervene on Behalf of Kingsport Power Company d/b/a AEP Appalachian Power* (“*Motion to Dismiss*”).¹

BACKGROUND

Kingsport Power Company d/b/a AEP Appalachian Power (“Kingsport,” “KPC,” or the “Company”) is a public utility, subject to Commission jurisdiction, engaged in the business of distributing electric power service to approximately 50,000 customers in its service area, which includes portions of Sullivan, Washington and Hawkins Counties, Tennessee, the City of Kingsport, Tennessee, and the Town of Mount Carmel, Tennessee. Kingsport’s Fuel and

¹ The Hearing Officer communicated her ruling on the *Motion to Dismiss* and Petitions to Intervene to the parties via email dated January 13, 2023.

Purchased Power Adjustment Rider (“FPPAR”) tariff was approved by the Commission on October 19, 2016 in Docket No. 16-00001² and allows KPC to annually true-up its estimated costs to the actual costs incurred for fuel and power purchased for use by its customers. KPC has made these filings yearly since 2018, and the accuracy of the filings are reviewed by Commission staff. KPC filed its 2022 FPPAR on September 30, 2022 with an effective date of November 1, 2022.³

CONSUMER ADVOCATE’S *PETITION TO INTERVENE*

In its *Petition to Intervene*, filed on October 28, 2022, the Consumer Advocate seeks to intervene in the docket pursuant to Tenn. Code Ann. § 65-4-118, which qualifies the Consumer Advocate to represent the interests of Tennessee consumers of public utility services in proceedings before the Commission. The Consumer Advocate asserts:

The interests of consumers may be affected by the determinations and orders made by TPUC with respect to: (i) the interpretation, application, and implementation of TENN. CODE ANN. § 65-5-103(a), TENN. CODE ANN. § 65-5-103(d), and other relevant statutory and regulatory provisions; (ii) the review and analysis of the Company’s documentation, financial spreadsheets, and materials; and (iii) the interpretation, application, and/or implementation of the terms and conditions of the Commission’s Order in TPUC Docket No. 16-00001, as well as any related settlement agreement applicable to this docket.⁴

In conclusion, the Consumer Advocate states that only by participating in this proceeding can it work to adequately protect the interests of consumers.⁵

ETEC’S *PETITION TO INTERVENE*

ETEC filed its *Petition to Intervene of the East Tennessee Energy Consumers* (“ETEC’s

² See *In re: Petition of Kingsport Power Company d/b/a AEP Appalachian Power for a General Rate Case*, Docket No. 16-00001, *Order Approving Stipulation and Settlement Agreement* (October 19, 2016).

³ Commission Staff was satisfied with the tariff filing and the tariff was allowed to go into effect on November 1, 2022.

⁴ *Petition to Intervene*, p. 3 (October 28, 2022).

⁵ *Id.*

Intervention”) on October 31, 2022. ETEC states it is a coalition of three of Kingsport’s largest industrial power customers.⁶ ETEC maintains the interests of ETEC and its members may be affected by the Commission’s action in this proceeding with regard to:

(i) the interpretation, application, and implementation of Tenn. Code Ann. §§ 65-5-103(a) and 103(d), and other relevant authorities; (ii) the analysis and significance of Kingsport Power’s documentation and workpapers, financial records and spreadsheets, and other materials offered in support of rate proposals at issue in the case; and (iii) the interpretation, application, and implementation of the Commission’s Order Approving Stipulation and Settlement Agreement in this docket.⁷

According to ETEC, it must conduct discovery to “properly evaluate the implications of the Company’s proposals and any other FPPAR proposals and to determine and address the reasonableness of such proposals.”⁸ ETEC argues that because no other party represents ETEC’s interests, allowing ETEC to participate as a party in the docket is in the public interest and will not impair the prompt and orderly conduct of the proceedings.⁹

KINGSPORT’S *MOTION TO DISMISS*

On November 1, 2022, Kingsport filed its *Motion to Dismiss Petitions to Intervene on Behalf of Kingsport Power Company d/b/a AEP Appalachian Power* (“*Motion to Dismiss*”). Kingsport argues the petitions to intervene of the Consumer Advocate and ETEC should be dismissed because they are untimely under Commission Rule 1220-01-02-.02(4) and the Commission lacks jurisdiction over the subject matter.¹⁰ Kingsport maintains that a complaint opposing a tariff should be filed no later than seven days prior to the Commission Conference

⁶ *ETEC’s Intervention*, p. 3 (October 31, 2022).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Motion to Dismiss*, p. 2 (November 1, 2022).

immediately preceding the proposed effective date of the tariff pursuant to Commission Rule 1220-01-02-.02(4), which would have been the October Commission Conference, but the Consumer Advocate and ETEC filed their interventions on October 30th and 31st respectively. Therefore, Kingsport argues the interventions are barred because they are untimely.¹¹ In addition, KPC asserts that since the tariff filing is based on actual costs incurred by Kingsport for Fuel and Purchased Power and there is nothing subjective in the filing, the Commission Staff is capable of reviewing and evaluating the numbers in the tariff.¹² Kingsport argues that Commission Staff has reviewed the FPPAR rate calculation and found no errors and has found that the updated rate is reasonable and issued a letter acknowledging its review of the Company's filing. In addition, Kingsport maintains that delaying the revised tariff would be detrimental to Kingsport's customers because each month that passes beyond November 1, 2022 will result in a larger increase to customers as the under-recovery amount increases.¹³

CONSUMER ADVOCATE'S RESPONSE

The Consumer Advocate filed the *Consumer Advocate's Response in Opposition to Motion to Dismiss* ("Consumer Advocate's Response") on November 4, 2022. The Consumer Advocate argues that Tenn. Code Ann § 65-4-104 gives the Commission general supervisory and regulatory power, control, and jurisdiction over the utilities it regulates; therefore, the lack of a complaint filed under Commission Rule 1220-01-02-.04(4) does not "divest the Commission of its jurisdiction."¹⁴ The Consumer Advocate maintains the procedural issue centers on the Commission's discretion to grant petitions to intervene, not its jurisdiction.¹⁵ The Consumer Advocate argues that the Commission has the statutory authority to grant a petition to intervene

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 2-3.

¹⁴ *Consumer Advocate's Response*, pp. 1-2 (November 4, 2022).

¹⁵ *Id.* at 2.

at any time if it determines it is in the interests of justice and won't delay the prompt and orderly conduct of the proceedings.¹⁶ According to the Consumer Advocate, Kingsport is wrong in its assertion that this filing is just verifying invoices, but there is also a policy dispute regarding whether the FPPAR should apply to street lighting customers.¹⁷ The Consumer Advocate asks that the Commission continue with its policy favoring a resolution on the merits and allow the Consumer Advocate to intervene as it seeks to "ensure the fair allocation of FPPAR costs to all customer classes, and such intervention would not impair any proceeding."¹⁸

ETEC'S RESPONSE TO MOTION TO DISMISS

ETEC filed *East Tennessee Energy Consumers' Response to Motion to Dismiss* ("ETEC's Response") on November 9, 2022. ETEC stated it has no objections to the proposed changes to Kingsport's FPPAR charges but filed its Petition to Intervene to protect the interests of its members in any proceeding that might change the FPPAR Rider or related charges. ETEC asks that its Petition to Intervene be granted if there are any further proceedings on Kingsport's proposed changes to its FPPAR charges.

KINGSPORT'S REPLY IN SUPPORT OF MOTION TO DISMISS

Kingsport was granted permission by the Hearing Officer to file a Reply and on November 16, 2022, filed *Kingsport Power Company d/b/a AEP Appalachian Power's Reply in Support of Its Motion to Dismiss Petitions to Intervene* ("Kingsport's Reply"). Kingsport maintains that the Petitions to Intervene are untimely and filed more than three weeks after the deadline established under Commission Rule 1220-01-02-.02(4).¹⁹ Kingsport argues that a previous Commission docket the Consumer Advocate relies on, Docket No. 01-00440, should

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 4.

¹⁹ *Kingsport's Reply*, pp. 1-2 (November 16, 2022).

not be persuasive because the Commission noted the filing was untimely but considered it to be a complaint under Commission Rule 1220-01-02-.09, and the Consumer Advocate's *Petition to Intervene* doesn't meet the requirements of a complaint under that rule.²⁰ In the alternative, Kingsport asks, that if the intervention is allowed, that it be limited to the one area set forth in the Consumer Advocate's *Petition to Intervene* –whether the FPPAR surcharge should apply to streetlighting customers.²¹ Kingsport argues that to preserve the benefits intended by the FPPAR and prevent additional expenses due the Consumer Advocate's intervention, it is “reasonable and prudent” to limit their intervention.²²

FINDINGS & CONCLUSIONS

KINGSPORT'S *MOTION TO DISMISS*

Commission Rule 1220-01-02-.02(4) establishes that a tariff filing shall not automatically be considered a contested case proceeding and describes the procedure for a party to object to the tariff by filing a complaint no later than seven days before the Commission Conference immediately preceding the effective date of the tariff. This Rule also provides that it is within the Commission's discretion to determine whether to convene a contested case. Kingsport argues that since the Consumer Advocate and ETEC failed to comply with the timeframe set forth in 1220-01-02-.02(4), the Petitions to Intervene are untimely and barred, and the Commission lacks jurisdiction over the subject matter. The Hearing Officer is not persuaded by Kingsport's arguments in the *Motion to Dismiss* and *Kingsport's Reply*.

Because the deadline for filing a complaint regarding a tariff has passed, does not somehow remove consideration of the tariff or Petitions to Intervene regarding the tariff from the Commission's jurisdiction. Tenn. Code Ann. §§ 65-4-104 and 106 and case law interpreting

²⁰ *Id.* at 2.

²¹ *Id.* at 3.

²² *Id.* at 4.

these sections provide the Commission with broad powers to exercise its jurisdiction over matters involving public utilities. Tenn. Code Ann. § 65-4-104 provides:

The Commission has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over the property, property rights, facilities, and franchisees, so far as may be necessary for the purpose of carrying out the provisions of this chapter.²³

Also, Commission Rule 1220-01-02-.02(1) provides “[t]he Commission may commence a contested case **at any time with respect to any matter within its jurisdiction.**” (emphasis added)

When a tariff is filed, Commission Rule 1220-04-01-.06(5) allows the Commission to suspend the tariff for further review, or it may suspend the tariff and convene a contested case proceeding on its own motion or in response to a Petition filed by another party. The Hearing Officer finds that since Kingsport’s tariff was not suspended but was allowed to go into effect on November 1, 2022 after the Commission Staff review, neither Kingsport nor its customers will be prejudiced by the convening of a contested case proceeding and the interventions being granted. In addition, in the *Stipulation and Settlement Agreement* entered into by the parties and approved by the Commission on October 19, 2016, the parties agreed that “[n]o Party to this Settlement Agreement shall be precluded from filing any action with respect to the Utility’s filing [the FPPAR].”²⁴

The Court of Appeals while acknowledging the Commission’s discretion has also recognized the importance of convening a contested case where there are disputed factual issues, or new legal or policy questions to be resolved. The Court of Appeals held that the Authority [Commission] abused its discretion when it declined to grant a contested case hearing regarding

²³ Tenn. Code Ann. § 65-4-104.

²⁴ See *In re: Petition of Kingsport Power Company d/b/a AEP Appalachian Power for a General Rate Case*, Docket No. 16-00001, *Stipulation and Settlement Agreement*, p. 6 (August 4, 2016).

the challenges that BellSouth's "Welcoming Rewards Program" tariff was discriminatory and anti-competitive."²⁵ In this docket, the Hearing Officer finds there is a legitimate policy dispute to be resolved regarding whether the FPPAR should apply to street lighting customers. In addition, although the Commission rules sets forth a procedure for filing a complaint regarding a tariff, the timeline is established to allow the Commission to evaluate the complaint and avoid delaying the tariff going into effect if it determines not to convene a contested case. There is no danger of that in this situation because the tariff was allowed to go into effect. Even though the tariff was not suspended, the issues raised by the Consumer Advocate remain relevant because the FPPAR is an annual filing. While the Consumer Advocate and ETEC might not have filed the Petitions to Intervene within the timeframe of the Rule, the Commission has ample authority to waive this rule pursuant to Commission Rule 1220-01-01-.01. Further, the Commission has broad authority to convene a contested case proceeding on any matter pursuant to 1220-01-02-.02(1) and grant petitions to intervene. Based on the forgoing, the Hearing Officer concludes that the *Motion to Dismiss* should be DENIED.

PETITIONS TO INTERVENE

Tenn. Code Ann. § 4-5-310 establishes the following criteria for granting petitions to intervene:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

²⁵ See *Off. of the Atty. Gen. v. Tennessee Regul. Auth.*, No. M200301363COAR12CV, 2005 WL 3193684, at *11 (Tenn. Ct. App. Nov. 29, 2005).

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

(b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.²⁶

CONSUMER ADVOCATE'S *PETITION TO INTERVENE*

In its *Petition to Intervene*, filed on October 28, 2022, the Consumer Advocate seeks to intervene in the docket pursuant to Tenn. Code Ann. § 65-4-118, which qualifies the Consumer Advocate to represent the interests of Tennessee consumers of public utility services in proceedings before the Commission. Although it is not an automatic or absolute right to participate in proceedings before the Commission, Tenn. Code Ann. § 65-4-118(b)(1) provides a general basis for the qualification of the Consumer Advocate to be permitted to intervene as a party to represent the interests of Tennessee public utility consumers. It provides as follows:

The consumer advocate division has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division may, with the approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the commission or any other administrative, legislative or judicial body and initiate such proceeding, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and the rules of the commission.²⁷

Because the FPPAR may result in a rate change for customers, and there is a policy issue regarding whether the FPPAR should apply to street lighting customers, the Hearing Officer

²⁶ Tenn. Code Ann. § 4-5-310.

²⁷ Tenn. Code Ann. § 65-4-118(b)(1).

finds there is a sufficient factual basis to find that the legal rights or interests held by consumers may be determined in this proceeding.

THEREFORE, upon due consideration, the Hearing Officer concludes that the legal rights, duties, privileges, immunities or other legal interest of Tennessee consumers may be determined in this proceeding. Further, the Hearing Officer finds that the Consumer Advocate qualifies under law as an intervenor for the purpose of representing those consumer interests and its *Petition to Intervene* should not impair the interests of justice or the orderly and prompt conduct of the proceedings. For these reasons, the Hearing Officer concludes that the Consumer Advocate's *Petition to Intervene* should be GRANTED.

ETEC'S *PETITION TO INTERVENE*

On October 31, 2022, ETEC, a group consisting of three of Kingsport's largest industrial power customers, filed a *Petition to Intervene* seeking to intervene as a party in this docket. Members of ETEC take service under Kingsport's Industrial Power rate schedules. ETEC asserts that "ETEC and its members may be affected by the Commission's orders and determination in this proceeding ... and must undertake discovery to properly evaluate the implications of the Company's proposals and to determine and address the reasonableness of such proposals."²⁸ In addition, ETEC maintains that "...because there is no other party that exclusively represents the interests of Industrial Power customers of the Company, ETEC's participation as a party in this contested case is in the public interest."²⁹

The Hearing Officer finds that the determinations made in this docket will directly impact ETEC's members. Therefore, upon due consideration, the Hearing Officer concludes that the legal rights, duties, privileges, immunities or other legal interest of ETEC's members may be

²⁸ *Petition to Intervene*, p. 3 (October 31, 2022).

²⁹ *Id.*

determined in this proceeding. Further, the Hearing Officer finds that ETEC's *Petition to Intervene* should not impair the interests of justice or the orderly and prompt conduct of the proceedings. For these reasons, the Hearing Officer concludes that ETEC's *Petition to Intervene* should be GRANTED.

IT IS THEREFORE ORDERED THAT:

1) The *Motion to Dismiss Petitions to Intervene on Behalf of Kingsport Power Company d/b/a AEP Appalachian Power* is DENIED.

2) The *Petition to Intervene* filed by the Consumer Advocate Division of the Office of the Tennessee Attorney General is granted. The Consumer Advocate Division of the Office of the Tennessee Attorney General may intervene and participate as a party in this proceeding and, as such, shall receive copies of any notices, orders, or other documents filed herein.

3) The *Petition to Intervene of East Tennessee Energy Consumers* is granted. The East Tennessee Energy Consumers may intervene and participate as a party in this proceeding and, as such, shall receive copies of any notices, orders, or other documents filed herein.


Monica Smith-Ashford, Hearing Officer