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VIA ELECTRONIC FILING AND VIA U.S. MAIL

Chairman Kenneth C. Hill  
Attn: Ectory Lawless, Esq.  
Docket & Records Manager  
Tennessee Public Utility Commission  
Andrew Jackson State Office Building  
502 Deaderick Street, Floor  
Nashville, TN 37243-0001

Re: Application of Jackson Sustainability Cooperative for a Determination of Exemption  
Docket No. 21-00061

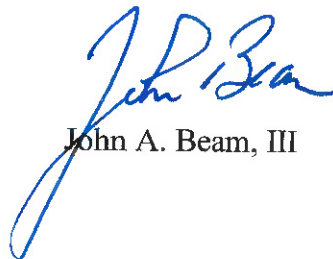
Dear Chairman Hill:

Enclosed please find for filing the following documents:

1. Response to Motion to Compel filed by JEA; and
2. Response to Motion to Compel filed by TECA.

The originals are coming to you in the mail. Please let me know if you have any questions or need additional information.

Sincerely,



John A. Beam, III

enclosure

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION  
NASHVILLE, TENNESSEE**

<b>IN RE: THE APPLICATION OF JACKSON )</b>	
<b>SUSTAINABILITY COOPERATIVE )</b>	
<b>FOR A DETERMINATION OF EXEMPTION )</b>	<b>DOCKET NO. 21-00061</b>
<b>AND IN THE ALTERNATIVE, FOR A )</b>	
<b>CERTIFICATE OF PUBLIC CONVENIENCE )</b>	
<b>AND NECESSITY )</b>	

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**RESPONSE BY JACKSON SUSTAINABILITY COOPERATIVE  
TO THE MOTION TO COMPEL FILED BY THE  
TENNESSEE ELECTRIC COOPERATIVE ASSOCIATION**

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COMES NOW, Jackson Sustainability Cooperative (“Jackson Sustainability Cooperative” or “Petitioner”), and responds to the Motion to Compel filed by Tennessee Electric Cooperative Association<sup>1</sup> (“TECA”) seeking materials which do not exist. More importantly, the materials sought are not necessary or relevant to a full consideration of the Petition filed by Jackson Sustainability Cooperative. Jackson Sustainability Cooperative filed a Petition with the Tennessee Utility Commission (the “Commission”) requesting that the Commission declare the legal rights of Jackson Sustainability Cooperative to operate a solar facility with battery-energy storage and shared interconnection (the “Solar Facility”) so that a small group of local manufacturing and commercial users, its members, can acquire clean, renewable, stable, supplemental electricity. TECA’s use of the discovery process to delay these proceedings is evidenced by its obtaining many documents in a subpoena issued to a key contract vendor for design and construction of the facility, Northern Reliability, Inc., then failing to identify any

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<sup>1</sup> A real party in interest is the party that stands to be affected by the action of the Commission. TECA is not a real party in interest. (see Roberts v. State Bd. of Equalization, 557 S.W. 2d 502, 503 (Tenn. 1977))

specific document that it requests that is necessary to a full and fair hearing on the Petition.

TECA's motion to compel assumes Jackson Sustainability Cooperative withheld documents without any proof. TECA asserts that "it is apparent that JSC/CDE is purposefully withholding responsive, nonprivileged information; is unable to produce documents it has destroyed; or is unwilling to search for the requested information." (TECA Memo., p. 13) This argument ignores the document retention policy of Jackson Sustainability Cooperative and its solar developer. If this motion was not intended to delay these proceedings, a simple motion to compel the production of documents that Jackson Sustainability Cooperative admitted were withheld would be all that was needed. On page 19 of its memorandum in support of the motion to compel, TECA asserts that Jackson Sustainability Cooperative admits "it chose not to produce drafts ... and documents that it believed were not representative of what it claims to be the current plan for the solar project."

In reality, these are false statements built on false assumptions. TECA has not provided the slightest proof for its claim that the Petitioner is withholding evidence essential to the Commission to decide on the Petition. TECA has not identified specific documents the Commission needs to understand the operation of the proposed Cooperative or the design and construction of the Solar Facility.

### **PROCEDURAL BACKGROUND**

On July 21, 2021, the Tennessee Public Utility Commission gave notice pursuant to T.C.A. § 4-5-224 that it would hear the Petition filed by Jackson Sustainability Cooperative. The Petition requests an order from the Commission that it is not a public utility and is exempt from Commission regulation because it is a non-profit electric cooperative which is covered by an

express exemption under T.C.A. § 65-4-101(6)(A)(v). (Doc. No. 2100061l) This notice was in response to the May 24, 2021 petition filed by Jackson Sustainability Cooperative seeking a declaratory ruling that it is a nonprofit cooperative entity subject to the Rural Electric and Community Services Cooperative Act found in title 65, chapter 25. (Petition, p. 1)

On June 10, 2021, the Commission set a deadline for intervening petitions. On June 25, 2021, Tennessee Electric Cooperative Association (“TECA”) filed an intervening petition. (Doc. 2160001f). Much like the other intervening parties, without asserting any facts, TECA stated a disputed legal conclusion that the Petitioner’s proposed activities were illegal under the Generation and Transmission Act. (Id., p.1, ¶ 6) On October 8, 2021, the Southern Alliance for Clean Energy (“SACE”) filed a statement in support of the Petition. (Doc. No. 2160001ad) SACE emphasized that in addition to clean energy and environmental benefits, the solar facility proposed by Jackson Sustainability Cooperative will provide a much needed economic stimulus to the residents of Jackson, Tennessee. (Id.)

### **STATEMENT OF FACTS**

Jackson Sustainability Cooperative seeks authority to supply supplemental solar energy to a small group of members in East Jackson, in an area where clean solar energy is presently uneconomical. (Testimony D. Emberling, JSC - 0003760) The Board of Directors consists of mostly local citizens of Jackson who desire to see clean solar energy in their community. (JSC 000024) The Board of Directors will transition over to a board elected by the members once the solar facility is operational. (JSC 000039) On October 26, 2021, Jackson Sustainability Cooperative entered into a lease agreement with a purchase option with Community Development Enterprises - Jackson I for its solar facility. (Lease, JSC Confidential 500143) Community

Development Enterprises - Jackson I is a joint venture which includes several local citizens. (JSC Confidential 500088) Mr. Emberling and Mr. Shimon are the only persons who serve on the Board of Directors for Jackson Sustainability Cooperative, and who are officers of the managing entity (E A Solar, LLC) for the lessor of the equipment comprising the solar facility, Community Development Enterprises - Jackson I. Mr. Emberling has provided direct testimony in support of this Petition.

Northern Reliability, Inc. entered into a signed contract with Community Development Enterprises - Jackson I to design and build the controller hardware and software, install the battery and microgrid systems, and oversee, test, and commission the connections to the members of Jackson Sustainability Cooperative. (Testimony D. Emberling, JSC - 000377; Contract, JSC Confidential 50001 - 500033) Northern Reliability, Inc. is the oldest developer of controller hardware and software in the nation. (Id.)

The solar facility consists of solar panels mounted on fixed mounts (no movable trackers), inverters, batteries, system controller, and all associated electric equipment installed on 34.2 acres of land in Jackson, Tennessee. (Testimony D. Emberling, JSC - 000376) Underground wiring will connect the solar facility to a small number of commercial users desiring supplemental solar energy. (Id.) Approximately 33,347 SunPower A-450-COM solar panels rated for approximately 16 MW of power will supply approximately 25 GWh/yr. of supplemental electricity through SMA Highpower string inverters, with Kore Power (now Kore Solutions) lithium battery storage of approximately 46 MWh. (Id.)

Jackson Sustainability Cooperative is a not-for-profit Tennessee membership organization that is organized and operates as a cooperative. (Charter, JSC 000023; Bylaws, JSC 000028)

There are currently three conditional members. (JSC Confidential 500162) Once the facility nears operations, conditional members with the required energy profile will participate in the cooperative by becoming full members. (JSC 000063) Each member-user will have a “smart electric meter.” (Testimony D. Emberling, JSC - 000376) Supplemental energy will flow from the Solar Facility to these smart meters leading to the electrical circuits of the member-users. (Id.) The controller technology intelligently allocates supplemental power to and from the batteries and to members to optimize the delivery of supplemental electric energy. (Id.) The controller systems allow members to consume supplemental solar energy at the very time their peak demand usage is high. (Testimony of D. Emberling, JSC - 000377)

The smart meters will be isolated from the existing Jackson Electric Authority (“JEA”) meters. (Testimony of D. Emberling, JSC - 000377) JEA will remain as the primary source of electrical energy. (Id.) No electrical power will backflow onto the JEA/TVA grid. (Id.) When a JEA/TVA grid outage occurs, the solar supplemental energy will become the primary source of electricity for short periods of time, hopefully until grid power is restored. (Id.)

After commissioning the completed facility, operations and maintenance will be handled by Northern Reliability, Inc. (Testimony of D. Emberling, JSC - 000377) The Solar Facility is exempt from federal regulation because it does not connect to the public utility grid. (Id.) Though some states have statutes that regulate submetering behind the municipal provider’s meter, Tennessee has no restrictions on submetering.

The solar developer, Community Development Enterprises - Jackson I has, for the benefit of Jackson Sustainability Cooperative, already initiated many tasks in accomplishing a solar facility for supplemental energy as follows:

- Site research, survey, and acquisition
- Executed Ground lease for the future solar facility
- Preliminary approval of site plan by the City of Jackson Planning Commission (JSC 000355)(subject only to submission of a decommissioning plan)
- Feasibility study (JSC Confidential 500057)
- Financial analyses (Petition, Conf. Exs. 11 and 12)
- Due diligence: environmental, regulatory, and permitting
- Completed 6 environmental approvals
- Preliminary design of the solar facility
- Selected equipment needed
- Signed contract with Northern Reliability, Inc. to design, engineer, and construct the project(JSC Confidential 500001)
- Signed a contract to produce all electrical schematic drawings (JSC Confidential 500180)
- Selecting local contractors for construction and electrical work
- Held neighborhood meetings to explain the project
- Arranged for insurance during and after construction
- Begin gathering electrical usage information from prospective users
- Begin discussions and negotiations with possible tax-equity investors

(Testimony D. Emberling Part II, JSC - 000435-436)

On June 25, 2021, Tennessee Electric Cooperative Association filed an intervening petition. (Doc. 2160001f). TECA averred without factual support that the Petitioner's proposed activities were illegal under the Generation and Transmission Act. (Id., p.1, ¶ 6; T.C.A. § 48-69-118(a))(officially known as "Electric G&T Cooperative Act") In its motion to compel, TECA does no more than "assume" that discovery responses were not completed. It fails to connect any request for information to its disputed theory that the proposed facility violates the Generation and Transmission Act. Instead, TECA criticizes the Petitioner's project that is in the development stage, intentionally requesting information that either does not exist or that is clearly irrelevant to the Petitioner's request for declaratory relief and TECA's limited intervention in this matter. Jackson Energy Authority filed an intervening petition which also makes the disputed contention that the Petitioner is not authorized to provide its proposed

services under the Generation and Transmission Act. (2100061e, p.4)

In the 39 questions TECA asked in its initial written discovery, not one question refers to the Generation and Transmission Act, the law that is the sole basis for TECA intervening in this matter. Jackson Sustainability Cooperative provided full responses to each of these 39 questions. Basic due process requires that the Intervening Party give adequate notice of its claims.

McClellan v. Board of Regents of State University, 921 S.W.2d 684, 688 (Tenn. 1996)("In the context of administrative hearing process, basic due process requires notice reasonably calculated under all circumstances to apprise interested parties of claims of opposing parties.") "The purpose of due process requirements is to notify the individual in advance in order to allow adequate preparation and reduce surprise." (Id., at 688) The intervening petition of TECA provides inadequate notice of a claim, and not one question out of 53 requests information connected to the Generation and Transmission act that forms the basis for TECA's intervention. Moreover, not seeking any specific response or specific document demonstrates how the intervening party seeks to weaponize discovery to frustrate and delay the solar facility that will provide supplemental energy to a small number of members in East Jackson.

Jackson Sustainability Cooperative has either produced responsive documents or discloses its failure to do so. For example, it disclosed that it failed to produce drafts of contracts that merged into the final contract that was produced. No requesting party contends that the final contract is ambiguous and should not be interpreted by looking at the four corners of the document. The contract with Northern Reliability includes a merger clause. (§ 19.5, JSC Confidential 500020) The merger clause provides that the signed contract supersedes all prior written and oral negotiations.



## STATEMENT OF LAW

### A. Discovery of relevant facts.

Tennessee's discovery rules reflect a broad policy favoring discovery of all **relevant**, non-privileged information. (Lee Medical, Inc. v. Beecher, 312 SW 3d 515, 525 (Tenn. 2010), citing Harrison v. Greeneville Ready-Mix, Inc., 220 Tenn. 293, 302, 417 S.W.2d 48, 52 (Tenn. 1967); Wright v. United Servs. Auto. Ass'n, 789 S.W.2d 911, 915 (Tenn. App.1990)) This policy encourages deciding disputes on facts rather than by legal maneuvering. (Id., citing White v. Vanderbilt Univ., 21 S.W.3d at 223) This policy embodies the general concept found in Tenn. R. Evid. 501 on making evidence available to the trier of fact to facilitate the ascertainment of the truth. (Id., citing Neil P. Cohen et al., Tennessee Law of Evidence § 5.01[2], at 5-12 (5th ed. 2005))

When compelling drafts of a signed contract and communications concerning a signed contract, the party seeking the drafts of the contracts and negotiation correspondence must show they are relevant to the subject matter where the signed final agreement is available. Boyd v. Comdata Network, Inc., 88 S.W. 3d 203, 224 (Tenn. App. 2002) Trial courts should deny motions to compel the discovery of documents leading to a signed contract when the moving party fails to demonstrate that the requested documents satisfy Tenn. R. Civ. P. 26.02(1)'s standards for relevancy to the issues. Boyd v. Comdata Network, Inc., 88 SW 3d 203, 224 (Tenn. App. 2002), citing American Tel. & Tel. Co. v. Cardwell, 798 S.W.2d 761, 762 (Tenn.1990) (reversing an order compelling the discovery of irrelevant documents); Price v. Mercury Supply Co., 682 S.W.2d 924, 936 (Tenn. App.1984) (affirming an order denying a motion to compel discovery of irrelevant documents). In Boyd, the documents were irrelevant because the rights

and obligations of the parties to a written contract are governed by the terms of the contract. Id. at 223, citing Hillsboro Plaza Enters. v. Moon, 860 S.W.2d 45, 47 (Tenn. App.1993) The rights and obligations of the parties do not include the parties' statements during their negotiations or drafts of the final contract. Id., citing Faithful v. Gardner, 799 S.W.2d 232, 235 (Tenn.Ct.App.1990) (holding that the existence of a written contract gives rise to the presumption that the parties have reduced their prior agreements to writing); GRW Enters., Inc. v. Davis, 797 S.W.2d 606, 610 n. 2 (Tenn.Ct.App.1990) (stating that negotiations and agreements are deemed to be integrated into a written contract when the parties intend the contract to be a complete expression of their agreement)

"Parties are encouraged where practicable to attempt to achieve any necessary discovery informally, in order to avoid undue expense and delay in the resolution of the matter at hand..."

Comm. Rule 1220-01-01-.11(1)

**B. Authority to Limit Discovery.**

The trial court may limit discovery sought in a particular case if the court determines, that "the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive," or that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Tenn. R.Civ .P. 26.02(1); Reid v. State, 9 SW 3d 788, 792-793 (Tenn. App. 1999)

**C. Burden of Proof in Compelling Discovery.**

The Intervening Party has the burden of proof. Specifically, the party compelling discovery under Tenn. R. Civ. P. 37.01 has the burden of establishing that it is entitled to

discover the documents or other materials withheld by its adversary. (Lee Medical, Inc. v. Beecher, 312 SW 3d 515, 525 (Tenn. 2010) To carry its burden, the party seeking discovery must establish (1) that the material being sought is relevant to the subject matter involved in the pending action, (2) that the material being sought is not otherwise privileged, and (3) that the material being sought consists of documents or other tangible things. Id. (internal cites omitted) Obviously, the above criteria are only applied to documents that still exist.

## **ARGUMENT**

### **I. TECA FAILED TO CARRY ITS BURDEN OF PROOF TO SHOW THE MATERIAL SOUGHT IN DISCOVERY IS CONNECTED TO THE SUBJECT MATTER OF THE PETITION.**

Jackson Sustainability Cooperative made prompt and proper responses to TECA requests for information consistent with reasonable document retention policies. Specifically, on September 8, 2021, TECA served discovery requests that included 39 questions. (2100061x) On September 22, 2021, Jackson Sustainability Cooperative provided responses to all questions. (2100061aa) On October 26, 2021, Jackson Sustainability Cooperative provided supplemental responses which were filed with the Commission on January 5, 2022. (2100061ak)

On February 11, 2022, TEAC issued a second set of questions related to Part II of Mr. Emberling's direct testimony. (2100061ar) On March 10, 2022, Jackson Sustainability Cooperative filed responses.(2100061av) Jackson Sustainability Cooperative provided timely responses to the requests. More importantly, over 1100 pages of documents were produced by Jackson Sustainability Cooperative in its responses, including a site plan approved by the Jackson Planning Commission, signed agreements with the essential vendors required to build

and operate the proposed solar facility, and signed agreements with members.

There were no questions connected to TECA's intervening petition based on the Generation and Transmission Act. There were a few questions related to how Jackson Sustainability Cooperative will share the supplemental energy among its few members as a nonprofit cooperative. The actual construction of the solar facility is not the purpose of the Petition. The purpose of the Petition is to determine that Jackson Sustainability Cooperative is not a public utility and exempt from Commission regulation when connecting off grid behind the municipal provider's meters because it is exempt from regulation as a non-profit electric cooperative. T.C.A. § 65-4-101(6)(A)(v)

Not only has TECA failed to connect its motion to the purpose of the Petition, TECA has not named any class of documents or specific subject matter connected to the Petition which will allow it to more effectively respond to the Petition. TECA has not contested the validity of any document already produced. Instead, TECA filed a motion to compel alleging generally that there were more documents other than those produced by Jackson Sustainability Cooperative.

TECA has the burden of proof as the party compelling discovery. It cannot carry that burden by making general allegations of withholding documents after receiving over 1100 pages of documents from Jackson Sustainability Cooperative, including signed contracts for most of the key pieces to the project.

Jackson Sustainability Cooperative entered into a signed lease agreement for its solar facility, with an option to purchase, from Community Development Enterprises - Jackson I. (Lease, JSC Confidential 500143) Though not a party to these proceedings, Community Development Enterprises - Jackson I as lessor produced its signed joint venture agreement. (JV

Agmt., JSC Confidential 500088) The joint venture agreement reads as a business plan for the development of a solar facility in Jackson, Tennessee, moving from ground lease to completed solar facility. (JSC Confidential 5000057) Jackson Sustainability Cooperative facilitates sharing this clean, solar energy among a few members.

E A Solar, LLC is the manager of Community Development Enterprises - Jackson I. (JV Agmt., JSC Confidential 5000088; Aff. D. Emberling, ¶ 3, attached) Mr. Emberling is the CEO of E A Solar, LLC. (Id.) E A Solar, LLC has a document retention policy. The document retention policy provides in part that the e-mail software is configured so that all e-mails are “permanently deleted after 30 days so that e-mail accounts are not overpopulated with unusable communications.” (Aff. D. Emberling, ¶ 4, attached) The document retention policy excludes signed documents from the monthly review of all text/formatted files. (Id.)

TECA speculates that Jackson Sustainability Cooperative has not produced documents because it asked broad questions. (Mot. Compel, p.15) In this case, Jackson Sustainability Cooperative has produced signed contracts for the “construction and operation of the facility” (Request 10). Request 5 was exceedingly broad in asking for documents concerning “JSC’s operations; market; competition; competitors; potential or current members, patrons, or other customers; and projected customer demand.” (Request 5) There are no current operations. This is a pre-construction development project with an approved site plan. Before spending the money to build the solar facility, Jackson Sustainability Cooperative wants to make sure that providing supplemental clean energy to its small group of members behind their meter box with JEA does not draw them into the regulatory authority of the Commission. Though most of the 1100 documents produced fall within the spectrum of Request 5, in addition to Mr. Emberling’s direct

testimony, Jackson Sustainability Cooperative produced a comprehensive feasibility study that discusses the concerns of Request 5 in detail. (JSC Confidential 5000057)

In Lee Medical, Inc. v. Beecher, 312 SW 3d 515 (Tenn. 2010) HCA owned hospitals outsourced certain vascular services to Lee Medical. While HCA considered internally providing these vascular services, Lee Medical submitted a revised contract and new proposal. A third party evaluated the services performed by Lee Medical which led to HCA deciding to terminate its contracts with Lee Medical. Lee Medical filed suit and commenced an aggressive discovery campaign, including issuing subpoenas duces tecum, lengthy interrogatories, and multiple depositions from parties and non-parties. Lee Medical believed that the decision to stop outsourcing vascular services was the result of defamatory remarks about the quality of its services. Under the pretext of learning the basis for the corporate decision, Lee Medical went after the third party evaluation. The defendants and their parties provided complete copies of records, redacted copies of confidential records, and identified certain “peer review” privileged documents. After viewing documents in chambers, the trial court ruled that except for three documents, the privileged items were not subject to production. The Tennessee Supreme Court noted that even though Lee Medical asserted that the third party evaluator acted with malice, the decision to stop outsourcing was an HCA decision not the decision of a third party. (Id. at 38)

In this case, Jackson Sustainability Cooperative has produced all documents connected to its proposed project. It has made objections to the production of several documents to challenge admissibility a future hearing, but has not withheld documents. There are no disputed documents for the Hearing Officer to review in chambers as in Lee Medical. TECA is asserting malice because Northern Reliability possessed documents from its vendors and subcontractors, and

emails which the vendors of Jackson Sustainability Cooperative did not retain. All of these items are connected to the construction of the solar facility and not to whether Jackson Sustainability Cooperative in delivering energy outside of the grid and behind the JEA meter is exempt from regulation by express statute.

Jackson Sustainability Cooperative has delivered signed agreements for most of the key components in its proposed solar facility for the delivery of clean solar energy to a few members behind the meters of members without contacting or connecting to the JEA/TEA grid. It respectfully requests an order denying the motion to compel.

**II. AFTER TECA SUBPOENAED BUSINESS DOCUMENTS FROM NORTHERN RELIABILITY, TECA FAILED TO IDENTIFY ANY SPECIFIC DOCUMENT NECESSARY TO UNDERSTAND THE OPERATION OF THE COOPERATIVE OR THE DESIGN AND CONSTRUCTION OF THE SOLAR FACILITY AS STATED IN THE SIGNED CONTRACT WITH NORTHERN RELIABILITY.**

Jackson Sustainability Cooperative produced in discovery the signed contract with Northern Reliability for the design and construction of the solar facility. (JSC Confidential 50001 - 500033) The 33 page signed contract details the numerous responsibilities of Northern Reliability, Inc. in the design and construction of the solar facility. Page 4 of the contract provides that “NRIs responsibility within the project shall be that of the **technical lead and prime contractor** including the solar array, the electrical storage component, the microgrid controller and subservient customer microgrid panels, and the medium voltage distribution network.” (JSC Confidential 50004)(emphasis added) The scope of work is comprehensive. Northern Reliability has committed in writing to perform all technical aspects in the design and installation of the equipment that Jackson Sustainability Cooperative will lease under a signed

lease agreement with Community Development Enterprises - Jackson I. (Lease, JSC Confidential 500143)

After weeks of unnecessary - and perhaps intentional - delay, TECA subpoenaed documents from Northern Reliability. It was no great surprise that Northern Reliability had hundreds of documents that it used to cost and enter into a contract for \$22,359,188.00. (JSC Confidential 500031) The numerous documents produced evidence Northern Reliability taking its role as “technical lead and prime contractor” very seriously. The controlling document is the signed contract. All other documents are irrelevant in these proceedings because the 33 page contract details the responsibilities of the parties in completing the solar facility. In fact, TECA did not request any specific technical document or technical clarification related to the final signed contract after reviewing these subpoenaed documents. Instead, TECA chose to use weaponize the very excellent due diligence of Northern Reliability as a pretext for making conclusory false allegations that Jackson Sustainability Cooperative is not requiring the lessor of its future solar equipment, Community Development Enterprises - Jackson I, to produce requested documents.<sup>2</sup>

Other courts have addressed this type of discovery abuse and denied the motion to compel. Specifically, when compelling drafts of a signed contract and communications leading up to a signed contract, the party seeking the drafts of the contracts and negotiation correspondence failed to show they are relevant to the subject matter where the signed final agreement is available. Boyd v. Comdata Network, Inc., 88 S.W. 3d 203, 224 (Tenn. App. 2002)

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<sup>2</sup> Even if Jackson Sustainability Cooperative had the same documents as Northern Reliability, producing these documents a second time is of no benefit to the intervening parties.



In Boyd, Mr. Dudley Boyd owned a business that financed trucking companies. He used a line of credit from a company that specialized in transportation. Unable to repay, Mr. Boyd and the lender entered into three written agreements to restructure the business, to market services, and a note and debt reduction agreement with Boyd's personal guaranty. The lender entered into an agreement to sell its assets to Comdata. Even though there was a payment default, Mr. Boyd filed suit to rescind his personal guaranty based on changed conditions. In discovery Mr. Boyd asked for **all documents and communications** regarding the three agreements. Comdata objected to producing drafts of the signed agreements. The court of appeals held that trial courts should deny motions to compel the discovery of documents leading to a signed contract when the moving party fails to demonstrate that the requested documents satisfy Tenn. R. Civ. P.

26.02(1)'s standards for relevancy to the issues. Boyd v. Comdata Network, Inc., 88 SW 3d 203, 224 (Tenn. App. 2002), citing American Tel. & Tel. Co. v. Cardwell, 798 S.W.2d 761, 762 (Tenn.1990) (reversing an order compelling the discovery of irrelevant documents); Price v. Mercury Supply Co., 682 S.W.2d 924, 936 (Tenn. App.1984) (affirming an order denying a motion to compel discovery of irrelevant documents). In Boyd, the documents were irrelevant because the rights and obligations of the parties to a written contract are governed by the terms of the contract. Id. at 223, citing Hillsboro Plaza Enters. v. Moon, 860 S.W.2d 45, 47 (Tenn. App.1993) The rights and obligations of the parties do not include the parties' statements during their negotiations or drafts of the final contract. Id., citing Faithful v. Gardner, 799 S.W.2d 232, 235 (Tenn.Ct.App.1990) (holding that the existence of a written contract gives rise to the presumption that the parties have reduced their prior agreements to writing); GRW Enters., Inc. v. Davis, 797 S.W.2d 606, 610 n. 2 (Tenn.Ct.App.1990) (stating that negotiations and

agreements are deemed to be integrated into a written contract when the parties intend the contract to be a complete expression of their agreement)

In this case, the negotiations and agreements between the lessor of equipment, Community Development Enterprises - Jackson I and the technical contractor, Northern Reliability, are deemed to be integrated into the final written contract. The final written contract is the complete expression of their agreement. TECA fails to identify vague or ambiguous language in the contract to construct with Northern Reliability that might arguably require extrinsic evidence of negotiations. TECA fails to identify vague or ambiguous language in the lease agreement with Jackson Sustainability Cooperative that might arguably require extrinsic evidence of negotiations. TECA does not ask for any class of document to explain the technical features of the equipment. Instead, TECA uses the subpoenaed documents to attack Jackson Sustainability Cooperative for not having the same document retention policy as its lessor. This argument is irrelevant to any discovery dispute. The written contract details the rights and obligations of the lessor of the equipment and the contractor who will design and build the technical parts of the equipment. The Hearing Officer should deny the motion to compel. Just as in the Boyd case, the requesting party, TECA, failed to connect specific areas of the signed written contracts necessary to satisfy Tenn. R. Civ. P. 26.02(1)'s standards for relevancy to connect its request for email and other negotiation documents that are not in the possession of Jackson Sustainability Cooperative.

The subpoenaed documents demonstrate that Northern Reliability exercised due diligence in selecting its subcontractors and in pricing the solar facility before entering into a binding signed contract with Community Development Enterprises - Jackson I to design and build the

controller hardware and software, install the system, and oversee, test, and commission the connections to the members of Jackson Sustainability Cooperative. (Testimony D. Emberling, JSC - 000377; Contract, JSC Confidential 50001 - 500033) Mr. Emberling sought out and identified Northern Reliability, Inc. as the most experienced developer of controller hardware and software in the nation. (Id.) TECA asks no questions about this extensive experience coming to Jackson, Tennessee.

TECA accuses Jackson Sustainability Cooperative of not producing emails with iSUN, an engineering, procurement and construction business in the solar industry. (Mot. Compel, p. 13) Counsel for Jackson Sustainability Cooperative responded to this accusation in his letter of April 29, 2022 as follows:

iSUN was the last of these [Engineering, Procurement and Construction] candidates considered. It was to be a subcontractor to Northern Reliability, so no legal arrangements were considered or signed between iSUN and Community Development Enterprises Jackson I. One of the documents iSUN provided was this Solar Glare statement [NRI000267]. It was never used and not kept. iSUN was rejected as a subcontractor.

Rather than accept this clear informal explanation of iSUN, TECA assumes that emails and other documents must exist with iSUN. Discussions with iSUN were short lived. Next, TECA escalates the assumption into an unfounded conclusion that Jackson Sustainability Cooperative is “purposely withholding responsive, nonprivileged information.” iSUN offers three services to solar developers and owners: design/engineering, procurement, and construction. iSUN’s solar design and engineering services were deemed unsatisfactory, so an alternate solar design and engineering firm (PV Complete) was engaged. It was determined that the project had no need of iSUN’s procurement services at all, since Community Development Enterprises - Jackson I together with a local contractor can handle procurement of the items to construct the facility.

Finally, it was determined that iSUN's construction services were also unnecessary, since the combination of Northern Reliability's services and that of a local contractor were sufficient to build the solar facility. Once again, the signed contracts were produced in discovery for construction of the solar facility and its lease to the Petitioner. TECA fails to connect any part of the signed contracts for construction of the facility or its lease to the need for information from a rejected vendor, iSUN.

The last part of the technical requirements to complement Northern Reliability was met on November 19, 2021, when the lessor of the equipment entered into a signed contract for the electrical drawings for the layout of the solar array. (JSC Confidential 500180 to 500185) This completes the technical needs for the design of the solar facility. Together, PV Complete and Northern Reliability meet all technical design needs for the project. Once the Commission makes a declaratory ruling, the lessor will hire a local contractor and local electricians to build the solar facility for use by the Petitioner. The equipment will be leased to Jackson Sustainability Cooperative who will share clean supplemental solar energy among its members. The sharing of energy is the purpose behind the Petition. Jackson Sustainability Cooperative respectfully requests an order denying the motions to compel. The responsibilities of the parties for the design are established in written contracts. TECA fails to connect its requests to explaining provisions in the written contracts.

### **Conclusion**

E A Solar, LLC has a document retention policy. (Aff. D. Emberling, attached) It does not collect emails unless they are critical to a project. After over 1100 pages of documents were produced, TECA blindly insists there are missing documents. However, where executed

contracts establish the responsibilities of the parties, TECA must connect its request for documents to specific sections in the written agreements where there is a possible need to understand the construction of a paragraph or section. TECA simply makes accusations that it does not have everything when in reality it has the executed signed agreements detailing what is expected of the parties. Without connecting its requests to specific concerns in the written agreements or in the Petition, TECA fails to carry its burden of proof that documents exist, and that they are needed to clarify the responsibilities of parties to a written agreement.

Jackson Sustainability Cooperative respectfully requests an order denying TECA's motion to compel.

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served via U.S.

Mail, postage prepaid, and by email to the following this 1<sup>st</sup> day of June, 2022.

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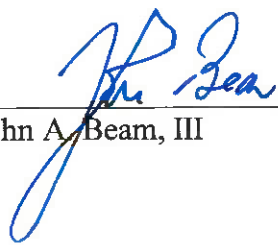
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John A. Beam, III

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION  
NASHVILLE, TENNESSEE**

**IN RE: THE APPLICATION OF JACKSON )  
SUSTAINABILITY COOPERATIVE )  
FOR A DETERMINATION OF EXEMPTION ) DOCKET NO. 21-00061  
AND IN THE ALTERNATIVE, FOR A )  
CERTIFICATE OF PUBLIC CONVENIENCE )  
AND NECESSITY )**

**AFFIDAVIT OF DENNIS EMBERLING**

I, the undersigned, being duly sworn, do hereby state to the best of my knowledge and belief as follows:

1. I am over eighteen (18) years of age and competent to testify and I have personal knowledge of the facts set forth herein.
2. I am a resident of Davidson County, Tennessee.
3. I am the CEO of E A Solar, LLC, the manager of Community Development Enterprises - Jackson I. Neither E A Solar, LLC nor Community Development Enterprises - Jackson I are a party in this action seeking declaratory relief.
4. E A Solar, LLC has a document retention policy. Excerpts from that policy are as follows:

**ELECTRONIC DOCUMENTS**

**Electronic Mail:** Not all email needs to be retained.

- All e-mail—from internal or external sources—is to be permanently deleted after 30 days so that e-mail accounts are not overpopulated with unusable communications. Our e-mail client software is configured to do this automatically.

- Staff will strive to keep only that e-mail found in an e-mail account that is essential to business issues.
- Staff will not store or transfer business e-mail to non-work-related computers except as necessary or appropriate for business purposes.
- Staff will take care not to send confidential/proprietary E A Solar information to outside sources.
- Any e-mail staff deems vital to the performance of their job should be copied to the staff member's hard drive.

Electronic Documents: Retention also depends on the subject matter.

- PDF documents – The length of time that a PDF file should be retained should be based upon the content of the file and the category under the various sections of this policy. The maximum period that a PDF file evidencing a signed document should be retained is 6 years unless the project is not complete.
- Text/formatted files - Staff will conduct monthly reviews of all text/formatted files (e.g., WordPerfect, MicrosoftWord documents) and will delete all those they consider unnecessary or outdated, excluding signed documents.

5. The Intervening Parties are seeking many items that do not exist at this stage in the development of the solar facility.
6. Requesting more documents without naming a specific document or category appears to me targeted to delay the solar facility and to harass.



FURTHER AFFIANT SAITH NOT.

Dennis Emberling  
Dennis Emberling

STATE OF TENNESSEE     )  
COUNTY OF WILLIAMSON    )

Sworn to and subscribed before me this 1 day of ~~May~~ <sup>June</sup>, 2022.

Tiffany Young  
Notary Public

My Commission Expires: 1/29/2023

