

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

November 14, 2022

IN RE:

PETITION OF JACKSON SUSTAINABILITY  
COOPERATIVE TO DETERMINE IF A  
CERTIFICATE OF CONVENIENCE AND  
NECESSITY IS NEEDED

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DOCKET NO.  
21-00061

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INITIAL ORDER GRANTING, IN PART AND DENYING, IN PART MOTIONS TO  
COMPEL FILED BY TENNESSEE ELECTRIC COOPERATIVE ASSOCIATION AND  
JACKSON ENERGY AUTHORITY

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This matter is before the Hearing Officer of the Tennessee Public Utility Commission (“Commission” or “TPUC”) on *Tennessee Electric Cooperative Association’s Motion to Compel Discovery from Jackson Sustainability Cooperative* and the *Memorandum of Law in Support of Tennessee Electric Cooperative Association’s Motion to Compel Discovery from Jackson Sustainability Cooperative* (together “TECA’s Motion to Compel”) filed by Tennessee Electric Cooperative Association (“TECA”) on May 20, 2022 and the *Motion to Compel and Memorandum of Law in Support of Jackson Energy Authority’s Motion to Compel* (together “JEA’s Motion to Compel”) filed by Jackson Energy Authority (“JEA”) on May 20, 2022 (*TECA’s Motion to Compel* and *JEA’s Motion to Compel* together “*Motions to Compel*”). On June 2, 2022, Jackson Sustainability Cooperative (“JSC” or the “Petitioner”) filed the *Response of Jackson Sustainability Cooperative to the Motion to Compel Filed by Jackson Energy Authority* (“JSC’s JEA Response”) and the *Response of Jackson Sustainability Cooperative to the Motion to Compel Filed by*

*Tennessee Electric Cooperative Association (“JSC’s TECA Response”)* (together “*Responses to Motions to Compel*”). Oral arguments were held on the *Motions to Compel* on June 8, 2022.

### ***TECA’S MOTION TO COMPEL***

In *TECA’s Motion to Compel*, TECA requests that JSC be compelled to comply with its discovery obligations and produce all documents responsive to TECA’s First and Second Discovery Requests.<sup>1</sup> TECA maintains that JSC has produced minimal documents related to its project, including only four emails.<sup>2</sup> According to TECA, JSC’s counsel has repeatedly confirmed that JSC has produced all responsive documents, and that no non-privileged documents have been withheld on the basis of an objection.<sup>3</sup> TECA states that in a letter from JSC dated April 29, 2022, JSC informed TECA that Mr. Emberling had deleted potentially responsive emails stating ‘[m]any of the documents for which you requested explanation were draft investigation or development working documents,’ many of which ‘were discarded as they were superceded [sic] by later documents.’<sup>4</sup> TECA argues that JSC has been picking and choosing which documents to produce while maintaining it has produced everything.

After being told by JSC that Northern Reliability, Inc. (“Northern Reliability”), a JSC business contractor, may have additional documents, TECA sought third-party discovery for documents in the possession of Northern Reliability. TECA eventually had to hire an attorney in Vermont to assist in serving the subpoena on Northern Reliability, then TECA maintains Northern Reliability delayed responding to the subpoena and sought an amendment to the Protective Order. TECA states it “pressed Northern Reliability to explain the absence of emails or other written correspondence or to immediately produce these documents. On May 12, 2022, Northern

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<sup>1</sup> *TECA’s Motion to Compel*, p. 1 (May 20, 2022).

<sup>2</sup> *Id.* at 2-3.

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 12 (quoting the letter from JSC to TECA dated April 29, 2022).

Reliability sent TECA a .pdf file that included 838 pages of emails and a small number of attachments.”<sup>5</sup> The emails produced by Northern Reliability included over 200 emails from, to, or copying Mr. Dennis Emberling or Mr. David Shimon. TECA argues that discovery has been ongoing in this docket for eight months and TECA has asked several times for JSC to provide the steps taken to fulfill its discovery obligations, but JSC has failed to do so. According to TECA, based on documents provided by Northern Reliability, it is clear that JSC has “thwarted discovery in this docket”<sup>6</sup> and JSC is “purposely withholding responsive, non-privileged information and/or is unable or unwilling to search for the requested information.”<sup>7</sup> In addition to sanctions, producing documents in its possession, and detailing steps taken to find discoverable documents, TECA also seeks to have JSC answer a supplemental interrogatory due to JSC’s “admission to the destruction of potentially relevant evidence...”<sup>8</sup>

According to TECA, “[t]hey [JSC] have now admitted that key players in this project, including Mr. Emberling, have been deleting emails and other documents as a matter of course both before the petition was filed, but more importantly after the petition was filed and discovery in this case was ongoing.”<sup>9</sup> TECA maintains that although the parties have been talking about discovery since October of last year and discussing the need to make sure that discovery is thorough and complete, TECA was only informed about the auto-delete policy after *TECA’s Motion to Compel* was filed.<sup>10</sup> TECA argues that such actions by JSC raise serious concerns about spoliation of evidence.<sup>11</sup> In addition, TECA argues that JSC’s actions during the discovery process make it impossible for the Commission to have a complete and accurate record in this docket and

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<sup>5</sup> *Id.* (emphasis omitted)

<sup>6</sup> *Id.* at 18.

<sup>7</sup> *Id.* at 16.

<sup>8</sup> *Id.* at 20.

<sup>9</sup> Transcript of Proceedings, p. 8 (June 21, 2022).

<sup>10</sup> *Id.*

<sup>11</sup> *TECA’s Motion to Compel*, p. 4 (May 20, 2022).

to obtain the necessary facts to make a decision.<sup>12</sup> Therefore, TECA asks that JSC be compelled to “fully comply with its discovery obligations, perform thorough searches for responsive documents, produce all documents responsive to TECA’s discovery requests, and comply with the relief requested in the Motion...”<sup>13</sup>

### ***JEA’S MOTION TO COMPEL***

In *JEA’s Motion to Compel*, JEA expresses concern that the volume of documents produced by Northern Reliability seems to indicate that JSC has “either failed to conduct a diligent search for records or has destroyed documents which were responsive to the JEA requests.”<sup>14</sup> According to JEA, *TECA’s Motion to Compel* “clearly connects the dots with respect to documents not produced, and perhaps destroyed by JSC.”<sup>15</sup> JEA states it joins in TECA’s request for relief that includes sanctions, production of documents, explanation of steps taken to find discoverable documents, and to answer additional interrogatories.

### ***JSC’S TECA RESPONSE***

On June 2, 2022, JSC filed *JSC’s TECA Response*. In *JSC’s TECA Response*, JSC argues that TECA seeks documents that do not exist and “the materials sought are not necessary or relevant to a full consideration of the Petition filed by Jackson Sustainability Cooperative.”<sup>16</sup> JSC also alleges that TECA has used the discovery process to delay the proceedings as evidenced by TECA issuing a subpoena to a key contract vendor, Northern Reliability, Inc. “then failing to identify any specific document that it requests that is necessary to a full and fair hearing on the Petition.”<sup>17</sup> JSC states TECA made claims that JSC has withheld documents without any proof

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<sup>12</sup> Transcript of Proceedings, p. 9 (June 21, 2022).

<sup>13</sup> *TECA’s Motion to Compel*, p. 4 (May 20, 2022).

<sup>14</sup> *JEA’s Motion to Compel*, p. 1 (May 20, 2022).

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *JSC’s TECA Response*, p. 1 (June 2, 2022).

<sup>17</sup> *Id.* at 1-2.

and ignores the “document retention policy of Jackson Sustainability Cooperative and its solar developer.”<sup>18</sup> While acknowledging Tennessee’s broad discovery policy of favoring all relevant, non-privileged information, JSC points out that with regard to contracts, “[t]rial 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. Civ. P. 26.02 (1)’s standards for relevancy.”<sup>19</sup> According to JSC, “[n]ot 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.”<sup>20</sup> JSC maintains TECA cannot carry its burden on its Motion to Compel by making general allegations of JSC withholding documents after JSC has produced over one thousand pages of documents, including signed contracts.<sup>21</sup> JSC emphasizes it has “made objections to the production of several documents to challenge admissibility [at] a future hearing, but has not withheld documents.”<sup>22</sup> JSC advises that EA Solar, LLC<sup>23</sup> has a document retention policy and does not collect emails unless they are “critical to a project.”<sup>24</sup> JSC alleges that 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.”<sup>25</sup> JSC argues that all of those documents 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

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<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 13.

<sup>23</sup> EA Solar, LLC is the manager for Community Development Enterprises-Jackson I (“CDE”). JSC entered into a lease agreement with a purchase option with CDE for its solar facility. Mr. Emberling and Mr. Shimon are on the Board of Directors for JSC and are also officers of EA Solar. *Id.* at 3-4.

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.* at 13.

regulation by express statute.”<sup>26</sup> According to JSC, “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” and if it fails to do so, 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.”<sup>27</sup> Therefore, JSC asks that *TECA’s Motion to Compel* be denied.

### ***JSC’s JEA RESPONSE***

JSC filed *JSC’s JEA Response* on June 2, 2022, as well. In *JSC’s JEA Response*, JSC argues that *JEA’s Motion to Compel* should be denied because JEA has not identified specific documents to be produced and “...because they are not identified are not necessary or relevant to a full consideration of the Petition filed by Jackson Sustainability Cooperative.”<sup>28</sup> According to JSC, JEA has not produced any evidence that JSC is withholding documents and has made no effort to connect the relevance of its requests to the documents requested.<sup>29</sup> JSC maintains “JEA fails to connect any request for information to its disputed theory that the proposed facility violates the territorial restrictions provided to municipalities under the Generation and Transmission Act. Instead, JEA criticizes the lack of emails produced in discovery under a subpoena issued by another party to Northern Reliability.”<sup>30</sup> JSC explains that EA Solar, LLC, the manager of Community Development Enterprises-Jackson I, has a document retention policy and its email software is configured so that all emails are permanently deleted after thirty days and excludes signed documents.<sup>31</sup> JSC argues that JEA fails to carry its burden by showing that “the material sought consists of documents and the material being sought is relevant to the subject matter as stated in

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<sup>26</sup> *Id.* at 13-14.

<sup>27</sup> *Id.* at 20.

<sup>28</sup> *JSC’s JEA Response*, p. 1 (June 2, 2022).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 5-6.

<sup>31</sup> *Id.* at 10.

the Petition or in the intervening petition it filed.”<sup>32</sup> JSC maintains it has not withheld any documents and that additional emails are not available due to EA Solar’s document retention policy. Further, JSC argues any additional emails are not relevant because there are signed contracts in place and when compelling drafts, when the final agreement is available, the party seeking the draft must show the drafts and negotiation correspondence is relevant to the subject matter.<sup>33</sup> JSC asks the Hearing Officer to deny *JEA’s Motion to Compel* because all agreements were incorporated into final contracts, and the emails requested by JEA are not relevant, not connected to a specific purpose in the Petition, and further, they are not in JSC’s possession.<sup>34</sup>

## **LEGAL FRAMEWORK**

### **I. GENERAL DISCOVERY PRINCIPLES**

The discovery rules of the Tennessee Rules of Civil Procedure (“TRCP”) apply to contested cases before administrative agencies under the Uniform Administrative Procedures Act.<sup>35</sup> Tenn. Code Ann. § 4-5-311(a) provides in pertinent part “[t]he administrative judge or hearing officer, at the request of any party, shall issue subpoenas, effect discovery, and issue protective orders, in accordance with the Tennessee Rules of Civil Procedure...” Further, Commission Rule 1220-1-2-.11 also provides that when informal discovery is not practicable, discovery shall be effectuated in accordance with the Tennessee Rules of Civil Procedure.

The TRCP permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.<sup>36</sup> Through these instruments, a party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject

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<sup>32</sup> *Id.* at 9 citing *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 525 (Tenn.2010).

<sup>33</sup> *Id.* at 13-14 citing *Boyd v. Comdata*, 88 S.W. 3d 203, 224 (Tenn. App. 2002).

<sup>34</sup> *Id.* at 17-18.

<sup>35</sup> See AC 26:1 Scope of rule, 3 Tenn. Prac. Rules of Civil Procedure Ann. § 26:1 (4th ed.).

<sup>36</sup> Tenn. R. Civ. P. 26.01.

matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.”<sup>37</sup> The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.<sup>38</sup> Rule 26.02(1) is broad in scope, allowing parties “to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . .”<sup>39</sup>

The key phrase in this definition—“relevant to the subject matter involved in the pending action”—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of the case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.<sup>40</sup>

Tennessee law construes the relevance requirement as “synonymous with ‘germane or ‘bearing on the subject matter.’”<sup>41</sup> Thus, “[d]iscovery can be used to obtain information which not only relates to the issues apparent from the pleadings, but to formulate additional issues which relate to the subject matter of the pleadings.”<sup>42</sup>

Further, parties may learn of information related to books, documents or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.<sup>43</sup> However, Tennessee’s rules do provide some limitations. Rule 26.02 permits a court to limit discovery under certain circumstances, such as undue burden, and Rule 26.03 permits a court to

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<sup>37</sup> *Id.* at 26.02(1).

<sup>38</sup> *Id.*

<sup>39</sup> In general, Tenn. R. Civ. P. 26 is identical to Fed. R. Civ. P. 26. See *Austin v. City of Memphis*, 684 S.W.2d 624, 631 (Tenn. Ct. App. 1984).

<sup>40</sup> *Vythoulkas v. Vanderbilt University Hospital*, 693 S.W.2d 350, 359 (Tenn. Ct. App. 1985) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389 (1978) (internal citations omitted)).

<sup>41</sup> *Id.*

<sup>42</sup> *Shipley v. Tennessee Farmers Mutual Ins Co.*, No. 01-A-01-9011-CV-00408, 1991 WL 77540 (Tenn. Ct. App. May 15, 1991); see e.g. *State ex rel. Leech v. Wright*, 622 S.W.2d 807, 810 (Tenn. 1981).

<sup>43</sup> Tenn. R. Civ. P. 26.02(1).



issue protective orders as justice requires.<sup>44</sup> In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).<sup>45</sup>

Tenn. R. Civ. P. 37 provides sanctions for failure to make or cooperate in discovery. Rule 37.01(2) permits parties to move for an order compelling an answer when a party fails to properly respond to a discovery request. Rule 37.01(3) mandates that evasive or incomplete responses be treated as a failure to answer. “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”<sup>46</sup> In addition, courts have recognized that tribunals have the authority under the Rules of Civil Procedure to impose sanctions to address a general abuse of the discovery process.<sup>47</sup> The Court in *Strickland v. Strickland* made clear that “where there has been a violation of Tenn. R. Civ. P. 26.02, the Trial Court has an inherent power to sanction the offending party, and the Trial Court has wide discretion in such matters.”<sup>48</sup>

Tenn. R. Civ. P. 37.01(4) allows the tribunal to award against the party whose conduct necessitated filing the motion or against the attorney advising such conduct, the reasonable expenses incurred in obtaining the order, including attorney’s fees. Rule 37.01 (4) states:

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees, unless the court finds that the opposition to the motion was

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<sup>44</sup> *Id.* at 26.02 & .03.

<sup>45</sup> *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

<sup>46</sup> *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, \*5 n.4 (Tenn. Ct. App. June 27, 2002).

<sup>47</sup> *See Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn.2004).

<sup>48</sup> *See Cornell v. State*, 118 S.W.3d 374, 379 (Tenn. Ct. App. 2003) citing *Strickland v. Strickland*, 618 S.W.2d 496, 501(Tenn. Ct. App. 1981.)

substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

Rule 37.06 deals with motions to compel electronically stored information. Rule 37.06(1) requires the judge or hearing officer to determine if the information sought is subject to production and weigh the benefits of production against the burden and expense of producing the discovery on the responding party. Absent exceptional circumstances, Rule 37.06(4) prevents imposing sanctions under the TRCP for failing to provide documents deleted as a result of the routine, good faith operation of an electronic information system. Rule 37.06(4) provides in pertinent part as follows:

(1) If a party fails to provide electronically stored information and a motion to compel discovery is filed, a judge should first determine whether the material sought is subject to production under the applicable standard of discovery. If the requested information is subject to production, a judge should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party... and whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable.

(2) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith, operation of an electronic information system.

## **FINDINGS AND CONCLUSIONS**

The Hearing Officer is persuaded by the arguments of TECA and JEA on the *Motions to Compel*. Based on the record in this docket thus far and the arguments of the parties, the Hearing

Officer finds that JSC has failed to comply with its discovery obligations, and further, the actions of JSC during the discovery process have thwarted the orderly administration of the proceedings and resulted in the destruction of potentially relevant evidence. JSC's actions have caused delay in the discovery process and increased the expense incurred by the parties involved in this matter.

In its *Petition for a Solar Facility for Supplemental Energy* ("Petition") filed with the Commission on May 24, 2021, JSC seeks a declaratory order that it is not a public utility and not subject to regulation by the Commission because of its status as a non-profit electric cooperative. Making such a determination regarding a company that is new to Tennessee requires a fact specific inquiry to validate that the entity falls within the statutory exemption from Commission regulation. Therefore, documents related to JSC's corporate structure, its members, governance, and financing are crucial to provide the Commission with information necessary to making a determination.

As TECA noted, this is not a typical Motion to Compel where the Hearing Officer is asked to determine whether a particular objection is valid or to rule on a narrow discovery dispute, but rather, whether JSC may be excused from making basic discovery efforts when seeking a complete exemption from Commission regulation based on a statutory exception for non-profit electric cooperatives. On June 2, 2022, JSC revealed in its *Responses to Motions to Compel* that the bulk of EA Solar's emails are not available because the emails have been deleted through a document retention policy that deletes emails after thirty days. JSC also argues in its *Responses to Motions to Compel* that the discovery requested by JEA and TECA is not relevant. The Hearing Officer finds that JSC's relevancy argument is a distraction ploy used to obfuscate JSC's actions during the discovery process. Further, the Hearing Officer finds that JSC has not acted in good faith during the discovery process, and its actions have resulted in unnecessary expense and delay.

When a motion to compel concerns electronic data, Rule 37.06(4) requires the Hearing Officer to first determine that the information sought is discoverable. JSC has stated repeatedly that no documents have been withheld based on relevance or specific objections, but it has made general objections to preserve its right to challenge admissibility at a future hearing. However, in its *Responses to the Motions to Compel*, JSC argues that the documents TECA states have not been produced are not relevant because JSC has produced final, signed contracts for the construction and operation of the solar facility, and the communications that are part of the negotiation process are no longer relevant when there is a signed contract in place. The Hearing Officer finds that JSC's argument is without merit. The standards JSC seeks to apply from the *Boyd* and *Lee Medical, Inc.* cases are based on cases dealing specifically with a contract dispute or with privileged information and are not controlling here. By issuing a subpoena on a third-party, Northern Reliability, TECA obtained nearly 200 emails that were from, to, or that copied Mr. Emberling, whereas previously, it had only been provided four emails from JSC. Through TECA's review of the emails from Northern Reliability, TECA discovered many relevant emails and many emails to and from Mr. Emberling and Mr. Shimon. The Hearing Officer finds that the documents sought in the *Motions to Compel* are relevant to these proceedings because the emails requested deal with efforts to fund the project, communications with potential funding sources, the status of the project, creation of the cooperative, and plans for additional projects, etc.<sup>49</sup>

In addition, the Hearing Officer finds that the benefit of the emails outweighs the burden of JSC to produce emails. The emails may contain vital information that goes to the heart of the fact determination to be made regarding JSC's status as a not-for-profit electric cooperative exempt from Commission regulation. In its *Responses to Motions to Compel* filed June 2, 2022, JSC

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<sup>49</sup> *TECA's Motion to Compel*, p. 17 (May 20, 2022).

advised the parties and the Commission for the first time during the course of the docket that the information that has been the subject of many discussions for almost a year had been destroyed. The Hearing Officer finds that since the bulk of EA Solar's responsive emails have been deleted, extra effort needs to be taken by JSC to try to recover responsive emails or explain the steps JSC has taken to comply with its discovery obligations. Rule 37.06(4) states the court may not impose sanctions for failing to produce electronically stored information lost as a result of routine, good faith operation of an electronic information system, absent exceptional circumstances. The Hearing Officer finds that based on the facts in the record, exceptional circumstances exist in this docket and sanctions should not be precluded.

On May 24, 2021, JSC filed its *Petition*. TECA and JEA sent their first discovery requests on September 8, 2021, and JSC responded on September 27, 2021. Early in the discovery process, TECA and JEA expressed concern about the lack of emails produced by JSC. According to TECA, this production consisted of only four emails. However, JSC assured the parties that it had produced all of the responsive documents and that no document was not being produced based on an objection by JSC. JSC had maintained to the parties that Mr. Emberling does not email much as an explanation for the lack of emails. From documents obtained from Northern Reliability, TECA discovered that Mr. Emberling, who is President of JSC and on the Board of EA Solar, is actually a prolific emailer and emails from various addresses, including an email address from EA Solar.

In addition to JSC's failure to produce responsive documentation during the progression of this docket, numerous status conferences were held where TECA explained in great detail that there had been many conversations and meetings with JSC regarding discovery and JSC continued to maintain it had produced all responsive documents and did not mention EA Solar's auto-delete policy. The Hearing Officer finds that JSC did not act in good faith when it failed to apprise the

parties of EA Solar's document retention policy that directly related to discovery requests submitted by JEA and TECA. It was not until the *JSC filed the Responses to the Motions to Compel* on June 2, 2022, that JSC first revealed a document retention policy and that responsive documents had been destroyed. JSC waited more than a year after the filing of its *Petition* and almost nine months after the first discovery requests were filed in the docket file, to finally advise of EA Solar's document retention policy and that the destruction of emails has continued throughout the course of the docket. The destruction of emails continued even after JSC knew the parties were seeking such emails. The Hearing Officer finds that JSC either knew or had a duty to know about EA Solar's document retention policy and was obligated to advise the Commission and the parties of its existence and the likelihood that some responsive documents had been deleted.

Over the course of these proceedings JSC has accused various parties of delay tactics and causing delay in the progression of the docket. The main cause of delay has been JSC's failure to advise of auto-delete policy of responsive emails and this lack of candor by JSC has resulted in wasted time and resources. JEA and TECA maintain that to date, JSC has not produced EA Solar's actual document retention policy, nor has it provided information as to when the policy went into effect. JSC only provided some provisions of the policy in Mr. Emberling's affidavit. TECA only became aware of the emails from a production by Northern Reliability. Since Northern Reliability is located in Vermont, TECA expended additional resources obtaining service of process on Northern Reliability.

JEA and TECA acknowledge that it is rare for the Commission to award sanctions, if it has ever been done. They maintain, however, that it is within the Commission's authority to award sanctions and that sanctions are warranted under the present circumstances. The Hearing Officer agrees. If these set of facts were before any other tribunal, sanctions would certainly be imposed

against JSC for its actions during the discovery process. It is rare that companies appearing before the Commission behave so cavalierly during the discovery process. The Commission's authority and its processes must be respected by any party appearing before the Commission. Such a blatant disregard for the discovery process will not be tolerated.

Therefore, the Hearing Officer concludes that the motions to compel filed by JEA and TECA should be granted, in part and denied, in part. The Hearing Officer concludes that the relief requested by TECA and JEA in the form of requiring JSC to perform a thorough search of its records for all responsive documents and to provide details of the search should be granted. In addition, for all documents JSC maintains have been deleted or destroyed, JSC should respond to the interrogatories set forth in *TECA's Motion to Compel*. Further, the Hearing Officer concludes that sanctions should be imposed against JSC in the form of an award of reasonable attorney's fees and expenses for JEA and TECA related to the filing of the *Motions to Compel*. The Hearing Officer will convene a separate proceeding where the fees may be presented and JSC will have an opportunity to contest any amounts it determines to be unreasonable or inapplicable. TECA's request for attorney's fees related to serving the subpoena on Northern Reliability is denied. JEA's request for additional attorney's fees related to seeking Supplemental Responses to Discovery Requests is denied.

**IT IS THEREFORE ORDERED THAT:**

1. The *Tennessee Electric Cooperative Association's Motion to Compel Discovery from Jackson Sustainability Cooperative* is granted, in part and denied, in part.
2. The *Motion to Compel and Memorandum of Law in Support of Jackson Energy Authority's Motion to Compel* filed by Jackson Energy Authority is granted, in part and denied, in part.

3. Specifically, Jackson Sustainability Cooperative, Community Development Enterprises-Jackson I, and its principals and agents shall perform a thorough search of its records, provide details of the search performed, and produce all documents responsive to Tennessee Electric Cooperative's discovery requests.

4. To the extent Jackson Sustainability Cooperative/Community Development Enterprises-Jackson I, maintains that documents have been deleted or otherwise discarded, they shall answer the following three interrogatories:

- State whether any of the following categories of documents were discarded or destroyed during the period July of 2020 to Present, and if any such documents were destroyed, for each, describe the contents of such document, in whose possession the document was, who destroyed or discarded it and the circumstances of the destruction of such document.
  - Legal structure of Jackson Sustainability Cooperative and Community Development Enterprises-Jackson I
  - Communications with potential members of Jackson Sustainability Cooperative
  - Membership requirements for Jackson Sustainability Cooperative
  - Jackson Sustainability Cooperative status as a non-profit cooperative
  - Jackson Sustainability Cooperative status as a public utility
  - Financing of Jackson Sustainability Cooperative, Community Development Enterprises-Jackson I, and/or the solar facility
  - Communications with Northern Reliability, Inc. regarding the solar facility
  - Communications with iSun regarding the solar facility



- Documents or communications relating to the construction or operation of solar facilities, or the generation, transmission, or sale of electricity in the state of Tennessee by Jackson Sustainability Cooperative, Community Development Enterprises-Jackson I, or any entity affiliated with Jackson Sustainability Cooperative or Community Development Enterprises-Jackson I.

5. Jackson Sustainability Cooperative shall pay the reasonable attorney's fees and expenses of Tennessee Electric Cooperative Association related to the filing of its *Tennessee Electric Cooperative Association's Motion to Compel Discovery from Jackson Sustainability Cooperative* and the *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery from Jackson Sustainability Cooperative*.

6. Jackson Sustainability Cooperative shall pay the reasonable attorney's fees and expenses of Jackson Energy Authority associated with the filing of its *Motion to Compel* and *Memorandum of Law in Support of Jackson Energy Authority's Motion to Compel*.

7. A hearing will be conducted at a later date to establish the amount of the attorney's fees and expenses to be awarded.

8. Tennessee Electric Cooperative Association's request for attorney's fees and expenses associated with obtaining service of process on Northern Reliability, Inc. is denied.

9. Jackson Energy Authority's request for attorney's fees for seeking Supplemental Responses to Discovery Requests is denied.



Monica Smith-Ashford  
Hearing Officer