

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION**

**NASHVILLE, TENNESSEE**

**December 12, 2022**

<b>IN RE:</b>	)	
	)	<b>DOCKET NO.</b>
<b>PETITION OF JACKSON SUSTAINABILITY</b>	)	<b>21-00061</b>
<b>COOPERATIVE TO DETERMINE IF A</b>	)	
<b>CERTIFICATE OF CONVENIENCE AND</b>	)	
<b>NECESSITY IS NEEDED</b>	)	

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**MOTION FOR INTERLOCUTORY APPEAL TO THE FULL  
PUBLIC UTILITY COMMISSION**

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Pursuant to Rule 1220-01-02-.06 of the Tennessee Public Utilities Commission (the “Commission”) Jackson Sustainability Cooperative (the “Cooperative” or the “Petitioner”) moves for interlocutory review<sup>1</sup> by the Commission of the Hearing Officer’s decision to issue sanctions against the Petitioner to be paid to the opposing parties, themselves each an arm of the State or Federal Government, or an umbrella organization for these entities (collectively, the “Government Intervenors”), as well as the Hearing Officer’s decision to bar the Petitioner’s discovery to the Government Intervenors while allowing the Government Intervenors to effect enormous discovery against the Petitioner.

The Commission itself is a political body, rather than a ministerial or judicial body. This means that the Commissioners are tasked with carrying out the Governor’s and General Assembly’s policies, rather than merely performing their duties in an objective manner. Given

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<sup>1</sup> Any party who wishes to seek interlocutory review by the Commission of a Hearing Officer decision on a preliminary motion shall make application by motion to the Hearing Officer. **Permission for interlocutory review shall not be unreasonably withheld.**

that the Hearing Officer's decisions involve several major policy changes and dramatic expansion of the Commission's power, the full Commission should review these unprecedented steps at this juncture.

### **MATERIAL ERRORS IN THE INITIAL ORDER RENDERING IT VOID**

As a preliminary matter, the Initial Order is invalid on its face because it fails to specify how it can be appealed. *See* Tenn. Code Ann. § 4-5-314 (c)(stating: "[t]he final order, **initial order** or decision **must also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief** and the time limits for seeking judicial review of the final order.") As such, it is not an Order of the Commission, and the Initial Order itself is a nullity.

The Hearing Officer has also taken the extraordinary step of issuing sanctions to be paid *to another party*, which is plain error as this Commission may only adjudicate disputes between the Petitioner and the State, as will be explained below. Even if this was within the Commission's power, the Initial Order is inadequate to support it. As a basis for this decision, the Hearing Officer totally relied on Government Intervenors' counsel and directly quoted the Government Intervenors' briefs for her "evidence." Respectfully, these statements are not evidence, and attorneys are not witnesses.<sup>2</sup> It is not sufficient for the Commission to refer only to the Government Intervenors' briefs for the Initial Order. The laws governing evidence in contested case hearings before the Commission are clear:

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<sup>2</sup> A perfect example of the Government Intervenors' counsel testifying was when counsel for TECA testified during the Motion to Compel hearing that it is impossible for an inbox to delete messages that have not been saved in a specific folder. To be proper evidence is introduced by sworn witnesses with first-hand knowledge or expert opinions.

(2) **All evidence, including records and documents in the possession of the commission of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case.** Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference;

(3) **Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence;**

Tenn. Code Ann. § 65-2-109

The UAPA (Tenn. Code Ann. Title, 4, Chap. 5, generally) also includes basic requirements of only considering evidence, not bare assertions by counsel, which is properly included in the record:

(d) **Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding.**

Tenn. Code Ann. § 4-5-314

(a) The administrative judge or hearing officer shall regulate the course of the proceedings, in conformity with the prehearing order if any.

(b) To the extent necessary for full disclosure of all relevant facts and issues, **the administrative judge or hearing officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence,** except as restricted by a limited grant of intervention or by the prehearing order.

Tenn. Code Ann. § 4-5-312

The failure of a hearing officer to base its decisions on the evidence not cited to the record is fatal to any Order, and renders such Order a nullity. Relying on evidence outside of the record is a clear abuse of discretion and constitutes an arbitrary and capricious decision. *Tenn. Dep't of Health v. Collins*, 2020 WL 6940702, 2020 Tenn. App. LEXIS 532, \*16.

## ACTIONS TAKEN OUTSIDE OF THE COMMISSION'S AUTHORITY

As the Initial Order grossly exceeds the Commission's authority, the Initial Order is invalid as well. *Gen. Portland v. Chattanooga-Hamilton Cty*, 560 S.W.2d 910, 913 (Tenn. Ct. App. 1976) (holding: "[a]dministrative agencies have only such power as is granted them by statute, and any action which is not authorized by the statutes is a nullity.") The Tennessee Court of Appeals has explained the strict limits of administrative powers as follows:

An administrative agency cannot enlarge its own jurisdiction, nor can jurisdiction be conferred upon the agency by parties before it. Accordingly, it is held that deviations from any agency's statutorily established sphere of action cannot be upheld because based upon agreement, contract, or consent of the parties, nor can they be made effective by waiver or estoppel.

The Hearing Officer acknowledges that "it is rare for the Commission to award sanctions, if it has ever been done." The Commission has most likely never awarded sanctions before because under the UAPA, if the agency feels that a party has not complied with a subpoena or discovery request, the agency properly applies to the circuit or chancery court where said party resides for an order to comply. *See* Tenn. Code Ann. § 4-5-311(b).<sup>3</sup>

The General Assembly has given the Commission limited authority to enforce its order, but such authority is strictly limited by statute. The only authority with which the Commission is statutorily empowered regarding issuing penalties for noncompliance is as follows:

Any **public utility** which violates or fails to comply with any lawful order, judgment, finding, rule, or requirement of the commission, shall in the discretion

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<sup>3</sup> In case of disobedience to any subpoena issued and served under this section or to any lawful agency requirement for information, or of the refusal of any person to testify in any matter regarding which such person may be interrogated lawfully in a proceeding before an agency, the agency may apply to the circuit or chancery court of the county of such person's residence, or to any judge or chancellor thereof, for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony.

of the commission be subject to a penalty of fifty dollars (\$50.00) for each day of any such violation or failure, which may be declared due and payable by the commission, upon complaint, and after hearing, and when paid, either voluntarily, or after suit, which may be brought by the commission, **shall be placed to the credit of the public utility account.**

Tenn. Code Ann. § 65-4-120

The ordinary course of action for alleged disobedience with an order of the Commission is to refer the matter to a court of law, which hears such disputes often and has a body of knowledge gained from presiding over similar disputes.

First, the Commission is not a court of law, and the Hearing Officer is not vested with the inherent powers of a court of law. The Commission cannot award any penalties or judgment to any party besides the State of Tennessee. The Cooperative is the only party who could possibly be under the Commission's jurisdiction. From the earliest days of the Commission, then called the Railroad and Public Utilities Commission, the Tennessee Supreme Court made clear that the Commission is not a court or part of the judicial branch:

**But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions . . . In prescribing regulations or rules of action under the police power of the State for the safety and convenience of the public, or in determining a schedule of rates and charges for public services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals.**

*In re Cumberland Power Co.*, 147 Tenn. 504, 249 S.W. 818 (Tenn. 1922).

The judicial branch is a distinct branch of the State of Tennessee, established under the Tennessee Constitution, and is vested with the sole judicial power in Tennessee. Disputes between private parties are the sole jurisdiction of the judicial branch. *Id.* at 506.

Second, the Cooperative's petition and contested case hearing is a matter between the Cooperative and the State of Tennessee. It is not a case between the Cooperative and the Government Intervenors, nor is EA Solar, Community Development Enterprises-Jackson I, or Mr. Emberling a party to the contested case or could by any stretch of the imagination considered a "public utility." The Commission has power to regulate public utilities, and only public utilities. EA Solar, Community Development Enterprises-Jackson I, and Mr. Emberling are assuredly not public utilities. The Commission does not have the jurisdiction over these parties.

#### **ADMINISTRATIVE DUE PROCESS AND ERRORS OF LAW IN THE INITIAL ORDER AND THE PROCEEDINGS**

The Initial Order lacks the basic requirements of due process, both the statutorily required mandates in the UAPA and the due process inherent in any government action. In fact it appears that the aspect that the Government Intervenors are subdivisions of the State and Federal Governments has not been taken into account at all, which heightens the requirements for due process in these proceedings.

Basic due process requires a clean record for which the Petitioner can concretely understand the authority by which the Commission purports to act. The "Findings [of Fact] and Conclusions [of Law]" section of the Initial Order does not contain a single reference to the record or citation to a statute as it properly should. *See* Tenn. Code Ann. § 4-5-314(c).<sup>4</sup> Merely citing to the Government Intervenors' brief is not sufficient. Once again, those are the

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<sup>4</sup> A final order, initial order or decision under § 50-7-304 shall include **conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order**, including the remedy prescribed and, if applicable, **the action taken on a petition for stay of effectiveness**. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings.

characterizations of an attorney, not actual evidence that may be relied on by the Commission.

As the sole legal basis for its authority to award sanctions, the Hearing Officer states:

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.

Respectfully, the Hearing Officer needs to cite the proper statute for any administrative action of this magnitude, much less one that is unprecedented, and include a detailed assessment of why such a dramatic increase regulatory power is appropriate.

As its sole basis for the Commission having the power to award attorney's fees, the Government Intervenors cite the case of *Consumer Advocate & Protection Div. v. Tenn. Regulatory Auth.*, 2012 Tenn. App. LEXIS 355, \*1, 2012 WL 1964593, a case that on its face, deals with the Commission allowing a utility to recover its attorney fees for appearing in front of the Commission. Once again, the Government Intervenors have felt free to dramatically misstate the holding in this case. In *Consumer Advocate & Protection Div. v. Tenn. Regulatory Auth.*, the Commission permitted the utility to recover its attorney's fees *from the utility's rate payers* as part of the *expenses factored into the utility rate*. The question as to what expenses are permitted to be recovered through utility rates is a matter squarely within the Commission's jurisdiction and expertise.

As stated above, the Commission does not resolve discovery disputes of this nature, much less award attorney's fees to be paid *from private parties*. The crux of *Consumer Advocate & Protection Div. v. Tenn. Regulatory Auth.* is that the General Assembly has not taken action to

curtail the powers of the Commission. This unreported case was decided in 2012. Since that time the General Assembly has clearly spoken by passing Tenn. Code Ann. § 4-5-326, stating:

In interpreting a state statute or rule, a court presiding over the appeal of a judgment in a contested case shall not defer to a state agency's interpretation of the statute or rule and shall interpret the statute or rule de novo. After applying all customary tools of interpretation, the court shall resolve any remaining ambiguity **against increased agency authority.**

Acts 2022, ch. 883, § 2. April 14, 2022.

The Petitioner also moves for interlocutory appeal to the full Commission regarding the Hearing Officer's decision to conduct one way discovery, which allows the Government Intervenors to access the confidential files of a private company (which happens to be the Petitioner's business competitor) while allowing the Government Intervenors to not respond to Petitioner's discovery. There is absolutely no basis for one way discovery.

In the interests of fairness and efficiency, all parties should proceed with discovery simultaneously." 1-Pt.2 Moore's Federal Practice para. 0.50. The Court has ample means to limit possible abuses of what is generally recognized as the right of a party to pursue simultaneous discovery. See, e.g., Rules 11, 26(b)(1), 26(c), 26(d), 37, Federal Rules of Civil Procedure.

*Federal Deposit Ins. Corp. v. Blackburn*, 109 F.R.D. 66, 70, 1985 U.S. Dist. LEXIS 14440, \*7.

Finally, the Petitioner moves for interlocutory appeal to the full Commission regarding the Hearing Officer's decisions to allow the Government Intervenors to intervene. It appears that the problems in the Hearing Officer's Initial Order are endemic throughout the Orders allowing the Government Intervenors to intervene. The threshold for intervention is whether the intervening petitioner's "*legal rights*, duties, privileges, immunities or other *legal interest* may be determined in the proceeding." The respective orders state analyze whether the Government Intervenors will be *factually affected* in any manner. Under this analysis, any person who uses



electricity in Tennessee would conceivably be affected. This is not logical nor the purpose of the statute.

For example, in the “Order Granting the Petition to Intervene filed by the Tennessee Valley Authority,” it states that “the Cooperative providing supplemental electric service to customers in TVA’s service area could have a direct impact on the TVA distributors that it wholesales power to, and as a result, directly and negatively impact TVA.” TVA is executive branch corporate agency and instrumentality of the United States.<sup>5</sup> The Supremacy Clause<sup>6</sup> clearly provides that the State of Tennessee may not affect the legal rights, duties, privileges, immunities or other legal interests of TVA, or in fact any other instrumentality of the United States. In accordance with Tenn. Code Ann. § 4-5-314, the Order allowing TVA to intervene should be accompanied by a much more thorough legal, factual, and policy analysis as to how the Supremacy Clause is not applicable to this situation.

### **CONCLUSION**

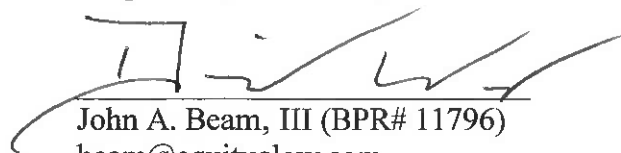
For these reasons, Petitioner would state that the Hearing Officer’s unprecedented decisions to dramatically expand the State’s regulatory power, award discovery sanctions to be paid to an intervening parties, abandon the universal principles of simultaneous discovery, and allow government entities access to a private companies confidential business information (despite being a direct competitor), should be reviewed by the full Public Utilities Commission.

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<sup>5</sup> “Petition of the Tennessee Valley Authority for Leave to Intervene,” p. 2, §3.

<sup>6</sup> USCS Const. Art. VI, Cl 2

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Beam, III', is written over a horizontal line.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via either U.S. Mail, postage prepaid, or email to the following this 12th day of December, 2022.

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