BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

January 20, 2022

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

INTERLOCUTORY APPEAL BRIEF TO THE FULL PUBLIC UTILITY COMMISSION

Pursuant to Rule 1220-01-02-.06 of the Tennessee Public Utilities Commission (the "Commission") Jackson Sustainability Cooperative (the "Cooperative" or the "Petitioner"), appeals the following issues to the Tennessee Public Utility Commission. In the interest of readability and clarity, the Petitioner's argument is set forth first, and legal analysis and support of the issues with citations, follows.

1) Is this Commission empowered, or even desires, to issue sanctions against the Petitioner totaling $89,459.95 because one of its vendors, EA Solar, did not suspend its automatic email deletion policy despite no order or direction from the Commission to do so?

2) Can this declaratory action affect the legal rights of Jackson Energy Authority, Tennessee Electric Cooperative Association, and Tennessee Municipal Electric Power Association, as sub-divisions of the State government which the Tennessee Public Utility Commission does not have jurisdiction, such that they are permitted to intervene?

3) Can this declaratory action affect the legal rights of Tennessee Valley Authority, as an instrumentality of the United States government which the Tennessee Public Utility Commission does not have jurisdiction, such that it is permitted to intervene?

ARGUMENT

The "Petitioner," Jackson Sustainability Cooperative, petitioned the Tennessee Public Utility Commission (the "Commission") for a declaratory ruling on May 24, 2021, to first and foremost, verify that its proposed solar facility would not be considered a "public utility" or a "public electric system" under Tennessee statutes. If necessary, and only if this Commission finds that the Petitioner would be a public utility subject to its regulation, the Petitioner would adopt governance in accordance with a permissible statutory framework to operate as a member owned cooperative. Since the prime motivation for this project is to allow large industrial private businesses to have more control of their own electrical power, organizing as a public utility would be the option of last resort.

In essence, the Petitioner asked the Commission for permission to do something in an abundance of caution. In this case, it was to join with four to eight local heavy industrial plants or factories in Jackson, Tennessee to build a shared 16.5 Megawatt solar field with 46 Megawatt-hours of battery storage (the "facility"). It would supply the local factories and plants with supplemental electrical power provided from renewable resources. Several major companies have plants and factories in the city near the proposed Facility. Many of these corporations have sustainability targets to operate on a certain percentage of renewable energy, so key individuals of the Petitioner found a parcel that lent itself to developing a solar field that could supply supplemental power to these industrial users.

The Petitioner does not need, and does not want, condemnation powers or other privileges inherent in a public utility. The corporations that own the local factories and plants would be members in the cooperative that owns the Facility and share control of the electrical power supply. These potential members are sophisticated owners who deal with running extremely large electrical loads on a daily basis. They know how to optimize the power supply according to their own standards for their own machinery. The power supply would be connected behind the member's electric meter.

The Petitioner has preliminary designs for the solar field and battery storage of the Facility and submitted the site plans to the proper authorities with the City of Jackson for approval. The City of Jackson approved the site plan on June 2, 2022. Compared to other power generation methods, solar fields take up a large area, but the connections between panels, battery storage, and supply are relatively simple, at least in power plant terms. Unlike other types of supplemental power plants, such as natural gas turbines, the mechanical design of a solar field is much simpler. Obviously though, solar fields do take up a much larger area, so the civil, environmental, storm water, and other site design work is amplified accordingly. Thus, the site plan is a big part of the design process, and the load generated and stored needs to be specified before the site plan can be finished. Thus, there is no logical reason that the Petitioner would want to abandon this detailed site plan to construct the Facility differently than it was submitted to the Commission.

And yet, the hearing officer believes the arguments of Jackson Energy Authority, Tennessee Electric Cooperative Association, and Tennessee Municipal Electric Power Association (the "Government Intervenors") that the Petitioner is merely using all the details in the Petition as a ruse and plan to build a maverick public utility to operate outside of the

law. Based upon the ridiculous metaphor that "in order to know where [the Petitioner] is going, we need to know where they have been," (proffered by the Government Intervenors) the Petitioner, and any company related to it, have been subjected to over a year of detailed and invasive discovery requests into their operations. Not only concerning the Facility, but all projects as well.

Presumably, "where [the Petitioner] is going," or the "destination," is the final plan for the solar facility intended to be built and the Petitioner's governance. In other words, the hearing officer and the Government Intervenor want to predict the design and operation of the Facility based upon detailed discovery requests submitted about every possible working mechanism in the related vendors selected by the Petitioner. Though they share key individuals, these are private companies with a different ownership structure than the Petitioner. According to the Government Intervenor's argument, if they can learn every detail about how other solar facilities were designed, constructed, and operated they will be able to predict the Facility's design and operation.

In what is absolutely a first for the Commission, the hearing officer has now awarded damages **payable to the Government Intervenors** because EA Solar, a separate company from the Petitioner, had an automatic email retention policy that deleted emails that the actual EA Solar employees did not want. *See* Tenn. Code Ann. § 4-5-314(c).[1] Merely citing to the Government Intervenors' brief is not sufficient. Once again, those are the characterizations of an attorney, not actual evidence that may be relied on by the Commission.

[1] 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.

The Government Intervenors then subpoenaed emails relating to EA Solar from Northern Reliability, a vendor chosen by the Petitioner to work on the Facility. The Government Intervenors now want their attorney's fees for recovering these emails because they apparently contain information so critical to this case that no decision could be rendered without them. But despite the apparent need to issue unprecedented sanctions, **the hearing officer has apparently not even reviewed the emails in question.**

In her order for sanctions, the hearing officer stated "[t]he 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." The contents of the emails are not unknown at this juncture. They are in the hearing officer's possession. Either the emails contain "vital" information or they do not. The Government Intervenors filed their motion for sanctions on May 20, 2022. The motion was argued on June 8, 2022. The hearing officer did not issue her decision until November 14, 2022. Thus, the hearing officer had 159 days to review these emails from the date the motion was argued until a decision was entered. There is no logical explanation for why the emails would not be reviewed before ruling except that the hearing officer has turned control of the case over to the Government Intervenors.

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.

The hearing officer is under the misunderstanding that she may award judgments to parties besides the State. This is a grave misunderstanding. Judges and courts decide such matters. The Commission, like all executive agencies, speaks for the State government and only the State government.

During the hearing, Government Intervenors' attorney testified (unsworn of course) that such an automatic email policy was not even possible. Government Intervenors' counsel did not offer any evidence to support this conclusion. In reality, Microsoft Outlook, the most common email reader, allows users to modify the Inbox retention policy. Simply by going to Settings > Mail > Retention Policies, an administrator can set customized retention policies for folders. In fact, a 30 day retention policy is one of the default options for email retention. As a general rule, attorneys are not permitted to act as witnesses in the same case in which they are an attorney, but since the Government Intervenors have not produced any witness, expert or otherwise, all they can do is have their attorneys testify.

But what happens if the hearing officer and the Government Intervenors predict a different result from the detailed design, operational details, and non-profit cooperative structure submitted by the Petitioner? A declaratory ruling is only binding for the facts and circumstances submitted to the Commission. The Facility is ready for final design and construction. Not only was it submitted to the Commission, but already approved for construction by other regulatory boards. The Petitioner cannot, and will not, build whatever the Government Intervenors predict it should build. The submitted design was completed by competent engineers, not third-party lawyers.

The Petitioner is also bound by the facts set forth to the Commission. If the Petitioner needs to revise aspects of the Facility before a final ruling is made by the Commission, these revisions would, of course, be submitted to the Commission voluntarily and as soon as possible. If the Petitioner put in the effort to go through a declaratory action, whose sole purpose was to grant permission regarding a certain set of facts, the declaratory action would be useless if the Commission issued a ruling not based upon the **actual set of facts and circumstances** for the Facility. If not, the Petitioner ends up in the same place as if it had not filed the declaratory action at all. It defeats the entire purpose of asking permission. The final set of facts and circumstances must be approved by the Commission before the Petitioner begins construction.

At this same time, the Petitioner has not been allowed to serve discovery on any of the Government Intervenors. One key benefit to the members of the Petitioner is the ability to provide backup power and load stabilization. As recent TVA outages have shown, there is a real and pressing need for supplemental power when the public grid shuts down. The Facility's design provides an uninterruptable power supply when the grid stops flowing. The Facility's power stabilization abilities also make the industrial machinery run better and last longer. The Petitioner has requested that Jackson Energy Authority ("JEA," the local municipal power provider and one of the Government Intervenors) answer discovery about its history of supplying unreliable power, but these requests have been denied until the Government Intervenors conclude their exhaustive discovery.

Those in charge of the plants and factories also know that they cannot control TVA or JEA's priorities, but they will still answer to the parent corporation if production stops. They will still be responsible for meeting sustainable power goals. Being subject to circumstances out of their control, while still answering to parent companies for corporate priorities is not an

enviable position. It is bad for the State of Tennessee if multinational corporations are confronted with a choice to relocate out of TVA territory or meet their corporate goals. It is much better if private companies are allowed to run their businesses without government interference and red tape. The Government Intervenors have done a remarkable job conjuring themselves into an additional government regulator, and the local industrial leaders have taken note that TVA territory is not a friendly place to do business.

The Government Intervenor's chosen metaphor is that "in order to know where you are going, you must know where you have been," but this is much more applicable to discovering their own track record of whether or not they can provide reliable and stable power. Discovery should always be a two-way street. The only exceptions are when the regulator is the only other party, because the regulator would not be party to any of the facts to the case. Jackson Energy Authority should answer reasonable discovery by the Petitioner regarding its historical ability to provide power to major industry in Jackson. These facts will answer whether the Facility is a public concern under the statute far more than the discovery piled on the Petitioner and third-parties.

In reality, the Government Intervenors drug in every possible legal theory, no matter how irrational or unjustified, to delay or prevent the Commission from providing a straight answer to a simple question. There is no amount of discovery responses or prior emails from the Petitioner that would satisfy the Government Intervenors. They want the project dead. The Government Intervenors do not like the idea of private businesses working together to have their own supplemental electrical supply, plain and simple, and they are willing to spend as much taxpayer money as necessary to maintain their power.

The Government Intervenors know that courts will not overrule the Commission when the Commission acts within its jurisdiction to determine whether the Petitioner would qualify as a public utility or a public electric system, because the Commission sets public policy for utilities in Tennessee. When the Commission views the facts and makes a policy determination, it is within the "political decision doctrine," and courts will not insert themselves into the Commission's policy making decisions. Courts are judicial offices, and they deliver justice. The Commission is a political body, and it delivers policy.

Instead, the Government Intervenors have, unfortunately, turned a political question into a legal quagmire. The problem started when the Government Intervenors were allowed to intervene. Parties are only permitted to intervene in contested cases when their legal rights could be affected by the outcome. The ability of a court, agency, or other political body to determine the legal rights of a party is the political body's **jurisdiction**. The Commission's enacting statutes clearly state that the Commission does not have jurisdiction over an agency of the Federal Government (such as TVA), utilities owned by municipalities (such as JEA), and organizations controlled by these entities (such as Tennessee Electric Cooperating Association and Tennessee Municipal Power Association).

In short, none of the Government Intervenors are subject to the Commission's jurisdiction. None of these entities appear before the Commission to justify their rate increases or any other actions, like privately owned public utilities must. Counties and municipalities, along with the public utilities they own, are **subdivisions** of the State. These subdivisions of the State are governed according to their own enacting legislation, most often through elected or appointed boards of directors. TVA is an agency and instrumentality of the United States, and does not answer to the State of Tennessee at all.

Unlike local government corporations like JEA, the Commission is an **arm** of the State of Tennessee. The Commission is charged with regulating public utilities throughout the state, not only a particular geographic region. The Commission's jurisdiction is limited by the subject matter entrusted to it, not by geographic territories.

The Government Intervenors have performed great feats of mental gymnastics to convince the hearing officer that this Commission will determine the Government Intervenors' legal rights even though the Commission does not have jurisdiction over the Government Intervenors. The hearing officer has accepted these ridiculous contentions entirely:

> [The Petitioner] providing supplemental electric service to customers in TVA's service area could have a direct impact on the TVA distributors that it sales [sic] wholesale power to, and as a result, directly and negatively impact TVA. Therefore, the Hearing Officer finds there is a sufficient **factual basis** to find that the **legal rights or interests** held by TVA may be determined in this proceeding.

There is no "factual basis" that will determine a government agency's "legal rights." Legal rights flow from statutes, court decisions, and the Constitutions of the United States and the State of Tennessee. The hearing officer has reasoned that because TVA's bottom line may be affected, they have a legal right that will be determined. So does this reasoning hold true if a single company in Jackson decided to build its own solar field? What about a private citizen adding solar panels to their home? By the hearing officer's reasoning, any citizen's decision that reduces electrical use in TVA territory grants TVA the legal right to use the Commission to stop it. TVA also serves parts of Alabama, Georgia, Kentucky, Mississippi, North Carolina, and Virginia. Are those states also permitted to intervene and have a say on Tennessee's public utility policy?

The answer is clearly "No." Once the Government Intervenors reasoning is followed down to its implications, it quickly falls apart. Government agencies cannot insert themselves wherever they please to stop private business decisions simply because it hurts their bottom line. Tennessee encourages free enterprise and regulates only where it is necessary. In this State, the government exists to serve the citizens, not the other way around.

The Petitioner does not desire powers of imminent domain, franchises, or the other trappings and privileges of a regulated public utility. Public utilities are defined by the fact that they receive franchises and privileges from the government. The customers have no choice to select the utility and only indirect representation in the utility's governance. Logically, this means that public safeguards must be put in place to protect the public.

In contrast, the Petitioner will have approximately four to eight members. Once operations, the Petitioner's controlling board will primarily be representatives from each of its user-members. Members can join or leave according to the contracts they sign with the Petitioner to share supplemental power. Members of the cooperative will have direct representation and control over the Petitioner. Government regulation of the Petitioner is unnecessary. The Petitioner does not want to impact or control anyone's property besides its members. The members will connect to the Facility behind the electric meter. The public grid is not used. No one's land need be taken to construct the Facility. There is no need to regulate the Petitioner as a public utility, and the Petitioner does not want to be a public utility. The point of bringing this case to the Commission is merely to verify that it will not be a public utility or a public electric system.

The ultimate question of whether the Petitioner may operate is whether the Facility is "affected by and dedicated to public use." Why this designation is important and what it means to be "affected by and dedicated to public use" in the context of a supplemental power facility has been answered by the Attorney General's Office as follows:.

> The ultimate question is whether the utility conducts its business in a way that makes it a public concern. Put in a more concrete way, the question is whether the utility holds itself out (expressly or implicitly) as engaged in supplying its product or services to the public in general or to a limited portion of the public, as opposed to holding itself out as serving or prepared to serve only particular individuals.

2017 Tenn. AG, Opinion No. 17-25 (attached as **Exhibit A**)

Instead of permitting the Commission to answer a simple question, the Government Intervenors have sponsored a prosecution on private enterprise. The hearing officer has been complicit to allow the Government Intervenors to run the case. The Petition was filed before the Commission on May 24, 2021. Since that time, the hearing officer has not examined the substance of Petition, the underlying design for the Facility, the proposed organizational structure actually submitted, or allowed the Petitioner to serve discovery on the Government Intervenors. The hearing officer has deferred to the Government Intervenors in every aspect. The Government Intervenors volunteered to conduct this case for her, and she has willingly accepted. Unsurprisingly, the Government Intervenors have run the case off of the rails.

Counties, municipalities, and local government agencies are not allowed to intervene in Commission cases, and in most other regulatory cases, because they do not speak for the State. When local government utilities are allowed to intervene, they spend taxpayer money to hire outside attorneys and push for their own interests. If one local government is allowed to

intervene, then all local governments must be allowed to intervene as well. Eventually, each local government will be lobbying for their individual goals and using taxpayer funds and outside attorneys to do it. Local government agencies spend taxpayer money to argue for their own interests, and no cohesive policy for the State is achieved.

The State of Tennessee already has a decision making body to handle public utility policy: the Tennessee Public Utility Commission. The Commission is tasked with deciding this matter, not local governments. The Commission's duty is clearly stated:

> It is the duty of the **Tennessee public utility commission** to ensure that chapter 305 of the Public Acts of 1995 [the enacting statute of the Tennessee Regulatory Authority, now the Commission] and all laws of this state over which they have jurisdiction are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the state are collected.

Tenn. Code Ann. § 65-1-113

It does not say "along with municipal power companies," or "in conjunction with the Federal Government," or any such language. The statute delegates this authority to the Commission, and only the Commission.

When a third-party's legal rights may be determined, the Commission **may** permit the third-party to intervene. The Commission **can always deny** a third-party permission to intervene. However, the Commission is **barred** from letting a third-party intervene **unless their legal rights will be determined**. The Government Intervenors convinced the hearing officer to ignore the Commission's statutory threshold for intervening, potentially invalidating any decision in this case for violating the statute.

The Petitioners respectfully ask this Commission to take the conservative approach that avoids the legal pitfalls advocated by the Government Intervenors. Even taking the Government Intervenors' incorrect and self-contradictory legal arguments as true, it is always in the Commission's discretion to not let a third-party intervene. The Government Intervenors clearly demonstrated they are ready, willing, and able to cause undue delay in these proceedings. When the Petition was filed in May of 2021, the original hearing was scheduled for November of 2021. What was scheduled for months is now measured in years because the Government Intervenors convinced the hearing officer discovery was needed to predict what the Petitioner would do. The Petitioner is not some natural event or animal specimen, where the future is out of human control. The Petitioner is a non-profit cooperative building a solar facility, operated by humans with free will who can decide and change their future plans. **Instead of guessing what will happen, the Commission can simply tell the Petitioner what to do or not to do in the future.** That is the basic concept of an open regulatory environment is a dialogue between the government and private parties. The future is not written in stone.

The Commission is under no duty to let allow the Government Intervenors into this case. Denying the Government Intervenors permission to intervene is the only legally sound decision for the Commission. Allowing the federal and local governments to intervene violates the statute, and the entire case will be right back in front of the Commission if the intervention is overturned on a UAPA appeal. Denying the federal and local governments permission to intervene is unquestionably within the Commission's discretion, cannot be overturned by the courts on UAPA appeal, and will allow the Commission to actually reach the merits of the Petition, which simply asks if the Facility will "affected by and dedicated to public use."

In the past, the Commission has denied other government agencies permission to intervene, and it should do so again now. The Commission (at that time, the Tennessee Regulatory Authority) denied permission for the Consumer Advocate Division of the Attorney General's office to intervene in the case of *Tennessee Wastewater Systems, Inc.* docket no. 14-00041. In its Initial Order filed May 1, 2014, (attached as **Exhibit B**) and later adopted by the Commission as a final order, the Commission reasoned:

> By statute and the requirements of due process, the Consumer Advocate has no legal role in the proceeding, and "no legal right to act as a separate prosecutor, taking its own discovery, presenting its own case, and making its own argument for whatever remedies [it] may request." [Respondent] contends that to allow the Consumer Advocate to intervene and present a separate case against it is inconsistent with Tenn. Code Ann. § 65-2-106 and unfair to [Respondent].
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> In addition, citing the cases of *State v. Brown and Williamson Tobacco Corp.* (Tenn. 2000) and *State v. Silski* (Tenn. Crim. App. 2006), [Respondent] asserts that it is well established that third parties have no right to intervention in proceedings brought by the State. Similarly, in this proceeding, the [Commission] is not litigating the legal interests of third parties in this enforcement proceeding. As such, **the [Commission] is the sole representative of the State's interests** and allowing a third party to intervene and act as an additional prosecutor does not serve the "interests of justice" or the "orderly and prompt conduct of the proceedings."

JEA, and all the individual members of the Tennessee Electric Cooperating Association and the Tennessee Municipal Power Association, are subdivisions of the State of Tennessee. These subdivisions of the State have no statutory role in this proceeding. Their legal rights will in no way be decided by the ruling of the Commission, and as such, should not be permitted to intervene. They do not have a legal right to torpedo a private business in order to beef up revenue. State agencies are created to serve the needs of the citizens, not the other way around.

It should be self-evident that TVA has no place meddling in State affairs. TVA is an arm and instrumentality of the federal government. The federal government can direct its own affairs, and the State of Tennessee can remain sovereign over Tennessee decisions.

LEGAL SUPPORT

I. The Commission is not a Court of Law, and cannot award any amount, to third-parties, much less sanctions of $89,459.95.

It should be uncontested that the Commission is not a court of law.[2] Simply because the Commission uses parts of the Tennessee Rules of Civil Procedure does not turn it into a judicial body. Courts have inherent powers over the discovery process. Regulatory agencies have no inherent powers. *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 UAPA's plain language clearly states that administrative agencies have no inherent powers, only those granted to the agency by statute.

> (a)(2) **Administrative agencies shall have no inherent or common law powers**, and shall only exercise the powers conferred on them by statute or by the federal or state constitutions.

Tenn. Code Ann. § 4-5-103

[2] "**The authorities hold without exception that Utility Commissions are administrative bodies and not courts**, and that the power conferred upon them to fix rates is legislative and not judicial." *In re Cumberland Power Co.,* 147 Tenn. 504, 515, 249 S.W. 818; *See also McCollum v. Southern Bell Tel. & Tel. Co.*, 163 Tenn. 277, 280, 43 S.W.2d 390, 390-391, 1931 Tenn. LEXIS 112, *3-4, 10 Smith (Tenn.) 277

However, the hearing officer cites the case of *Strickland v. Strickland*[3] to assert her position that "the Trial Court has an **inherent power to sanction** the offending party, and the Trial Court has wide discretion in such matters." (Order p. 9).

The hearing officer has clearly edited and exaggerated the cases cited in her proposed order to suit this expanded view of regulatory power. For instance, the hearing officer cites the case *Mercer v. Vanderbilt Univ., Inc.*[4] to justify imposing unprecedented sanctions. The hearing officer's proposed order states: "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." (Order, p. 9).

However, the case of *Mercer v. Vanderbilt Univ., Inc.* actually states that: "[a]lthough the Tennessee Rules of Civil Procedure do not provide a sanction for abuse of the discovery process, **trial judges have the authority** to take such action as is necessary to prevent discovery abuse." The hearing officer chose to substitute "tribunals" for "trial courts" in an attempt to justify wielding expanded powers. Instead of looking to judicial precedent, the hearing officer should instead look to the UAPA, which resolves any ambiguity against expanded agency powers.

> 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**.

Tenn. Code Ann. § 4-5-326

[3] *Strickland v. Strickland*, 618 S.W.2d 496 (Tenn. App. 1981) (assumed, as the hearing officer did not provide a case citation).
[4] *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133, 2004 Tenn. LEXIS 360, *25-26

II. The Commission's Powers Under Its Enacting Statute

The Commission is created and given its powers through its enacting statutes, found in Title 65 of the Tenn. Code Annotated (that is, all statutes found under Tenn. Code Ann. § 65-1-101 through 65-37-104). These statutes generally only apply to the Commission, although the statutes also include other agencies related to the Commission, such as the Consumer Advocate division of the Attorney General's Office or the Underground Utility Damage Board, etc.

The enacting statute gives the Commission authority to regulate public utilities in Tennessee.

> It is the duty of the Tennessee public utility commission to ensure that chapter 305 of the Public Acts of 1995 and all laws of this state over which they have jurisdiction are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the state are collected.

Tenn. Code Ann. § 65-1-113

> (a) **The commission has general supervisory and regulatory power, jurisdiction, and control over all public utilities**, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter. However, such general supervisory and regulatory power and jurisdiction and control shall not apply to street railway companies.

Tenn. Code Ann. § 65-4-104

"Public utility" is a defined term in the statute, which both generally defines public utility and expressly exempts certain entities, namely government entities, from being considered public utilities.

> (A) "Public utility" means every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, **affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof.** "Public utility" as defined in this section shall not be construed to include the following nonutilities:
>
> (i) Any corporation **owned by or any agency or instrumentality of the United States** [including TVA];

(ii) Any county, municipal corporation or other subdivision of this state [including the City of Jackson, Tennessee];

(iii) Any corporation **owned by or any agency or instrumentality of the state** [including Jackson Energy Authority];

(iv) Any corporation or joint stock company **more than fifty percent (50%) of the voting stock or shares of which is owned by** the United States, this state or **by any nonutility referred to in subdivisions (a)(1), (2), and (3)** [including Tennessee Electric Cooperating Association and Tennessee Municipal Power Association];

. . .

Tenn. Code Ann. § 65-4-101

Each of the Government Intervenors expressly qualifies as a "nonutility" exempt from the Commission's jurisdiction. Thus the Commission cannot affect the legal rights, duties, privileges, immunities or other legal interests of the Government Intervenors.

The Petitioners do not believe they qualify as a "public utility" under the statute because they are not "dedicated to the public use" or "under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof." Petitioners do not wish to be "under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof." The Petitioner has not applied for franchises, and it does not need any privileges granted by the state or by any political subdivision thereof. The Petitioner will use the railroad right-of-way to run the power supply through private agreement.

Ultimately, the Petitioner's ability to operate is not assured simply because it does not operate "under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof." The ultimate question is whether the Facility will be "affected by and dedicated to public use" under the factors set out by the Attorney General's Office in its advisory opinion.

Title 65, Chapter 34 restricts "non-consumer owned electric systems" from operating within certain territories already served by incumbent municipal or cooperative utilities. A "non-consumer owned electric systems" is similar to a "public utility" except that it is limited to electrical utilities and does not require that the electric system operate under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof.

> (4) "**Non-consumer owned electric system**" means any **public electric system** other than electric and community service cooperatives and municipal electric systems; and
>
> (5) "**Public electric system**" **includes** electric and community service cooperatives, municipal electric systems, and **every individual, co-partnership, association, corporation or joint stock company**, their lessees, trustees or receivers, appointed by any court whatsoever, **that own, operate, manage, or control any electric power system**, plant, or equipment within Tennessee **affected by and dedicated to public use**.

Tenn. Code Ann. § 65-34-102

Thus, the ultimate question of whether the Petitioner may operate is whether the Facility is "affected by and dedicated to public use." What it means to be "affected by and dedicated to public use" in the context of a supplemental power facility has been answered by the Attorney General's Office in the opinion attached hereto as Exhibit A, but principally:

> The ultimate question is whether the utility conducts its business in a way that makes it a public concern. Put in a more concrete way, the question is whether the utility holds itself out (expressly or implicitly) as engaged in supplying its product or services to the public in general or to a limited portion of the public, as opposed to holding itself out as serving or prepared to serve only particular individuals.

2017 Tenn. AG, Opinion No. 17-25

III. The Commission's Powers Under the UAPA

The Commission, like most executive agencies of the State, is also governed by the Uniform Administrative Procedures Act, commonly abbreviated as the "UAPA." The

Government Intervenors rely on the UAPA, and its provision adopting the Tennessee Rules of Civil Procedure to justify that the Commission can impose discovery sanctions that the hearing officer agrees are "unprecedented."

The hearing officer stated 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. . . . The Hearing Officer finds that JSC 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."

The UAPA's discovery provisions provide that:

> (a) **The 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**, except that service in contested cases may be by certified mail in addition to means of service provided by the Tennessee Rules of Civil Procedure. The director of the administrative procedures division of the secretary of state's office may issue subpoenas on behalf of an administrative judge employed by the secretary of state. The administrative judge or hearing officer shall decide any objection relating to discovery under this chapter or the Tennessee Rules of Civil Procedure. Witnesses under subpoena shall be entitled to the same fees as are now or may hereafter be provided for witnesses in civil actions in the circuit court and, unless otherwise provided by law or by action of the agency, the party requesting the subpoenas shall bear the cost of paying fees to the witnesses subpoenaed.
>
> (b) **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. Forthwith, the court shall cite the respondent to appear and shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unlawful, **the court shall enter an order requiring compliance**. Disobedience of **such order** shall be punished as contempt of court in the same manner and by the same procedure as is provided for like conduct committed in the course of judicial proceedings.
>
> . . .

Tenn. Code Ann. § 4-5-311

The Government Intervenors cite part (a) for their basis that the Commission has the power to sanction the Petitioner with attorney's fees, but disregard part (b)'s procedure for alleged "disobedience . . . to any lawful agency requirement for information." The UAPA clearly requires that discovery disputes are referred to Circuit or Chancery Court. Instead, the Government Intervenors ask the Commission to fine the Petitioner the Government Intervenors' attorney's fees in what the hearing officer agrees is "unprecedented" action by the Commission.

The rules and regulations of the Commission also adopt the Tennessee Rules of Civil Procedure for discovery matters, but the adoption of these rules is based on the authority found in the UAPA, and not Title 65 (the Commission's enacting statute). The Commission does not have any more power over discovery disputes than any other agency governed by the UAPA.

1220-01-02-.11 DISCOVERY.

> (1) Any party to a contested case may petition for discovery. In any case where discovery is sought, no discovery shall be undertaken until a discovery schedule is set in accordance with these rules. **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.** When such attempts have failed or where the complexity of the case is such that informal discovery is not practicable, discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure.
> . . .
>
> Authority: T.C.A. §§ 4-5-311 [adopting the Tennessee Rules of Civil Procedure in UAPA cases] and 65-2-102 [Commission's general power to promulgate rules].

These "unprecedented" sanctions are demanded because emails to and from EA Solar, not the Petitioner, were deleted pursuant to EA Solar's email retention policy. The hearing officer did not find that Petitioner, or EA Solar, violated one of the Commission's rules, statutes, or orders, but because the Petitioner "should have known" to stop EA Solar. Not only is EA Solar not a party to these proceedings, there is nothing in the Commission's rules, statutes, orders

of this case, or even discovery schedules that would indicate to the Petitioner that these emails would be useful, much less required.

The applicable rules state that "[p]arties are encouraged where practicable to attempt to achieve any necessary discovery informally. . ." not that all third-party emails must be retained in perpetuity. The Government Intervenors feel that this email retention policy should bring down the full wrath of the Commission upon the Petitioner. These sanctions are solely based on a duty that the Petitioner "should have known" and for actions of a party definitely not under the Commission's jurisdiction. Once again, the Government Intervenors are drawing the Commission outside of its rules and statutes so that this hearing would be overturned by a trial court on a UAPA appeal.

These "unprecedented" sanctions are also way beyond the authority granted to the Commission, or any other State agency, under the UAPA. If the hearing officer's reasoning were true, every single agency of the State would have the ability to impose unlimited monetary sanctions for attorney's fees, payable to any party, whether a part of the State government or not. In reality, the UAPA has a simple procedure for resolving discovery disputes: refer the matter to the courts.

> In case of disobedience to . . . any lawful agency requirement for information . . . 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.

The hearing officer is also incorrect to allow 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.

IV. Actions for Declaratory Rulings by the Commission

In a declaratory order action, the petitioner states a hypothetical set of facts for the commission to review. The commission's ruling is binding between the commission and the petitioner, but only to the extent of the hypothetical facts stated. The Declaratory Order statute is set out, in full, below:

> On the petition of any interested person, the commission may issue a declaratory ruling **with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it** or with respect to the meaning and scope of any order of the commission. A declaratory ruling, if issued after argument and stated to be binding, is binding between the commission and the petitioner on the state of facts alleged in the petition, unless it is altered or set aside by a court in a proper proceeding. Such rulings are subject to review in the chancery court of Davidson County in the manner provided in this chapter for the review of decisions in contested cases. The commission shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition

Tenn. Code Ann. § 65-2-104

Declaratory Orders are also governed by the UAPA:

> (a) **Any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute**, rule or order within the primary jurisdiction of the agency. The agency shall:
>
> (1) Convene a contested case hearing pursuant to this chapter and issue a declaratory order, which shall be subject to review in the chancery court of

Davidson County, unless otherwise specifically provided by statute, in the manner provided for the review of decisions in contested cases; or

(2) Refuse to issue a declaratory order, in which event the person petitioning the agency for a declaratory order may apply for a declaratory judgment as provided in § 4-5-225.

(b) A declaratory order shall be binding between the agency and parties on the state of facts alleged in the petition unless it is altered or set aside by the agency or a court in a proper proceeding.

(c) If an agency has not set a petition for a declaratory order for a contested case hearing within sixty (60) days after receipt of the petition, the agency shall be deemed to have denied the petition and to have refused to issue a declaratory order.

(d) Each agency shall prescribe by rule the form of such petitions and the procedure for their submission, consideration and disposition.

Tenn. Code Ann. § 4-5-223

Declaratory Orders are also governed by rules and regulations prescribed by the Commission, which are set forth in full below:

1220-01-02-.05 DECLARATORY ORDERS.

(1) Pursuant to T.C.A. §§ 4-5-223 and 65-2-104, **any affected person may petition the Commission for a declaratory order as to the validity or applicability of a statute**, rule or order within the primary jurisdiction of the Commission.

(2) The Commission does not have jurisdiction to determine the constitutionality of a statute on its face, and any petition seeking such a declaration shall be denied. The Commission may grant petitions to determine questions as to the constitutional application of a statute to specific circumstances, or as to the constitutionality of a rule promulgated, or order issued, by the Commission.

(3) Petitions for declaratory orders shall be filed in the same form and manner as other petitions, as specified in these rules. **Any such petition shall state the factual circumstances warranting a declaration by the Commission; the specific statute, rule or order as to which a declaration is sought; how the application of that statute, rule or order, affects or threatens to affect the petitioner; and a statement of the declaration requested.**

(4) The Commission may allow persons other than the petitioner to file statements as to whether the Commission should commence a contested case, or refuse to issue a declaratory order, as provided in T.C.A. § 4-5-223. Any such statements shall be served on all parties.

The Petitioner duly followed the rules prescribed by the Commission and set forth the factual circumstances the Petitioner desired the Commission to interpret. The Petition itself is approximately 374 pages and includes the total generating capacity, total storage capacity, the approved site plan for the facility, and requirements for potential members with maps showing how the Petitioner plans to run the power supply to neighboring businesses (as potential members) without involving the public right of way or need to condemn property.

V. The Government Intervenors' Legal Rights Will Not be Affected and Have No Right to Intervene

Any person that may be affected by a statute can petition the Commission for a determination as to the statute's applicability, but the threshold for intervening in a case is more stringent. The Commission may only permit parties to intervene if the proposed intervenor proves that "the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding."

Intervention into a contested case before the Commission is governed by the Commission's statutes and the UAPA generally. Importantly though, **permission to intervene is always at the discretion of the Commission**.

> [The UAPA] provisions are designed to strike a balance between public participation in an administrative proceeding and the rights of the parties. The rights of the parties counterbalances the drive to let all interested persons participate**. Accordingly, intervention in administrative proceedings is not of right, and administrative agencies have substantial discretion whether to grant or deny intervention.**

Wood v. Metro. Nashville & Davidson County Gov't, 196 S.W.3d 152, 159 (Tenn. App. 2005) (internal citations omitted).

Applicable UAPA intervention provisions:

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

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

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

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

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

(c) If a petitioner qualifies for intervention, the administrative judge or hearing officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

(2) Limiting the intervenor's use of discovery, cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(3) Requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery and other participation in the proceedings.

(d) The administrative judge, hearing officer or agency, at least twenty-four (24) hours before the hearing, shall render an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The administrative judge, hearing officer or agency may modify the order at any time, stating the reasons for the modification. The administrative judge, hearing officer or agency shall promptly give notice of an order granting, denying or modifying intervention to the petitioner for intervention and to all parties.

Tenn. Code Ann. § 4-5-310

Applicable Commission provisions:

All persons having a right under the provisions of the laws applicable to the commission to appear and be heard in contested cases as defined in this chapter shall be deemed parties to such proceedings for the purposes of this chapter. In

> addition, the commission **may** upon motion allow any interested person to intervene and become a party to any contested case.

Tenn. Code Ann. § 65-2-107

Applicable Commission Rules on Intervention:

> 1220-01-02-.08 INTERVENTION.
>
> (1) Petitions for intervention shall be granted in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-2-107.
>
> (2) A petition for intervention shall **set forth with particularity those facts that demonstrate that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be determined in the proceeding** or that the petitioner qualifies as an intervenor under any provision of law. Intervention may be denied or delayed for failure to provide such specific facts.
>
> (3) A petition for intervention shall be filed at least seven (7) days prior to the date of the contested case hearing.

As stated above, the Commission cannot affect any legal rights of a party under which it does not have jurisdiction. Local municipalities and their utilities are controlled by their own statutes, and are not subject to the Commission's jurisdiction. Therefore, they have no right to intervene.

CONCLUSION

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

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 either U.S. Mail, postage prepaid, or email to the following this 20th day of January, 2023.

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EXHIBIT A

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

April 10, 2017

Opinion No. 17-25

Sale of Electricity by a Solar Electricity Generating Facility

Question 1

Is a solar electricity generating facility that provides power directly and exclusively to owners and/or tenants located on the same or adjacent premises "affected by and dedicated to the public use," such that the facility would be prohibited from selling the power to those owners and/or tenants under Tenn. Code Ann. § 65-34-103?

Opinion 1

A solar electricity generating facility that comes within the statutory definition of "public electric system" is prohibited from selling power in certain geographical territories. Tenn. Code Ann. § 65-34-102(4), § 65-34-102(5), and § 65-34-103. The question assumes that a solar generating facility meets all of the Tenn. Code Ann. § 65-34-102(5) definitional elements of a "public electric system" save only the element that its property be "affected by and dedicated to public use." Whether its property is "affected by and dedicated to public use" will depend on a variety of factors, specific to each case. The fact that it provides power "directly and exclusively to owners and/or tenants located on the same or adjacent premises" is just one of many factors to be considered but is not alone determinative of whether or not its property is affected by and dedicated to public use.

Question 2

Is the owner of the solar facility described in the previous question a "public utility" as defined in Tenn. Code Ann. § 65-4-101(6)?

Opinion 2

If the owner of a solar electricity generating facility is a public electric system as defined in Tenn. Code Ann. § 65-34-102(5), it would likewise be a public utility as defined in Tenn. Code Ann. § 65-4-101(6)(A) unless it were to come within one of the many statutory exceptions detailed in Tenn. Code Ann. § 65-4-101(6)(A)(i) through (B)(ii).

ANALYSIS

In 1989 the Tennessee Legislature enacted a statutory scheme[1] entitled the "Geographic Territories of Electric Utility Systems." Tenn. Code Ann. §§ 65-34-101 through 108. That legislation was designed to prevent duplication of electric system facilities because the Legislature found that such duplication results in excessive consumer costs and environmental and aesthetic problems. Tenn. Code Ann. § 65-34-101. To avoid duplication of electric system facilities and to protect consumer investment in those facilities, the Legislature deemed it in the public interest to keep in place geographic territories it had established in 1968 for electric utilities and to limit "utilities that are not consumer owned" from expanding "service into areas already served by consumer-owned municipal and cooperative electric system." Tenn. Code Ann. § 65-34-101.

To that end, the "Geographic Territories of Electric Utility Systems" statutory scheme prohibits a "non-consumer owned electric system" from constructing, acquiring, and maintaining facilities and equipment for the "distribution or sale of electricity outside its current geographic territory," and from providing, "by sale or otherwise, electricity to any parcel of land located outside its current geographic territory." Tenn. Code Ann. § 65-34-103. It also prohibits municipalities from expanding the territories of non-consumer owned electric systems. Tenn. Code Ann. § 65-34-107(b).

If a solar electricity generating facility is a "non-consumer owned electric system" these statutory prohibitions would apply to it. But even if it does meet the definition of a non-consumer owned electric system (i.e., even if it is a public electric system), it may still enter into an agreement with another public electric system serving an adjacent geographic territory to modify the territories and transfer the right to provide service from one to another. Tenn. Code Ann. § 65-34-108.

A "non-consumer owned electric system" is a "public electric system" (other than a municipal electric system or a community service cooperative). Tenn. Code Ann. § 65-34-102(4). A "public electric system" is any entity or individual that owns, operates, manages, or controls any electric power system, plant, or equipment in Tennessee "affected by and dedicated to public use." Tenn. Code Ann. § 65-34-102(5).

Question 1 assumes that a solar generating facility meets all the definitional elements of a "public electric system" save only the element that its property be "affected by and dedicated to public use."[2] The phrase "affected by and dedicated to public use" is legal shorthand for the concept that "[a] distinguishing characteristic of a public utility is a devotion of private property by the owner to service useful to the public, which has a right to demand such service so long as it is continued with reasonable efficiency under proper charges." 73B C.J.S. *Public Utilities* § 1 (2016).

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[1] The Tennessee Court of Appeals has referred to this statutory scheme as a "labyrinth," and one that "leave[s] a large void" in some respects. *Electric Power Bd. v. Middle Tennessee Electric Membership Corp*., 841 S.W.2d 321, 323, 324 (Tenn. Ct. App. 1992).

[2] We assume that the solar electricity generating facility at issue is not a community service cooperative (as defined in Tenn. Code Ann. § 65-25-102(4)) or a municipal electric system within the meaning of Tenn. Code Ann. § 65-34-102(3).

Whether an entity should be deemed to have dedicated its property to public use is a question that turns on the specific facts of each particular case. Just because its services are available to the public does not necessarily make the service provider a public utility. Similarly, an entity that sells all its product or services under contract to public utilities (which in turn sell that product to consumers) is not by that fact alone a public utility. On the other hand, the number of customers is not controlling; a facility is not rendered non-public just because a limited number of customers may have occasion to buy its services. And an entity that does other business in addition to providing a public service may nevertheless be a public utility subject to regulations. *See* cases cited in 73B C.J.S. Public Utilities § 2 (2016).

The ultimate question is whether the utility conducts its business in a way that makes it a public concern. Put in a more concrete way, the question is whether the utility holds itself out (expressly or implicitly) as engaged in supplying its product or services to the public in general or to a limited portion of the public, as opposed to holding itself out as serving or prepared to serve only particular individuals. To answer this question, courts will consider the totality of the particular circumstances, including how the company actually conducts business, what the company's articles of incorporation and bylaws provide for, what its stated purpose is, whether it is providing a good or service in which the general public has an interest, whether it accepts substantially all requests for its services, how its service contracts are structured, and whether it is in actual or potential competition with other entities that are public utilities. *See* cases cited in 73B C.J.S. Public Utilities § 2 (2016). *See also Memphis Natural Gas Co. v. McCanless*, 194 S.W.2d 476, 480 (1946) (charter conclusively authorized gas company to do business as a public utility).

In sum, whether the property of any particular solar electricity generating facility is "affected by and dedicated to public use" will depend on a variety of factors, specific to each case. The fact that it provides power "directly and exclusively to owners and/or tenants located on the same or adjacent premises" is just one of many factors to be considered but is not alone determinative of whether or not its property is affected by and dedicated to public use.

The "public use" element in the statutory definition of "public electric system" in Tenn. Code Ann. §§ 65-34-102(5) is common in—indeed integral to—most statutory definitions of "public utility."[3] Not surprisingly, "public use" appears as a key element in the statutory definition of "public utility" in Tenn. Code Ann. § 65-4-101(6)(A). The §101(6)(A) definition of "public utility" encompasses providers of other services in addition to providers of electric services, but is otherwise essentially the same as the definition of "public electric system" in Tenn. Code Ann. § 65-34-102(5). A "public utility" includes all individuals and entities that

> own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, *affected by and dedicated to the public use . . . .*

Tenn. Code Ann. § 65-4-101(6)(A) (emphasis added).

[3] In fact, the Tennessee Supreme Court has found it "abundantly clear" that "the terms *'public use'* and *'public utility'* are synonyms." *Memphis Natural Gas Co. v. McCanless*, 194 S.W.2d 476, 479-80 (Tenn. 1946)(emphasis in original).

Thus, if the owner of a solar electricity generating facility is a public electric system as defined in Tenn. Code Ann. § 65-34-102(5), it would likewise be a public utility as defined in Tenn. Code Ann. § 65-4-101(6)(A) unless it were to come within one of the many statutory exceptions detailed in Tenn. Code Ann. § 65-4-101(6)(A)(i) through (B)(ii).

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

Requested by:

The Honorable Gerald McCormick
State Representative
206A War Memorial Building
Nashville, Tennessee 37243

EXHIBIT B

BEFORE THE TENNESSEE REGULATORY AUTHORITY AT

NASHVILLE, TENNESSEE

May 1, 2014

IN RE:	)	
	)	
SHOW CAUSE PROCEEDING AGAINST	)	**DOCKET NO.**
TENNESSEE WASTEWATER SYSTEMS, INC.	)	**14-00041**
FOR MATERIAL NON-COMPLIANCE AND/OR	)	
VIOLATIONS OF STATE LAW AND/OR TENN.	)	
R. & REGS. §§ 1220-04-13, *et. seq.*	)	

INITIAL ORDER DENYING CONSUMER ADVOCATE'S PETITION TO INTERVENE

This matter is before the Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") upon a *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of the Tennessee Attorney General ("Consumer Advocate") on April 22, 2014. On April 24, 2014, the parties to the docket, the Tennessee Regulatory Authority Staff designated as a Party ("Party Staff")[1] and the Respondent Utility, Tennessee Wastewater Systems, Inc. ("TWSI" or "Respondent"), each filed separate Objections to the *Petition to Intervene* in the docket file.[2] Also on April 24, 2014, the Consumer Advocate filed a Reply to the Objection of the Party Staff.[3] Oral arguments on the *Petition to Intervene* were presented before the Hearing Officer during a Status Conference held on April 24, 2014, which had been scheduled and noticed on April 16, 2014.

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[1] In accordance with TRA Rule 1220-1-2-.21(1), as to show cause proceedings, staff members designated by the Authority and represented by counsel employed by the Authority *shall* participate as a party.

[2] Party Staff and TWSI each filed separate responses, both titled *Objection to the Intervention of the Consumer Advocate and Protection Division,* opposing the Consumer Advocate's request to intervene in the proceedings.

[3] *Consumer Advocate's Reply to the Party Staff's Objection to the Intervention of the Consumer Advocate and Protection Division* (April 24, 2014).

BACKGROUND

During the regularly scheduled Authority Conference held on January 13, 2014, considering the entire record in Docket No. 13-00017, which included the hearing held on November 25, 2013, the Authority found that the evidence was sufficient to conclude that TWSI should be required to appear and show cause why the Authority should not proceed to take action against TWSI for the actions and omissions alleged against it in the Amended Petition (i.e., Complaint) filed by Emerson Properties, LLC ("Emerson"), on March 1, 2013.[4] Subsequently, during the regularly scheduled Authority Conference on April 14, 2014, the Authority opened the instant docket for the purpose of conducting a show cause proceeding in accordance with Tenn. Code Ann. § 65-2-106 and Tenn. R & Regs. 1220-04-13-.09(4), and further moved that the evidentiary record assembled in Docket No. 13-00017 be made part of the record in the show cause docket. Finally, the Authority appointed the Hearing Officer to expeditiously administer all preliminary matters and promptly present this proceeding for hearing no later than June 16, 2014.[5]

DOCKET FILINGS

Consumer Advocate's Petition to Intervene

In its *Petition to Intervene*, the Consumer Advocate states that, pursuant to Tenn. Code Ann. § 65-4-118, it seeks to intervene in this show cause proceeding on behalf of the public interest.[6] Specifically, the Consumer Advocate asserts that its request should be granted because the issues to be considered in this docket involve the TRA's procedures concerning Certificates of Public Convenience and Necessity ("CCNs") and could result in the revocation of TWSI's

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[4] *See Order Initiating Show Cause Proceeding Against Tennessee Wastewater Systems, Inc.* (April 14, 2014) (entered in Docket No. 13-00017 on March 25, 2014).
[5] *See Amended Order Initiating Show Cause Proceeding Against Tennessee Wastewater Systems, Inc.* (April 14, 2014) (entered in Docket No. 13-00017 on April 24, 2014).
[6] *Petition to Intervene,* p. 1 (April 22, 2014).

CCN to provide service to a subdivision located in Campbell County, Tennessee, known as The Villages at Norris Lake ("The Villages"), as well as, the imposition of civil penalties and fines on TWSI for violation of state law and various provisions of the TRA's wastewater rules. In addition, the Consumer Advocate noted that its intervention in Docket No. 13-00017 had been limited, and further expressed its desire to avoid any similar limitations to its participation in the show cause docket. For these reasons, the Consumer Advocate contends that this proceeding may affect ratepayers in the future and, therefore, only by participating as a party can it protect the interests of consumers.[7]

Party Staff's Objections to Intervention

In its Objection, the Party Staff asserts that the Consumer Advocate's request to intervene should be denied. First, Party Staff notes that Docket No. 13-00017 involved a dispute between Emerson and TWSI concerning whether or not TWSI should be allowed to retain its CCN to provide service to The Villages.[8] In addition, Party Staff points out that neither TWSI, nor any other utility, currently provides wastewater service to The Villages.[9] Party Staff further asserts that the Consumer Advocate's participation in Docket No. 13-00017 does not establish a basis for its request to intervene in this enforcement action. Next, Party Staff states that the Authority panel specifically ordered the Hearing Officer to expedite this proceeding and set a target hearing date of June 16, 2014, and that the parties have committed between themselves to a procedural

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[7] *Id.* at 2-3.

[8] On January 8, 2007, the Authority granted TWSI's petition to amend its CCN to include The Villages in Docket No. 06-00277. Subsequently, Emerson purchased the property and assets of The Villages through bankruptcy proceedings were instituted by The Villages' former owner/developer in the United States Bankruptcy Court for the Middle District of Florida. *See Order Requiring Tennessee Wastewater Systems, Inc. to Appear and Show Cause Why the TRA Should Not Take Action to Terminate, Amend, or Revoke It's CCN to Provide Wastewater Service to the Portion of Campbell Co., Tennessee, known as The Villages at Norris Lake, and to Impose Civil Penalties and Seek Additional Relief Against It for Its Material Non-Compliance and/or Violations of State Law and Tenn. R. & Regs. §§ 1220-04-13, et. seq.* (April 24, 2014).

[9] Party Staff's *Objection to the Intervention of the Consumer Advocate and Protection Division,* p. 1, ¶¶ 1-2 (April 24, 2014).

schedule that complies with that directive. Party Staff further states that the Consumer Advocate's *Petition to Intervene* provides no assurances that their intervention will not delay or impair the timeline set by the panel.[10]

Finally, Party Staff states that this docket is an enforcement action initiated by the Authority against TWSI for violations of law.[11] Under law, only the Authority and respondent utility are deemed parties to Show Cause Actions and, while the named respondent must be given opportunity to fully reply to the allegations brought against it, third party intervention is not contemplated.[12] In addition, the Consumer Advocate's originating statute allows it to petition the TRA to intervene, but does not grant it blanket intervention or intervention as of right in this or any other of the TRA's Show Cause dockets.[13] Further, Party Staff contends that the Consumer Advocate has raised general and unspecific concerns about unknown harm to unidentified customers, which is an insufficient basis for intervention.[14] Finally, in the exercise of its plenary authority, the Authority is empowered to issue Show Cause Orders to enforce matters under its jurisdiction and may rely upon counsel employed by the TRA to conduct such actions.[15]

Consumer Advocate's Reply to Party Staff's Objection

In its Reply, the Consumer Advocate asserts that the outcome of this enforcement proceeding will necessarily affect consumers' rights presently and in the future. Further, that the Consumer Advocate not only has authority to intervene to represent the interests of consumers, but also a duty to do so. And, while it does not seek to intervene in every show cause proceeding of the Authority, the interests of consumers are necessarily affected by this proceeding. The

[10] *Id.* at pp. 1-2, ¶¶ 4-5.
[11] *Id.* at p. 2, ¶6.
[12] *Id.* at p. 2, ¶¶ 7-8.
[13] *Id.* at p. 2, ¶ 9.
[14] *Id.* at p. 2, ¶ 10.
[15] *Id.* at p. 2, ¶ 11-13.

Consumer Advocate further claims that this case involves a matter of first impression, which alone constitutes grounds upon which its intervention should be granted.[16]

In addition, the Consumer Advocate contends that it has been granted intervention in other show cause dockets, and that the TRA properly admits such intervention when such dockets affect rates.[17] The Consumer Advocate contends, "the statutes do not preclude other parties if issues in a show cause will affect the public interest or the rights of other persons and entities."[18] Therefore, the fact that this is a show cause enforcement proceeding should not bar the Consumer Advocate's intervention as a party. Further, the Consumer Advocate asserts that its request meets the statutory requirements for intervention, and that the legislature neither preempted its authority nor excused its duty to represent consumer as concerns show cause proceedings before the Authority.[19] Finally, the Consumer Advocate states that it has no intention of delaying the proceedings so long as the public interest is being served, and is eager to see the matter resolved.[20]

TWSI's Objections to Intervention

In its Objection, TWSI joins in the Objection filed by the Party Staff and further asserts that, to preserve its rights to fundamental fairness and procedural due process, the Consumer Advocate's request to intervene should be denied. TWSI contends that, under Tenn. Code Ann. § 65-2-106, the Authority is empowered to bring this show cause action on its own initiative, and that the proceeding rests upon a preliminary investigation made by the Authority. As such, in a civil enforcement proceeding, the TRA issues a Show Cause Order that outlines its case against

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[16] *Consumer Advocate's Reply to the Party Staff's Objection to the Intervention of the Consumer Advocate and Protection Division,* pp. 1-2 (April 24, 2014).
[17] *Id.* at 2.
[18] *Id.* at 3.
[19] *Id.*
[20] *Id.* at 4.

the regulated entity, and, so doing, the agency steps into the role of "prosecutor."[21] By statute and the requirements of due process, the Consumer Advocate has no legal role in the proceeding, and "no legal right to act as a separate prosecutor, taking its own discovery, presenting its own case, and making its own argument for whatever remedies [it] may request."[22] TWSI contends that to allow the Consumer Advocate to intervene and present a separate case against it is inconsistent with Tenn. Code Ann. § 65-2-106 and unfair to TWSI.[23]

In addition, citing the cases of *State v. Brown and Williamson Tobacco Corp.* (Tenn. 2000) and *State v. Siliski* (Tenn. Crim. App. 2006), TWSI asserts that it is well established that third parties have no right to intervention in proceedings brought by the State. Similarly, in this proceeding, the TRA is not litigating the legal interests of third parties in this enforcement proceeding. As such, the TRA is the sole representative of the State's interests and allowing a third party to intervene and act as an additional prosecutor does not serve the "interests of justice" or the "orderly and prompt conduct of the proceedings."[24] Nevertheless, while TWSI opposes the Consumer Advocate's participation as a party, it does not object to the Consumer Advocate's participation as amicus curiae in these proceedings.[25]

STATUS CONFERENCE

On April 24, 2014, oral argument on the *Petition to Intervene* was presented before the Hearing Officer by the Consumer Advocate, Party Staff, and TWSI, during the Status Conference held in the Executive Conference Room in the Offices of the Tennessee Regulatory

[21] TWSI's *Objection to the Intervention of the Consumer Advocate and Protection Division,* p. 1 (April 24, 2014).
[22] *Id.*
[23] *Id.* at 1-2.
[24] *Id.* at 2.
[25] *Id.* at 3.

Authority located at 502 Deaderick Street, 4th Floor, Nashville, Tennessee.[26] The parties were represented as follows:

> **For TRA/Party Staff:**
> **Shiva K. Bozarth, Esq.,** Tennessee Regulatory Authority, 502 Deaderick Street, 4th Floor, Nashville, Tennessee 37243;
>
> **For TWSI:**
> **Henry Walker, Esq., and Pat Moskal, Esq.,** Bradley, Arant, Boult, Cummings, LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203.

Appearances were made by the Consumer Advocate, as represented by Charlena Aumiller, Esq., and Vance Broemel, Esq., and also by C. Mark Troutman, Esq., who appeared via telephone. In addition to the arguments set forth in their various filings, the Hearing Officer notes, in brief, the following additional arguments presented by the Consumer Advocate, Party Staff, and TWSI during the Status Conference:

Consumer Advocate

The Consumer Advocate states that a show cause proceeding is not a criminal case, and disagrees that such proceedings are similar or analogous in any way.[27] As the resolution of this matter involves the possible revocation of TWSI's CCN, the outcome of the proceeding will dictate whether the property owners at The Villages can choose to receive service from a provider of their choice. The Consumer Advocate asserts that is the claim and public interest at issue in this proceeding - that consumers have a right to obtain service from whomever they choose – and that it must be allowed to intervene as a party to protect such interest.[28] In addition, the Consumer Advocate contends that just as its intervention is proper in matters involving rates, its intervention in this case is proper because it involves the implementation of

[26] Public notice of the Status Conference was duly issued on April 15, 2014.
[27] Transcript of Proceedings, p. 4, 13 (April 24, 2014).
[28] Id. at pp. 11-12, 13.

procedures related to CCNs, which is also a matter of public interest.[29] The Consumer Advocate asserts that without its intervention, the interpretation and application of the TRA's statutes and rules concerning CCNs, and in particular the revocation of a CCN, will be determined without its input.[30] Finally, the Consumer Advocate noted that none of dates in the proposed procedural schedule offered by the parties appeared controversial and that it would commit to making every effort to comply with any reasonable schedule.[31]

Party Staff

Party Staff contends that simply asserting the existence of a generalized consumer interest is not alone sufficient for intervention under the statute. Further, Party Staff asserts that the Consumer Advocate has failed to show a basis for its intervention in this proceeding.[32] While it agrees that the instant docket is not a criminal proceeding, a show cause enforcement proceeding is analogous in a variety of ways. Providing further analogy, Party Staff stated that even in a civil court proceeding, third parties without a substantial claim are barred from becoming parties to the litigation.[33] In addition, Party Staff asserted that the outcome of this case is dependent on its particular facts and, therefore, is not likely to have precedential value in future cases.[34]

TWSI

TWSI asserted that while not a criminal proceeding, a show cause is a civil enforcement proceeding and is reasonably analogous as to the role and structure of the TRA in such cases. As such, permitting the Consumer Advocate to intervene and raise separate issues, theories of the

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[29] Id.
[30] Id. at p. 12, 17, 20.
[31] Id. at pp. 14-15.
[32] Id. at pp. 5-6.
[33] Id. at p. 6.
[34] Id. at p. 18.

case, conduct its own discovery, etc., is unfair and violates due process.[35] This is particularly so when one petitioning for intervention has no claim at issue for determination in the proceeding.[36] Opening up intervention in a show cause action on grounds such as that presented by the Consumer Advocate in this case would be detrimental to the agency's administration of its own proceedings and should not be permitted.[37] The grant of party status carries with it the right to present evidence, to cross-examine witnesses, and bring an appeal should the intervenor be dissatisfied with the Authority's decision. Under the circumstances of this case and the reasons for intervention presented by the Consumer Advocate, TWSI contends intervention is improper.[38] TWSI further stated, however, that allowing the Consumer Advocate to file an amicus brief would be appropriate in this case.[39]

FINDINGS & CONCLUSIONS

As Tennessee's public utilities regulatory body, the General Assembly has delegated to the TRA broad powers to exercise its jurisdiction over matters involving public utilities.[40] To that end, the TRA is charged and authorized to ensure that the laws of this State as they relate to its jurisdiction "are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the State are collected."[41] Under Tenn. Code Ann. § 65-2-106, the Authority is empowered and authorized to cite persons under its jurisdiction to appear and show cause why the TRA should not take certain actions that appear justified by its preliminary investigation, as indicated in its Show Cause Order, against those cited respondents:

> The authority is empowered and authorized in the exercise of the powers and jurisdiction conferred upon it by law to issue orders on its own motion citing

[35] Id. at pp. 8-9.
[36] Id. at p. 10.
[37] Id. at p. 21.
[38] Id. at p. 23.
[39] Id. at p. 22.
[40] Tenn. Code Ann. §§ 65-1-104-106 (2004).
[41] Tenn. Code Ann. § 65-1-113 (2004).

> persons under its jurisdiction to appear before it and show cause why the authority should not take such action as the authority shall indicate in its show cause order appears justified by preliminary investigation made by the authority under the powers conferred upon it by law. All such show cause orders shall fully and specifically state the grounds and bases thereof, and the respondents named in the orders shall be given an opportunity to fully reply thereto. Show cause proceedings shall otherwise follow the provisions of this chapter with reference to contested cases, except where otherwise specifically provided.[42]

By statute, the Authority's Show Cause Order must provide the grounds and bases for the TRA's action. Upon issuance of the Show Cause Order, the statute requires only that the respondents named in the orders must be given an opportunity to fully reply, and directs that the proceedings otherwise follow the provisions of Chapter 2 concerning contested cases. Upon determining, after preliminary investigation, that the record contained evidence sufficient to support the allegations of violations of state law and the TRA's rules, the Authority initiated this civil enforcement proceeding against TWSI by issuance of a Show Cause Order. As the named Respondent, TWSI must be given opportunity to fully reply to the TRA's Show Cause Order. Tenn. Code Ann § 65-2-106, however, does not grant a right or otherwise require the Authority to allow anyone other than those named as respondents to participate in the proceeding.

According to Tenn. Code Ann. § 65-2-101(2), "contested case" means a proceeding in which the "legal rights, duties, or privileges of specific parties are determined after a hearing before the [Authority]." A show cause proceeding is considered a contested case because an opportunity for a hearing after reasonable notice must be given before the Authority may determine the rights, duties, or privileges of any named respondent. Further, as concerns participation in contested cases under the provisions of Chapter 2, Tenn. Code Ann. §65-2-107 states, "All persons having a right under the provisions of the laws applicable to the [A]uthority to appear and be heard in contested cases as defined in this chapter shall be deemed parties to

[42] Tenn. Code Ann. § 65-2-106.

such proceedings for the purposes of this chapter. In addition, the authority may upon motion allow any interested person to intervene and become a party to any contested case."[43] Therefore, persons that have a right to appear and be heard, such as respondents named in a Show Cause Order, are deemed parties. The TRA may, however, exercise its discretion to allow any interested persons to intervene and become a party.

TRA Rule 1220-01-02-.08 sets forth the ways in which requests to intervene in contested cases before the Authority are to be made and considered, as follows:

> (1) Petitions for intervention shall be granted in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-2-107.
>
> (2) A petition for intervention shall set forth with particularity those facts that demonstrate that the petitioner's legal rights, duties, privileges, immunities or other legal interests may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law. Intervention may be denied or delayed for failure to provide such specific facts.
>
> (3) A petition for intervention shall be filed at least seven (7) days prior to the date of the contested case hearing.[44]

In addition to its own Rules and statutes, contested case proceedings before the Authority are governed by the provisions of the Uniform Administrative Procedures Act ("UAPA") found at Tenn. Code Ann. § 4-5-101, *et. seq.* As noted in the above Rule, the Authority shall grant petitions to intervene according to the standards provided under the UAPA, Tenn. Code Ann. § 4-5-310, and as provided in the Authority's statutes at Tenn. Code Ann. § 65-2-107, discussed above. Tenn. Code Ann. § 4-5-310 establishes the following criteria for mandatory and permissive or discretionary intervention, as follows:

> (a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:
>
> (1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

[43] Tenn. Code Ann. § 65-2-107.
[44] Tenn. Comp. R. & Regs. 1220-01-02-.08.

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

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

(b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.[45]

In *Wood v. Metropolitan Nashville & Davidson Co. Gov't,* the Tennessee Court of Appeals considered whether the denial of a city resident's request to intervene in administrative enforcement proceedings that had been brought against a solid waste power generation plant for violations of air quality regulations was proper.[46] In considering the procedures and criteria for intervention found in Tenn. Code Ann. § 4-5-310 and the applicable regulations of the Metropolitan Department of Health ("Department"), an administrative agency subject to the UAPA, Judge Koch writing for the Court, stated:

> These [intervention] provisions are designed to strike a balance between public participation in an administrative proceeding and the rights of the parties. The rights of the parties counterbalances the drive to let all interested persons participate. Accordingly, intervention in administrative proceedings is not of right, and administrative agencies have substantial discretion whether to grant or deny intervention.[47]

Further, the Court found that the Department was entrusted with the power to enforce the regulations at issue and, in the absence of proof to the contrary, the Court must presume that the Department was discharging its duties in good faith and in the manner prescribed by law. Holding that generalized grievances were not sufficient grounds for intervention, and noting that the resident requesting intervention was given great latitude in presenting his information and

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[45] Tenn. Code Ann. § 4-5-310.
[46] *Wood v. Metro. Nashville & Davidson Cnty. Gov't*, 196 S.W.3d 152 (Tenn. Ct. App. 2005).
[47] *Id.* at 159 (Tenn. Ct. App. 2005) (internal citations omitted); *see also* Tenn. Op. Atty. Gen. No 11-06, *3 (2011).

opinions to the Department during each public step of the proceedings, the Court affirmed the denial of intervention.[48]

In its written filings and oral arguments, the Consumer Advocate asserts that it satisfies the criterion for mandatory intervention in this case. Therefore, the Hearing Officer considers the Consumer Advocate's request to intervene in accordance with the standards for mandatory intervention set forth above in Tenn. Code Ann. § 4-5-310(a), and finds as follows:

Timeliness of Petition

The Authority ordered this show cause docket to be opened on April 14, 2014. On April 16, 2014, the Hearing Officer issued public notice setting a Status Conference with the parties on April 24, 2014. Thereafter, on April 22, 2014, the Consumer Advocate filed its *Petition to Intervene* in the proceedings. Under TRA Rule 1220-01-02-.06(2), any party opposing a motion in a contested case must file and serve a response to the motion within seven (7) days of service of the motion. Within two business days, both Party Staff and TWSI filed Objections in response to the Consumer Advocate's *Petition to Intervene.* Despite the prohibition against filing a Reply to a response to a preliminary motion except upon leave given or the order of the TRA or Hearing Officer, as set forth in TRA Rule 1220-01-02-.06(3), the Consumer Advocate filed its Reply to the Party Staff's Objection on April 24, 2014.

The Hearing Officer permitted the Consumer Advocate to present its request to intervene during the Status Conference. Neither the Consumer Advocate nor either of the parties raised an objection to the Hearing Officer's consideration of the *Petition to Intervene,* or to the presentation of oral argument thereon, during the Status Conference. Under Tenn. Code Ann. § 4-5-310(a)(1) and TRA Rule 1220-01-02-.08(3), to be considered timely, a petition for intervention must be filed at least seven (7) days prior to the date of the contested case hearing.

[48] *Wood v. Metro. Nashville & Davidson Cnty. Gov't*, 196 S.W.3d 152, 159 (Tenn. Ct. App. 2005).

Therefore, as the date for the hearing in this docket exceeds seven days, the Hearing Officer considers the Consumer Advocate's *Petition to Intervene* timely-filed.

Determination of Rights in the Proceeding/Qualification

Under Tenn. Code Ann. 4-5-310(a)(2), a petition to intervene must state facts that demonstrate that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law. In its *Petition to Intervene,* the Consumer Advocate states that, pursuant to Tenn. Code Ann. § 65-4-118, it seeks to intervene in this proceeding on behalf of the public interest.[49] In addition, the Consumer Advocate asserts that the present and future rights of consumers will necessarily be affected by the outcome of the proceeding.[50] Specifically, the Consumer Advocate contends that the Authority's interpretations of its statutes and rules concerning CCNs "will affect not only the present rights of the property owners of The Villages, but it will also affect the rights and interests of all Tennessee consumers" in the future.[51]

Both Tenn. Code Ann. 4-5-310(a)(2) and TRA Rule 1220-01-02-.08(2) require that a petition to intervene state facts, with particularity, demonstrating a legal right or interest held by the petitioner may be determined in the proceeding. Consistent with the statute and the legal authority cited above, both Party Staff and TWSI contend an intervenor must have some actual claim that will be resolved in the proceeding, and that a generalized interest will not suffice. The parties further contend that in this enforcement proceeding, neither the Consumer Advocate nor the property or home owners at The Villages, whom the Consumer Advocate asserts it has a duty

[49] *Petition to Intervene,* p.1 (April 22, 2014).
[50] *Consumer Advocate's Reply to the Party Staff's Objection to the Intervention of the Consumer Advocate and Protection Division* p. 2 (April 24, 2014).
[51] *Id.*

to represent in this matter, have any claims that will be resolved in these proceedings.[52]

Interestingly, the Consumer Advocate admits that, despite its CCN, TWSI has never provided wastewater service to The Villages.[53] In fact, as noted by Party Staff, the evidentiary record in this case shows that, at this time, TWSI has no customers at The Villages. Thus, there are no actual customers of public utility wastewater service to be represented in this proceeding, but, instead, homeowners that may or may not become customers in the future. As such, the Consumer Advocate presents a generalized, rather than specific, interest in the proceedings when it contends that because the issues involve the TRA's implementation of its CCN procedures, and could result in civil penalties and fines and the revocation of TWSI's CCN, the outcome of the case is likely to affect ratepayers in the future.

Tenn. Code Ann. § 65-4-118(b)(1) allows the Consumer Advocate, with the approval of the Attorney General and consistent with the UAPA and the TRA's rules, to intervene and participate as a party and to initiate proceedings before the Authority to represent the interests of Tennessee consumers of public utility services, as follows:

> The consumer advocate division has the duty and authority to represent the interests of Tennessee consumers of public utilities services. The division may, with the approval of the attorney general and reporter, participate or intervene as a party in any matter or proceeding before the authority or any other administrative, legislative or judicial body and initiate such proceeding, in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and the rules of the authority.[54]

While it may provide a general basis for qualification of the Consumer Advocate as an intervenor for the purpose of representing the interests of consumers of public utility services, Tenn. Code Ann. § 65-4-118(b)(1) does not confer an automatic or absolute right upon the Consumer Advocate to participate in this or any other of the Authority's proceedings.

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[52] Transcript of Proceedings, pp. 5-6, 10 (April 24, 2014).
[53] *Petition to Intervene,* p. 2 ¶ 3 (April 22, 2014).
[54] Tenn. Code Ann. § 65-4-118(b)(1).

The Hearing Officer agrees that more than a generalized interest or potential to be affected by the resolution of the proceeding is required to be demonstrated under the mandatory intervention provisions of the UAPA and TRA Rules. In fact, the Hearing Officer can think of no docket or matter than comes before the Authority that might not in some way or other affect consumers of public utility services. Such is the integral work and purpose of the Authority. The Hearing Officer acknowledges that Tenn. Code Ann. § 65-4-118(b)(1) provides a general basis for qualification of the Consumer Advocate as an intervenor for the purpose of representing those interests of consumers of public utility services that may be determined in a proceeding before the TRA. Nevertheless, while the TRA's enforcement and application of its CCN statute and rules may be of interest to consumers generally, and the property owners of The Villages have shown over the course of Docket No. 13-00017 that they are interested in the outcome of this matter, in light of the purpose of these proceedings, the assertion that a legal right, duty, privilege, immunity or other legal interest held by an actual consumer of public wastewater utility service will be determined in this proceeding appears tenuous.

Impairment to Interests of Justice/Conduct of Proceeding

Finally, Tenn. Code Ann. 4-5-310(a)(3) requires that the Hearing Officer grant the petition for intervention only upon determining that "the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention." Therefore, the Hearing Officer must weigh the impact of the proceedings upon the general legal rights and interests presented by the Consumer Advocate against the interests of justice and the need for orderly and prompt proceedings. In considering the interests of justice, it is proper that the Hearing Officer consider the rights of the Respondent to fundamental fairness and due process in

these proceedings.[55]

The Hearing Officer is not aware of any instance in which the Consumer Advocate has been permitted to intervene in an enforcement or show cause proceeding of the TRA over the reasonable objections of the Authority's enforcement counsel and the named respondents. The dockets cited by the Consumer Advocate as precedent for its intervention, namely, Berry's Chapel Utility Docket No. 11-00065 and Atmos Energy Corporation Docket No. 05-00258, are neither persuasive nor binding upon the agency in this instance. First, the Authority did not issue a Show Cause Order in either of those dockets.[56] The proceedings in those dockets are and were preliminary investigations of allegations raised against those respective regulated entities, instituted by the TRA for the purpose of determining whether or not a Show Cause Order should be issued. In addition, both dockets directly involved the setting of consumers' rates, with the latter proceeding evolving into a full-blown rate case proceeding. Finally, no objection to the Consumer Advocate's request to intervene in those proceedings was raised by any party.

The Consumer Advocate noted that its intervention in Docket No. 13-00017 was limited, and that it seeks unrestricted intervention in this docket. It is important to note that, in Docket No. 13-00017, the Hearing Officer granted the intervention that the Consumer Advocate requested in its Petition to Intervene, and, at least initially, the restrictions therein were self-

[55] TWSI's *Objection to the Intervention of the Consumer Advocate and Protection Division,* p. 1-2 (April 24, 2014) ("By statute – and by the requirements of due process – there is only one "show cause" case being brought against TWSI, and that is the case outlined in the agency's "Show Cause" Order. The Advocate has no legal right to act as a separate prosecutor, taking its own discovery, presenting its own case, and making its own argument for whatever remedies the Advocate may request. To allow the Advocate to present a separate case is inconsistent with the T.C.A. § 65-2-106 and unfair to TWSI. TWSI is prepared to oppose the case presented by the TRA Staff, but it is not required to prepare to defend itself against a second case presented by the Advocate . . . To allow a third party to intervene and act as an additional prosecutor does not serve the 'interests of justice' or the 'orderly and prompt conduct of the proceedings.'").

[56] Berry's Chapel Utility Docket No. 11-00065 is an active docket currently pending before the Authority. Atmos Energy Corporation Docket No. 05-00258 was closed by Order of the panel dated December 5, 2007.

imposed.[57] Further, in later amending the Consumer Advocate's intervention so as to allow it to participate in the hearing, due to the late timing of its request to expand its participation, the Hearing Officer properly exercised her discretion under Tenn. Code Ann. § 4-5-310(c) in placing reasonable conditions on such participation.[58] Regardless, the parties in Docket No. 13-00017, including the Consumer Advocate, were given full procedural due process and had opportunity to explore the issues and examine evidence. The record assembled in Docket No. 13-00017 constitutes the agency's preliminary investigation concerning the matters now raised in this enforcement proceeding. Nevertheless, the Consumer Advocate's participation in Docket No. 13-00017 does not form a basis for its intervention in this docket.

This docket is not simply a contested case proceeding; it is a full-on civil enforcement proceeding brought by the agency consistent with its delegated regulatory powers and in accordance with Tenn. Code Ann § 65-2-106. As an enforcement proceeding, the burden is upon TWSI to show why the agency should not take particular action against it for violations of state law and the TRA's Rules.[59] As was aptly noted by the Consumer Advocate in its *Response in Opposition to Motion to Continue Hearing* filed in Docket No. 13-00017, in this enforcement proceeding, TWSI is accountable to the TRA, and not to other third parties, for its actions or lack thereof.[60] Further, the Authority is empowered to conduct this action without undue interference and may rely upon counsel employed by the agency. There has been no allegation, nor is there any reason to believe, that in bringing this action to enforce its statutes and rules, the agency or its designated counsel is not discharging its duties in good faith. Finally, the panel specifically

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[57] Docket No. 13-00017, *Consumer Advocate's Petition to Intervene* (March 15, 2013); *and see* Docket No. 13-00017, *Order Granting Consumer Advocate's Petition to Intervene* (April 2, 2014).
[58] Docket No. 13-00017, *Pre-Hearing Order* (November 20, 2013).
[59] Tenn. Code Ann. 65-2-109(5).
[60] Docket No. 13-00017, *Consumer Advocate's Response in Opposition to Motion to Continue Hearing,* p. 5 (April 9, 2014).

ordered, and was clear in its directive, that the Hearing Officer expedite this proceeding and prepare it for a hearing as soon as possible, but no later than June 16, 2014.

Thus, weighing the impact of the proceedings upon the general rights and interests presented by the Consumer Advocate against the interests of justice, including the rights of the Respondent to fundamental fairness and due process, and the need for orderly and prompt proceedings, the Hearing Officer is unable to find that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention. Furthermore, considering the purpose and specific considerations at issue in this docket, granting this request for intervention appears contrary to the interests of justice and increases the likelihood of disruption in the prompt conduct of these proceedings. In addition, for all the reasons given above, the Hearing Officer also declines to grant discretionary intervention under Tenn. Code Ann. § 4-5-310(b).

In conclusion, the Hearing Officer finds that the *Petition to Intervene* was filed within the time required under Tenn. Code Ann. § 4-5-310 and TRA Rule 1220-01-02-.08(3). Further, although the Hearing Officer agrees that, under Tenn. Code Ann. § 65-4-118, the Consumer Advocate qualifies as an intervenor for the purpose of representing the legal rights and interests of consumers of public utility services. Nevertheless, as there are no consumers of public utility wastewater service at The Villages to be represented, the Consumer Advocate has presented only a generalized interest or reasons for its intervention. Further, the Hearing Officer is unable to find that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing intervention.

Therefore, upon due consideration of the filings made by the Consumer Advocate, Party Staff, and TWSI, and the arguments presented during the Status Conference on April 24, 2014,

all of which has been briefly summarized above, and for all of the reasons stated herein, the Hearing Officer concludes that the Consumer Advocate's request to intervene in this enforcement proceeding against TWSI should be denied. Nevertheless, while not a party to these proceedings, upon TWSI's suggestion and without objection of the Party Staff, the Hearing Officer agrees that the Consumer Advocate may, as an amicus curiae, file a substantive brief(s) in accordance with the deadlines designated for such filings provided in the procedural schedule (issued separately). Further, the Consumer Advocate is afforded opportunity to observe and comment just as are other members of the public, at such times as are appropriate.

IT IS THEREFORE ORDERED THAT:

1) The *Petition to Intervene* filed by the Consumer Advocate and Protection Division of the Office of the Attorney General is denied.

2) While not a party to these proceedings, the Consumer Advocate may file a substantive brief(s) in accordance with the deadlines designated for amicus curiae in the procedural schedule. In addition, the Consumer Advocate shall be afforded the opportunity as any other member of the public to observe and comment, at such times as are appropriate.

3) In accordance with TRA Rule 1220-01-02-.06(6), the Hearing Officer grants permission for interlocutory review of this Order by the presiding panel of the Authority.

Kelly Cashman-Grams

Kelly Cashman-Grams, Hearing Officer