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**VIA ELECTRONIC AND VIA U.S. MAIL**

Ectory Lawless, Esq.  
Tennessee Public Utility Commission  
Andrew Jackson State Office Building  
502 Deaderick Street, 4th Floor  
Nashville, TN 37243-0001

RE: **Jackson Sustainability Cooperative**  
Docket No. 21-00061

Dear Ms. Lawless,

We enclose the original and four copies of the Response of Jackson Energy Authority to Jackson Sustainability Cooperative's Interlocutory Appeal to the Full Public Utility Commission.

Sincerely yours,

Larry L. Cash

LLC/dac

Enclosures

cc: Mark Smith  
Teresa Cobb  
John A. Beam, III  
Henry Walker  
W. Brantley Phillips, Jr.  
Matthew J. Sinback  
Caleb H. Hogan  
Jeremy L. Elrod

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

<b>IN RE:</b>	)	
	)	
<b>PETITION OF JACKSON</b>	)	
<b>SUSTAINABILITY COOPERATIVE</b>	)	
<b>FOR DETERMINATION OF</b>	)	Docket No. 21-00061
<b>EXEMPTION OR, ALTERNATIVELY,</b>	)	
<b>CERTIFICATE OF PUBLIC</b>	)	
<b>CONVENIENCE AND NECESSITY.</b>	)	

**RESPONSE OF JACKSON ENERGY AUTHORITY TO  
JACKSON SUSTAINABILITY COOPERATIVE’S INTERLOCUTORY APPEAL TO  
THE FULL PUBLIC UTILITY COMMISSION**

Comes Jackson Energy Authority (“JEA”), by and through counsel, and responds to the Interlocutory Appeal Brief filed by Jackson Sustainability Cooperative (“JSC”) and avers that the arguments made by JSC should be denied for the reasons set forth herein.

**I. PROCEDURAL HISTORY**

Petitioner Jackson Sustainability Cooperative has filed an Interlocutory Appeal to the full Public Utility Commission, primarily questioning the authority of the Hearing Officer to: (1) impose sanctions and award attorney’s fees for discovery abuses, and to (2) grant the Intervenor’s (including JEA’s) Petitions to Intervene. For the reasons set forth hereinafter, it is clear that the Hearing Officer had the authority to impose sanctions, award attorney’s fees, and to grant the Petition to Intervene filed by JEA and the other Intervenor.

**II. THE HEARING OFFICER AND THE COMMISSION HAVE THE POWER TO IMPOSE SANCTIONS IN A DISCOVERY DISPUTE**

As a threshold matter, Petitioner JSC has chosen not to contest the amount of attorneys’ fees awarded by the Hearing Officer. Instead, Petitioner challenges the Hearing Officer’s authority to impose sanctions, including attorneys’ fees. Thus, Petitioner has waived any argument concerning the reasonableness, necessity, or amount of the attorneys’ fees award.

The crux of Petitioner JSC’s argument is that, in issuing sanctions, the Hearing Officer acted beyond the authority granted to the Commission under the Uniform Administrative Procedures Act (“UAPA”). Petitioner maintains that the UAPA requires the Commission to refer discovery disputes to a court for resolution. [Pet’r Br. at 22-23] (citing T.C.A. § 4-5-311(b)). This argument is incorrect, as Petitioner ignores both the plain language of the statute and the Commission’s adopted rule regarding discovery.

The UAPA, as enacted by the Tennessee legislature, provides, in relevant part, that a hearing officer may “effect discovery ... in accordance with the Tennessee Rules of Civil Procedure.” T.C.A. § 4-5-311(a). The statute then provides “[i]n case of disobedience to ... any lawful agency requirement for information ... the agency *may* apply to the circuit or chancery court ... for an order to compel compliance with ... the furnishing of information.” T.C.A. § 4-5-311(b). The statute uses permissive language; and thus, merely *allows*, but does *not require*, a discovery dispute to be referred to a court.

Alternatively, the Commission may handle a discovery dispute pursuant to rules it has adopted. T.C.A. § 4-5-311(c) provides that the Commission “may promulgate rules to further prevent abuse and oppression in discovery” and T.C.A. § 65-2-102 further empowers the Commission to adopt and enforce rules governing practice and procedure in proceedings before the Commission.

Utilizing this authority, the Commission adopted a rule governing discovery. *See* Tenn. Comp. R. & Regs. 1220-01-02-.11 (citing both T.C.A. §§ 4-5-311 and 65-2-102 as authority for the rule). The Commission’s discovery rule provides, in relevant part:

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 ... discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure.**

*Id.* (emphasis added). The rule plainly provides that the process of discovery before the Commission is governed by the Tennessee Rules of Civil Procedure.<sup>1</sup> Thus, in the event of a discovery dispute, the Commission *must* refer to, and apply as appropriate, the discovery provisions in the Tennessee Rules of Civil Procedure.<sup>2</sup>

Rule 37 of the Tennessee Rules of Civil Procedure, which governs discovery, addresses the imposition of sanction. Rule 37 expressly provides for an award of “reasonable expenses, including attorneys’ fees, caused by the failure [to produce documents],” unless an award of expenses would be unjust. Tenn. R. Civ. P. 37.02. Here, considering all the relevant facts and circumstances, the Hearing Officer made a fair, well-reasoned determination that sanctions were appropriate given JSC’s failure to preserve and produce emails. [Order Granting Motions to Compel at 10-15].

Accordingly, because the Commission has expressly adopted the Tennessee Rules of Civil Procedure governing discovery, and sanctions were imposed pursuant to Rule 37, the Hearing Officer acted well within her authority. The award of attorneys’ fees should be affirmed by the Commission.

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<sup>1</sup> The Commission authorized the application of *all* Tennessee Rules of Civil Procedure pertaining to discovery. The Commission did not cherry-pick certain discovery provisions that it deemed beneficial, and forbid application of the others. Instead, the Commission demanded that discovery be effectuated in accordance with the Tennessee Rules of Civil Procedure in their entirety.

<sup>2</sup> The Commissions discovery rule further provides, “[t]he hearing officer shall decide any motion relating to discovery pursuant to the Uniform Administrative Procedures Act (UAPA) and the rules promulgated thereunder or the TRCP.” Tenn. Comp. R. & Regs. 1220-01-02-.11(5). Thus, even if the Commission is not *required* to resolve discovery issues under the Tennessee Rules of Civil Procedure, it is certainly authorized to.

**III. JEA PROPERLY AND TIMELY FILED ITS PETITION TO INTERVENE, AND THE PETITION WAS APPROPRIATELY GRANTED**

In its second argument, JSC states the issue as follows:

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?

[Pet'r Br. at 1].

Initially, it must be noted that the issue as phrased is legally incorrect. Neither JEA, Tennessee Electric Cooperative Association, nor Tennessee Municipal Electric Power Association are subdivisions of state government. JEA is an energy authority created by a private act of the Tennessee General Assembly. JEA is headquartered in Jackson, Tennessee and provides various utility and other services. JEA provides retail electric service throughout the City of Jackson, Tennessee. JEA purchases electric power from the Tennessee Valley Authority ("TVA") under a wholesale power contract with TVA and resells that power within the City of Jackson, Tennessee. JEA has the exclusive right to provide retail electric service within the City of Jackson pursuant to provisions of Tennessee law.

Furthermore, a review of the docket clearly illustrates that this issue is neither timely nor supported by the law.

On June 10, 2021, a Notice of Filing Deadline for Petitions to Intervene was entered on the docket. The Notice required that any party wishing to intervene must file its Petition to Intervene by June 25, 2021. It was also noted that any such Petition must comply with T.C.A. §§ 4-5-310 and 65-2-107. Accordingly, on June 25, 2021, JEA filed its Petition to Intervene, and complied with the requirements of the prior Notice.

On August 20, 2021, almost two months after JEA filed its Petition to Intervene, the Hearing Officer entered an order granting JEA's Petition to Intervene ("Order Granting JEA's Petition to Intervene"). Significantly, during that almost two-month period, JSC never filed any Response or objection to the Petition to Intervene. During that time, the parties did agree to a Proposed Procedural Schedule which was submitted by TVA counsel Henry Walker to the Honorable Earl Taylor by letter dated August 20, 2021. Clearly, JSC had no intention or basis for objecting to the Petition to Intervene or it would have done so prior to proposing a Procedural Schedule.

Incredibly, Petitioner JSC waited almost a year and a half before raising its first objection to the JEA Petition to Intervene. JEA avers that such delay in and of itself should prohibit any further review.

Even absent the unexcused delay in filing its Response or objection to JEA's Petition to Intervene, a review of the Order granting the Motion confirms that the granting of JEA's Motion is appropriate.

T.C.A. § 4-5-310 establishes the criteria for granting petitions to intervene. Under the statute, the 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 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 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.

*Id.* (emphasis added).

In her Order granting the Motion, the Hearing Officer stated that because JSC's Petition "seeks a determination whether it is public utility, and its intent is to ultimately provide electric power in JEA's service area, JSC providing supplemental electric service to customers in JEA's service area could have a direct impact on JEA's ability to serve those customers, therefore, the Hearing Officer finds that there is a sufficient factual basis to find that the legal rights or interests held by JEA may be determined in this proceeding. [Order Granting JEA's Petition to Intervene at 2]. Further, the Hearing Officer "concludes that the legal rights, duties, privileges and immunities or other legal interests of JEA may be determined in this proceeding. The Hearing Officer finds that JEA's Petition to Intervene was timely filed and should not impair the interests of justice or the orderly prompt conduct of the proceedings. For these reasons, the Hearing Officer concludes JEA's Petition to Intervene should be granted." [Order Granting JEA's Petition to Intervene at 3]. JSC never filed any appeal or objection to the Order until filing its recent Motion for Interlocutory Appeal.

In its pending Motion, JSC confirms that the grant of a Petition to Intervene is discretionary with the Hearing Officer, citing *Metro Nashville v. Wood*, 196 S.W.3d 152, 159 (Tenn. Ct. App. 2005). Metro confirms that:

- (1) "[A]dministrative agencies have **substantial discretion** whether to grant or deny intervention."
- (2) "In the absence of proof to the contrary, we **must presume** that the [agency] was **discharging its duties in good faith, and in the manner prescribed by law.**"

The Hearing Officer has already determined that the required showings under T.C.A. § 4-5-310 have been met, and as such, that the grant of JEA's Petition to Intervene should not be overturned. JSC has presented no evidence that the Hearing Officer did not discharge her duties in

good faith, and in the manner prescribed by law, so the grant of the Petition to Intervene must be upheld.

#### **IV. CONCLUSION**

The Hearing Officer's decisions to impose sanctions, award attorneys' fees, and grant JEA's Petition to Intervene should be upheld. JSC's discovery abuses were articulated by the Hearing Officer in support of her decision, and, as set forth above, the authority to impose sanctions and grant an award of attorneys' fees is clearly set forth in the applicable statutes and regulations. Additionally, the Hearing Officer has substantial discretion to determine whether a Petition to Intervene should be granted, and the basis for the grant of JEA's Petition to Intervene is clear.

Respectfully submitted,

**MILLER & MARTIN PLLC**

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## **CERTIFICATE OF SERVICE**

I hereby certify that on February 2, 2023, a copy of the foregoing document was served on the following persons via email, hand delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

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