

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

**THE APPLICATION OF JACKSON
SUSTAINABLE COOPERATIVE FOR
A DETERMINATION OF
EXEMPTION AND IN THE
ALTERNATIVE, FOR A
CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY**

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Docket No. 21-00061

BRIEF OF THE TENNESSEE VALLEY AUTHORITY

Pursuant to the “Order Granting Motion for Interlocutory Review” issued by Hearing Officer Monica Smith-Ashford on January 5, 2023, the Tennessee Valley Authority (“TVA”) submits the following response to the brief filed on January 20, 2023, by Jackson Sustainability Cooperative (“JSC”).

JSC has appealed three decisions made by the Hearing Officer during the course of these proceedings. Those decisions are:

1. The Hearing Officer’s order issued August 20, 2021, granting TVA’s unopposed petition to intervene;¹
2. The Hearing Officer’s order issued September 8, 2021, adopting a procedural schedule that was proposed by agreement of the parties; and
3. The Hearing Officer’s order of November 14, 2022, granting motions to compel filed by Jackson Energy Authority (“JEA”) and the Tennessee Electric Cooperative Association (“TECA”) and imposing sanctions on JSC for abuse of the discovery process.

TVA urges the Commission to affirm all three orders, each of which is addressed below.

¹ JSC also appeals the Hearing Officer’s orders granting petitions to intervene filed by the Tennessee Municipal Electric Power Association, the Jackson Energy Authority and the Tennessee Electric Cooperative Association. This brief addresses only the order granting TVA’s petition to intervene.

1. TVA's Petition to Intervene

TVA filed a petition to intervene on August 13, 2021, explaining that TVA is a wholesale provider of electricity to JEA and that "JSC's business model appears intended to reduce the revenue of JEA and may result in the shifting of the TVA's wholesale costs to other wholesale customers." *Petition at 3*. JSC did not oppose TVA's petition which was granted on August 20, 2021. The Hearing Officer found that JSC's proposal "could have a direct impact on the TVA distributors...and, as a result, directly and negatively impact TVA." *Order at 3*. "Therefore," the Hearing Officer concluded, "the legal rights or interests held by TVA may be determined in this proceeding." *Id.*

Having failed to object to TVA's petition when it was filed, JSC has waived its right to appeal the Hearing Officer's decision granting the petition. "One cardinal principle of appellate practice is that a party who fails to raise an issue in the trial court waives its right to raise that issue on appeal." *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn., 2004). "It is axiomatic that parties will not be permitted to raise issue on appeal that they did not first raise in the trial court." *Powell v. Community Health Systems, Inc.*, 312 S.W.3d 496, 511 (Tenn., 2010). JSC's offers no explanation for its failure to object to TVA's petition at the time it was filed and no reason why the Commission should not now hold that JSC waived its right to raise this issue on appeal.

Even if JSC had not waived its right to appeal, the Hearing Officer's decision to grant TVA's petition to intervene was obviously correct. JSC states that TVA should not have been allowed to intervene because TVA is not a public utility under the Commission's jurisdiction. Interlocutory Appeal Brief to the Full Public Utility Commission ("JSC Brief") at 10, 19, 26 and 28. JSC apparently believes that since the Commission does not regulate TVA, the federal agency has no "legal interest" in the outcome of any Commission proceeding. *Id.*

While TVA itself is not regulated by the Commission, no federal law would preempt a decision by the Commission allowing JSC to sell electricity in competition with JEA. Such a decision, would, of course, impact TVA's wholesale revenue and, as the Hearing Office found, would "directly and negatively impact

TVA.” *Order at 3*. Therefore, TVA has a “legal interest” in this case and a right to intervene pursuant to T.C.A. 54-5-310 (a)(2).²

2. The Procedural Schedule

On August 20, 2021, counsel for TVA filed with the Hearing Officer a proposed procedural schedule that had been agreed to by all parties following “give-and-take negotiations from both sides.” “Proposal Procedural Schedule,” filed Aug. 20, 2021, cover letter. On September 8, 2021, the Hearing Officer issued an order adopting the proposed schedule “[b]ased on the agreements made by the parties regarding the procedural schedule.” *Order at 1*. The schedule provided, first, for the issuance of discovery by the intervenors to JSC and then, after the filing of testimony by the intervenors, the issuance of discovery by JSC to the intervenors.

Even though JSC agreed to the schedule, JSC now appeals the Hearing Officer’s decision because it provides for discovery first by one side and then the other instead of simultaneous discovery. JSC Brief at 23-24. Unlike a court, the Commission requires all witnesses to pre-file written testimony. Discovery questions are then asked based on the pre-filed testimony. First, the petitioner pre-files testimony and responds to discovery questions from the intervenors. Next, the intervenors file their testimony and then respond to discovery from the petitioner. This process allows each side to read the other’s pre-filed testimony before serving discovery questions. It is a practical and efficient approach that the Commission has followed for years. JSC agreed to the procedural schedule and, as discussed above in Section 1, JSC has waived its right to appeal that issue. Moreover, JSC does not explain why this schedule is unfair to JSC or deprives JSC of any procedural rights.

² The Commission has repeatedly held that any entity that may suffer a financial loss as the result of a Commission proceeding is “directly impacted” by that proceeding and has a statutory right to intervene. See, for example, *Petition of Kingsport Power Company et. seq.*, Docket 16-00001, “Order on Status Conference” (April 28, 2016) at 9-10 (allowing electric customers to intervene). While federal agencies do not often intervene in Commission proceedings, a federal agency may do so when it will be affected by the state agency’s decision. See *Secretary of the Army v. Tennessee Public Service Commission*, 807 S.W. 852 (Tenn. Ct. Appeal 1991).

3. Motions to Compel

While TVA supports the Hearing Officer's decision granting the motions to compel filed by JEA and TECA, TVA itself did not file discovery or a motion to compel and therefore will not address JSC's objections to the Hearing Officer's order.

CONCLUSION

This case should soon be over. As the Hearing Officer found in her order granting the motions to compel, JSC "has not acted in good faith," has demonstrated a "lack of candor" and shown a "blatant disregard for the discovery process." *Order at 11, 14 and 15*. While challenging the Hearing Officer's authority to impose sanctions, JSC has not attempted to explain or rebut these findings of misconduct which are going to undermine JSC's petition regardless of how the Commission rules on this interlocutory appeal.

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Even if JSC continues to try to persuade the Commission that JSC is an unregulated cooperative or, in the alternative, that JSC is not a public utility, the discovery process has produced ample evidence that JSC is a "public utility" subject to the agency's jurisdiction and not a "community service cooperative."

The Commission has previously ruled that in order to be exempt from regulation, a community service cooperative organized under T.C.A. § 65-25-101 *et. seq.* must be "an organization created by its members, for its members benefit and controlled by its members." Consumer Advocate's Petition for a Declaratory Order that Berry's Chapel Utility, Inc. is a Public Utility and Should be Regulated by the TRA, Docket 11-00005, Order issued August 5, 2011, at 18. As the Commission explained in that case, "[T]he essence of a cooperative is the presence of members control rather than corporate control." *Id.*

As revealed in JSC's responses to discovery, JSC is not run by its members. To the contrary, JSC was created by and is controlled by Community Development Enterprises – Jackson I ("CDE"), a for-profit

³ See *Tathan v. Bridgestone Americas Holding, Inc.* 473 S.W.3d 734, 740-742 (Tenn., 2015) (describing other remedies and sanctions that a trial court or the Hearing Officer may adopt when a party has abused the discovery process).

enterprise. Even though JSC as yet has no members, JSC and CDE have already entered into a long-term contract requiring all future members of this “cooperative” to purchase electricity from JSC for the next thirty years and to funnel most of the profits from these sales to CDE.⁴

Similarly, JSC intends to sell electricity to multiple customers (the “members” of the JSC cooperative). In light of the Commission’s prior rulings that an entity providing service to only one customer is a “public utility” subject to the agency’s jurisdiction,⁵ there is no question that JSC, which intends to serve at least “four to eight” large customers (JSC Brief at 2), will likewise be considered a public utility and, therefore, prohibited by the “Geographic Territories” law from selling electricity in competition with JEA. See T.C.A. §65-34-101 *et seq.*

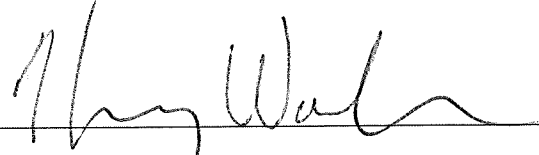
In sum, TVA urges the Commission to affirm all three of the Hearing Officer’s decisions that JSC has appealed. That should be enough to end this case. If not, the Intervenor’s motions to dismiss will soon follow and likely lead to the same result.

⁴ See “Memorandum of Law in Support of Tennessee Electric Cooperative Association’s Motion to Compel Discovery from Jackson Sustainability Cooperative,” filed May 20, 2022 at 5-7.

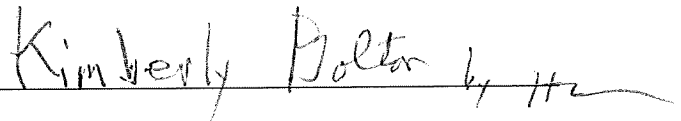
The Tennessee statutes creating electric cooperatives, T.C.A. §65-25-101 *et seq.*, were enacted in 1939 based on a model act drafted that same year by the Rural Electrification Administration (“REA”) to encourage the creation of the electric cooperatives in rural areas, especially the Tennessee Valley. As REA later explained, an electric cooperative organized under the model act should operate based on several basic principles including the understanding that “invested capital gets no profits, only interest.” “Democracy and Dysfunction, Rural Electric Cooperatives and the Surprising Persistence of the Separation of Ownership and Control,” Thomas, Jeter and Wells, 70 *Alabama Law Review*, 361, 383-386 (2018).

⁵ The Commission granted a certificate to a pipeline in Johnson City that served “a single industrial customer” at the time and anticipated that it might eventually serve “as many as four industrial customers.” Application of ESG Pipeline (JC) LLC for a Certificate of Convenience and Necessity *et seq.*, Docket 05-00244. “Order Granting Certificate of Convenience and Necessity,” April 19, 2006 at 1-2.

Respectfully Submitted,

By: 

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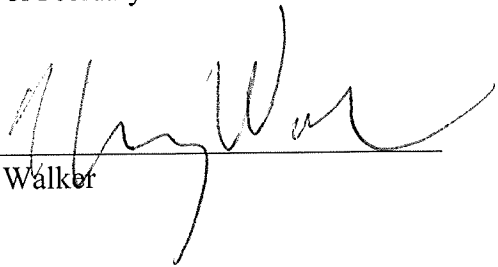
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CERTIFICATE OF SERVICE

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 3rd day of February 2023:


Henry Walker