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Hon. Herbert H. Hilliard, Chairman
c/o Ectory Lawless, Docket Manager
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
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Re: Petition of Jackson Sustainability Cooperative to Determine if a Certificate of Convenience and Necessity Is Needed
Docket No. 21-00061

Dear Chairman Hilliard:

Enclosed please find four copies of the Interlocutory Review Brief of Intervenor Tennessee Electric Cooperative Association (Public Redacted Version), which was filed electronically on February 2, 2023.

Pursuant to the Second Amended Protective Order governing this docket, the original and four copies of the CONFIDENTIAL version of the brief, which was also filed electronically on February 2, 2023, will be sent under separate cover.

Should you have any questions concerning the enclosed, please do not hesitate to contact me.

Sincerely,

Matthew J. Sinback

Enclosure
cc: All Counsel of Record (letter only)

FOR PUBLIC FILING

BEFORE THE
TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

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

INTERLOCUTORY REVIEW BRIEF OF INTERVENOR TENNESSEE ELECTRIC COOPERATIVE ASSOCIATION

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INTRODUCTION & BACKGROUND

Despite its claim to be an electric cooperative, Jackson Sustainability Cooperative ("JSC")[1] is, in fact, the creation of several for-profit companies that want to build a $70 million combined solar and battery storage facility and, then, sell retail electricity to industrial and commercial customers that are already being served by Jackson Energy Authority ("JEA"). (Petition Of [JSC], May 24, 2021 ("Petition"), at ¶¶ 2 & 30 and Ex. 3.) The proposed solar project will have a nameplate capacity of 16.5 MW, and the accompanying storage facility will have 46 MWh of capacity. (*Id.* at ¶ 3.) [redacted] (TECA's Mem. of Law in Support of Mot. to Compel, May 20, 2022 ("TECA Compel Mem."), at Ex. 5.) JSC suggests the project, if approved, will allow "heavy users of electricity" to "switch a major portion of their electricity usage to renewables." (*Id.* at ¶ 11 and Ex. 3; Direct Test. of Dennis Emberling, May 24, 2021 ("Emberling Test."), at 7.)

On May 24, 2021, JSC initiated this proceeding in an effort to shield its $70 million project from any and all regulation by the Commission. The Petition seeks a declaratory order that JSC is exempt from regulation because it is a nonprofit electric cooperative or, if not, because it does not otherwise qualify as a "public utility."[2] (*See* Petition at 17.)

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[1] While JSC is the named Petitioner, it has no members, and it has performed almost none of the work to develop the solar project. The real parties in interest in this docket are Community Development Enterprises - Jackson I ("CDE") and CDE's venture partners, including its managing partner, E A Solar, LLC. These for-profit entities have performed the primary development tasks referenced in the Petition, [redacted] and created JSC solely for the purpose of avoiding regulation. (*See, e.g.,* Petition at ¶¶ 23, 24, 27; Pet'r Response to TECA Compel Mot., June 2, 2022, at 5-6.) JSC, CDE, and E A Solar all share the same two executives: Dennis Emberling and David Shimon. (*See* Petition at 4-5; TECA Compel Mem. at Ex. 3, Ex. 4; Pet'r Response to TECA Compel Mot. at 4.) Given these facts, any reference to "Petitioner" should be read to include JSC and the for-profit entities who pull its strings.

[2] Petitioner initially said JSC was organized under the Tennessee Electric G&T Cooperative Act (the "G&T Act"). (Petition at Exs. 1-2; Emberling Test. at 2.) When JEA and Tennessee Valley Authority ("TVA") pointed out that G&T cooperatives are barred from serving retail

Given the sweeping relief sought by Petitioner, JEA, Tennessee Electric Cooperative Association ("TECA"), TVA, and Tennessee Municipal Electric Power Association ("TMEPA") (collectively, "Intervenors") petitioned to intervene in the contested case. ***Petitioner did not file any opposition to the petitions to intervene***. Hearing Officer Monica Smith-Ashford granted the intervention petitions on August 20, 2021, ***some 17 months ago***. ***Petitioner has never moved the Hearing Officer to modify or reconsider these decisions***. Instead, JSC coordinated with Intervenors on a procedural schedule that allowed for Intervenors' full participation in this docket. (*See* Jointly Proposed Procedural Schedule and Cover Letter, Aug. 20, 2021.)

Per the agreed Procedural Schedule, TECA served discovery requests on JSC.[3] On September 22, 2021, JSC filed supplemental direct testimony and provided wholly deficient responses to TECA's requests. (*See* TECA Compel Mem. at Ex. 6.) Despite the size, scope, scale, and description of JSC's proposed solar project, Petitioner produced only minimal documentation. Absent from the production were the types of documents commonly produced in litigation, including letters, spreadsheets, notes, and other electronic and paper documents. ***Most notably, Petitioner produced just four emails***.

In the months that followed, TECA sent Petitioner's counsel five letters identifying specific problems with JSC's discovery responses and requesting clarification of how JSC applied its

customers, Petitioner changed JSC's charter and bylaws to remove references to the G&T Act and add references to the Rural Electric and Community Services Cooperative Act, T.C.A. § 65-25-101, *et seq*. (*See* Pet'r Response to Filed Statements, July 13, 2021, at 3, 6-8, 13 and Exs. 15, 16.) In its appeal brief, ***Petitioner has shifted positions yet again***. Petitioner now says JSC will only operate as an electric cooperative as a "last resort." It states, "***only if*** this Commission finds that the Petitioner would be a public utility subject to its regulation, the Petitioner would adopt governance … to operate as a member owned cooperative." (Pet'r Br. at 2 (emphasis added).) These ever-shifting positions highlight the flim-flam nature of this project.

[3] TECA's motion to compel, supporting memorandum, and supporting exhibits, filed on May 20, 2022, provide a detailed description of the discovery disputes that led the Hearing Officer to sanction Petitioner. In the interest of economy, this brief provides only a high-level summary.

objections. These letters asked for an explanation of what searches JSC performed for responsive documents, which persons' electronic and paper files were searched, and what categories of documents were not searched. (*See* TECA Compel Mem. at Exs. 13, 14, 16, 17, 22.) And, TECA participated in numerous telephone conferences with Petitioner's counsel in an effort to understand why so few emails and other documents had been produced.

In response, Petitioner's counsel repeatedly—over a period of eight months—told counsel for TECA (and the Hearing Officer) that Petitioner had produced all responsive documents in the possession of JSC and CDE and that no non-privileged documents had been withheld based on objections. (*See, e.g.,* TECA Compel Mem. at Exs. 15, 16.) Petitioner's counsel also offered an explanation for why so few communications were produced: "[s]ince the list of potential members is small, [JSC] prefers to network and obtain personal introductions." (TECA Compel Mem. at Ex. 15, p. 3.) ***Petitioner's counsel told TECA*** that some of CDE's venture partners would have responsive documents and that Northern Reliability, Inc., the solar project's prime contractor, could also have responsive documents. (*See* TECA Compel Mem. at Ex. 16.)

Based on this information, in February 2022, TECA issued subpoenas to Northern Reliability and CDE's three owner-partners, E A Solar, Hunt Solar, and SynEnergy. Petitioner's counsel offered to arrange for Northern Reliability to accept the subpoena, but, as TECA later learned, [redacted] (TECA Compel Mem. at Ex. 21.) [redacted] (*Id.* (emphasis added).) [redacted]

[redacted][4] (*Id.*)

In stark contrast to JSC, Northern Reliability produced nearly 1,800 pages of documents about the solar project, including ***838 pages of emails***. [redacted] (*See generally* TECA Compel Mem. at 17-18 and exhibits cited therein.)

Northern Reliability's production showed [redacted] (*See* Northern Reliability document production.) [redacted] (*Id.*)

When asked to explain why Petitioner had not produced documents that clearly should have been in its possession, Petitioner's counsel essentially conceded Petitioner had been picking and choosing which documents it would produce in this docket, explaining: "[m]any of the documents for which you requested explanation were draft investigation or development working

[4] [redacted] (TECA Compel Mem. at Ex. 21.) [redacted] (*See* TECA Compel Mem. at 18-19.)

documents," many of which "were discarded." (TECA Compel Mem. at Ex. 23, pp. 1-2.) Incredibly, Petitioner once again represented that "[a]ll documents in possession of Jackson Sustainability Cooperative and Community Development Enterprises Jackson I have been produced." (*Id.*) And, remarkably, Petitioner again failed to explain what it had done to search for responsive documents.

The documents produced have made clear why detailed discovery is essential in this docket. The documents TECA has received revealed a long series of material inconsistencies in statements made in the Petition, Mr. Emberling's testimony and the few JSC documents received to date. For example, regarding financing, Mr. Emberling has testified "CDE has access to the financing necessary to fulfill any obligations it may undertake." (Emberling Test. at 7.) Further, Petitioner has stated "[n]umerous funders have made oral commitments to finance the Facility." (Petition at 14.) Yet, not a single document has been produced to support these statements. Petitioner's counsel has also said that a single "feasibility study is the only document that has been shared with potential funders," but it strains credulity that "commitments" to finance a $70 million solar facility have been made based on a single document. (TECA Compel Mem. at Ex. 16, p. 4.)

With respect to the public benefits of the solar project, Mr. Emberling testified "JSC will provide training, internships, and educational programs in the renewable energy field to Jackson's high school and colleges at its own cost" and "JSC's partners and members will contribute various programs to Jackson's community in the areas of job training and community building." (Emberling Test. at 7.) Mr. Emberling also testified about his discussions with "foundations eager to help in Jackson" who "offered to bring free educational programs … to Jackson's high schools and its four colleges, along with internships …." (TECA Compel Mem. at Ex. 10, Direct Test. of Dennis Emberling Pt. II, p. 12.) And, he testified "[w]e and our partners committed to contribute

a share of the project's revenue to help redevelop East Jackson." (*Id*.) Petitioner has not produced a single document reflecting any of these offers or commitments.

Regarding JSC's membership, Mr. Emberling testified "the coop is limited to allowing only a few manufacturers to participate in the project. … [W]e can only serve manufacturers whose electrical usage profiles fit effectively with each other …." (*Id.* at 15.) [redacted] (*See* TECA Compel Mem. at 23, Ex. 37.)

Discovery to date also has revealed troubling facts about the relationship between JSC and the for-profit entities behind it. Though the Petition makes it seem as though JSC already has members, in truth, JSC ***has no actual members***,[5] and CDE and Northern Reliability will decide who is allowed to join. (*See, e.g.,* TECA Compel Mem. at Ex. 10, p. 17.) [redacted] (TECA Compel Mem. at Ex. 3, §§ 3, 4.) Members will be required to sign a 30-year membership agreement, which is 100% contrary to Petitioner's assertion that members will be able to "join or 'leave' according to the contracts they sign with Petitioner …." (*See* Petition at Ex. 4; TECA Compel Mem. at Ex. 7 at Response 22; Pet'r Br. at 11.)

[5] *See e.g.,* TECA Compel Mem. at Ex. 9 at Response 12. A JSC "conditional member" is no more than an applicant and has no rights other than to receive "a detailed analysis of electrical profile and ***potentially*** [receive] an offer to participate …." (Petition Ex. 4 (emphasis added).)

[redacted] the "members" of JSC will supposedly pay a small amount (5%) less for electricity than they are currently paying, [redacted][6] [redacted] (TECA Compel Mem. at Ex. 11, JSC CONFIDENTIAL – 500057-87 at 500084-85.) [redacted] (*Id.* at 500066; *see also* TECA Compel Mem. at Ex. 12.)

Finally, as noted above, Petitioner has made multiple conflicting statements about how exactly it intends to structure its operations. First, JSC was organized as a G&T cooperative. Then, JSC was organized as a non-profit electric cooperative. Now, according to Petitioner's appeal brief, ***JSC may not even be a cooperative at all***. (Pet'r Br. at 2.)

Given all of this, in accordance with Commission Rule 1220-1-2-.11 and Tennessee Rule of Civil Procedure 37, TECA and JEA moved to compel discovery from Petitioner.[7] (*See* TECA's Mot. to Compel, May 20, 2022.) As explicitly provided by Rule 37, TECA requested an award of its reasonable attorneys' fees and expenses if the motion was granted. (*Id.* at 2-3.) In its opposition to TECA's motion, Petitioner ***did not argue that the Commission lacked authority to award sanctions under Rule 37.*** Instead, Petitioner argued that Intervenors had not met their burden of

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[6] *See e.g.,* TECA Compel Mem. at Ex. 3 at §§ 3, 4, Ex. 6 at Response 26; Petition Ex. 4 at JSC Full Member Agreement § 4.

[7] The fact that Northern Reliability had produced documents did not cure JSC's discovery misconduct. After all, Northern Reliability would not possess the Petitioner's internal documents or communications shared among the principals of CDE, E A Solar, Hunt Solar, and SynEnergy. Nor would Northern Reliability have communications between Mr. Emberling, Mr. Shimon and other vendors, potential customers, or potential funders about the project.

proof under Rule 37 and that the discovery sought was irrelevant because there was a final contract with Northern Reliability. (Pet'r Response to TECA Compel Mot. at 9-14.) Petitioner also came up with a new excuse for why JSC and CDE had produced just four emails. Petitioner revealed—***for the first time***—that "E A Solar, LLC has a document retention policy [that] provides in part that the e-mail software is configured so that all e-mails are 'permanently deleted after 30 days so that e-mail accounts are not overpopulated with unusable communications.'"[8] (*Id.* at 12.) Despite citing this policy to explain away its failure to produce documents and its repeated statements that all of JSC's and CDE's documents had been produced, Petitioner did not explain how E A Solar's document retention policy applies to JSC or CDE or why this policy resulted in the destruction of relevant documents.[9]

The Hearing Officer heard oral argument for more than two hours. (*See* Tr. of Proceedings, June 21, 2022.) After taking the matter under advisement for several weeks, the Hearing Officer granted the motions. (*See* Initial Order Granting, In Part And Denying, In Part Motions To Compel Filed By [TECA] And [JEA], November 14, 2022 ("Compel Order").)[10] The Hearing Officer

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[8] Petitioner never filed a copy of this policy or explained when it went into effect. Rather, Petitioner relied on an affidavit from Mr. Emberling purporting to recite parts of the policy. (Pet'r Response to TECA Mot. to Compel, Aff. of Dennis Emberling.)

[9] In its Appeal Brief, Petitioner seeks to characterize E A Solar as just a "vendor" and argues it could not have known that E A Solar should stop deleting emails relating to the solar project. (*See, e.g.,* Pet'r Br. at 1, 22.) This is absurd. E A Solar is the managing partner of CDE. And, based on Petitioner's own representations, E A Solar's systems apparently were used for all of Mr. Emberling's and Mr. Shimon's emails relating to the solar project. It is clear Petitioner is trying to play a shell game in discovery, and its complaint that Intervenors are conducting a "prosecution on private enterprise" is a false distraction. A party, and a real-party-in-interest, cannot destroy relevant documents and have that conduct excused because the documents were managed by a related non-party. *See Ohio Mining Co. v. Pub. Utilities Comm'n*, 106 Ohio St. 138, 147 (Ohio 1922) ("The three corporations … exist apparently for the sole purpose of defeating the operation of the law.").

[10] While the Compel Order used the term "initial order" in its title, it is not an "initial order" as that term is defined by statute. *See* Tenn. Code Ann. § 4-5-314. Instead, it is an order on a preliminary motion pursuant to Commission Rule 1220-01-02-.06. The Hearing Officer has

found that Petitioner has shown a blatant disregard for the discovery process, has failed to comply with its discovery obligations, and has not acted in good faith. (Compel Order at 11-15.) Moreover, the Hearing Officer determined that Petitioner's actions during the discovery process "thwarted the orderly administration of the proceedings … resulted in the destruction of potentially relevant evidence … caused delay in the discovery process and increased the expense incurred by the parties involved in this matter." (*Id.* at 11.) All of these conclusions are fully supported by the record.[11]

The Hearing Officer ordered Petitioner "to perform a thorough search of its records for all responsive documents and to provide details of the search." (*Id.* at 15.) In addition, she ordered that "for all documents [Petitioner] maintains have been deleted or destroyed, [Petitioner] should respond to the interrogatories set forth in TECA's Motion to Compel." Finally, she ordered Petitioner to pay the "reasonable attorney's fees and expenses for JEA and TECA related to the filing of the *Motions to Compel*," as provided in Rule 37. (*Id.*) In accordance with that rule, the Hearing Officer set a briefing schedule and a hearing to determine the amount of TECA's and JEA's reasonable attorneys' fees and expenses. TECA and JEA filed memoranda identifying these amounts. Petitioner did not file a response and did not comply with the non-monetary relief ordered by the Hearing Officer. Nor did Petitioner request a stay of the Compel Order. Instead, Petitioner filed the interlocutory "appeal" now before the Commission.

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clarified that the Compel Order is not an "initial order." (*See* Order Granting Motion for Interlocutory Review by the Panel of Commissioners, Jan. 5, 2023, at 2 n.4.)

[11] The Compel Order includes a thorough discussion of the applicable Tennessee Rules of Civil Procedure, the Commission's discovery rule, and statutory authority for applying the Tennessee Rules of Civil Procedure's discovery rules to this contested case proceeding. (Compel Order at 7-10.) It also includes a thorough recitation of the arguments and supporting facts presented by the parties. (*Id.* at 2-7.)

Simply put, this "appeal" is baseless and frivolous. Nothing in Petitioner's brief provides any basis to overturn the Compel Order or the orders granting intervention. Consistent with its conduct throughout the proceedings in this docket, Petitioner's appeal brief demonstrates it is willing to tell whatever story sounds good, regardless of the truth. Likewise, Petitioner is willing to make specious arguments that plainly have been waived or that are far too late in coming.

With respect to the Compel Order, Petitioner argues the Commission lacks authority to follow the Tennessee Rules of Civil Procedure or to require parties to comply with their discovery obligations. Petitioner waived this argument when it failed to raise it with the Hearing Officer. This argument also has no legal basis and, if adopted, would make every discovery order issued by the Commission unenforceable.

With respect to TECA's intervention in this case, Petitioner did not file any opposition to TECA's petition to intervene, did not ask the Hearing Officer to reconsider or modify her decision to allow TECA in, and waited over a year to make a belated challenge to that decision. Petitioner has waived any right to challenge that decision now.

Worst of all, Petitioner's appeal brief seeks to paint the Hearing Officer as a "complicit" tool in some alleged government scheme to prosecute private enterprise. That is beyond ridiculous. Petitioner is not a victim. Petitioner has failed to comply with basic discovery aimed at understanding the allegations Petitioner has made in this docket. Petitioner's current predicament is entirely of its own making. This appeal should be dismissed on that basis.

ISSUES PRESENTED FOR REVIEW

As explained below, Petitioner's statement of the issues presented for review is misleading, unreliable, and goes beyond what was requested in its Motion for Interlocutory Appeal.[12] To correct this nonsense, TECA restates the issues relevant to TECA as follows:

1. The Tennessee Uniform Administrative Procedure Act authorizes the Commission to conduct discovery in accordance with the Tennessee Rules of Civil Procedure. The Commission has further adopted the Civil Procedure discovery rules in accordance with Title 65 of the Tennessee Code. Tennessee Rule of Civil Procedure 37, titled *Failure to Make or Cooperate in Discovery: Sanctions*, covers motions to compel and prescribes penalties for discovery violations. Is the Commission empowered to award discovery sanctions explicitly set forth in the Tennessee Rules of Civil Procedure?

2. Should the Commission reverse the order granting TECA's petition to intervene where (i) Petitioner did not oppose the motion and waited over a year to oppose TECA's intervention; (ii) TECA established that the legal interests of its member electric cooperatives may be determined in the proceeding; and, (iii) in any event, the Commission has the broad discretion to permit the intervention.

[12] In Petitioner's Motion for Interlocutory Appeal to the Full Public Utility Commission, filed on December 12, 2022 ("Petitioner's Appeal Motion"), Petitioner indicated it would appeal "the Hearing Officer's decision to conduct one way discovery." (Pet'r Appeal Mot. at 8.) However, its statement of the issues does not identify this complaint as a review issue. Its briefing only makes a two-sentence statement complaining about the discovery procedure that ***it agreed to***, which also happens to be the standard procedure in the Commission's contested cases. (*See* Interlocutory Appeal Brief to the Full Commission, Jan. 20, 2023 ("Petitioner's Brief"), at 1-2, 23-24.) Likewise, Petitioner does not identify supposed errors in the Compel Order as an issue presented for review. (*See* Pet'r Br. at 1-2.) Accordingly, Petitioner has waived these issues.

ARGUMENT & AUTHORITY

I. DISCOVERY IN THIS MATTER IS GOVERNED BY THE TENNESSEE RULES OF CIVIL PROCEDURE, AND THE COMMISSION HAS AUTHORITY TO ORDER THE RELIEF PRESCRIBED BY RULE 37.

The Hearing Officer correctly ruled that the discovery rules of the Tennessee Rules of Civil Procedure apply to contested cases before administrative agencies under the Tennessee Uniform Administrative Procedures Act ("UAPA") and that Commission Rule 1220-1-2-.11 also provides that discovery shall be conducted in accordance with the Tennessee Rules of Civil Procedure. (Compel Order at 7.)[13] The Commission can and should uphold her determination that under these rules, Petitioner and its principals and agents must search for responsive documents, answer interrogatories relating to the destruction of documents, and reimburse TECA for its reasonable attorneys' fees and expenses.

On appeal, Petitioner argues—for the first time—that the Commission lacks authority to apply the Tennessee Rules of Civil Procedure. Petitioner argues that all agency discovery disputes must be referred to circuit or chancery court, and that the Commission has no power to order a party to comply with its discovery obligations in accordance with the Tennessee Rules of Civil Procedure. In addition to being far too late, Petitioner's argument is contrary to the law.[14]

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[13] Petitioner attempts to justify its discovery failures by asserting "'[p]arties are encouraged where practicable to attempt to achieve any necessary discovery informally' not that [documents] must be retained in perpetuity." (Pet'r Br. at 23.) But the Commission Rule also states "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." Tenn. Comp. R. & Regs. 1220-01-02-.11; (*see* Compel Order at 7.) That is the case here. Indeed, the agreed Procedural Schedule called for ***formal discovery***, and Petitioner relied on those rules and Tennessee cases when the parties were discussing discovery and in its opposition to TECA's motion to compel.

[14] When opposing TECA's and JEA's motions to compel, Petitioner made no argument that the Commission could not manage discovery disputes, nor did it make even a cursory attempt at rebutting TECA's and JEA's position that if the motions to compel were granted, they should be awarded reasonable attorneys' fees as prescribed by Rule 37.01. To the contrary, Petitioner relied

Moreover, if accepted, it would upend how the Commission conducts contested case proceedings, and it would virtually eliminate the Commission's ability to manage discovery in contested cases.

A. The Commission Has the Statutory Authority to Adopt the Tennessee Rules of Civil Procedure's Discovery Rules, and It Has Done So.

The Commission "is a regulatory agency and, consequently, it may exercise only the authority that is given to it expressly by statute or which arises by necessary implication from an express grant of authority." *Consumer Advoc. & Prot. Div. of Off. of Atty. Gen. of Tenn. v. Tenn. Regul. Auth.*, 2012 WL 1964593, at *14 (Tenn. Ct. App. May 30, 2012) (citations omitted). The authority of the Commission to issue discovery orders and sanctions in contested case proceedings pursuant to Rule 37.01 of the Tennessee Rules of Civil Procedure is established by the UAPA and the Commission's establishing statute.

The General Assembly has explicitly granted the Commission authority to conduct discovery in accordance with the Tennessee Rules of Civil Procedure. Specifically, the UAPA's contested-case provisions provide that an "administrative judge or hearing officer, at the request of any party, shall … effect discovery … in accordance with the Tennessee Rules of Civil Procedure." Tenn. Code Ann. § 4-5-311(a). (*See also* Compel Order at 7.)

Further, the Commission also has the authority to promulgate its own rules, which must be filed with and approved by the Office of the Attorney General. *See* Tenn. Code Ann. § 4-5-211 ("The office of the attorney general and reporter shall review the legality and constitutionality of

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on the Tennessee Rules of Civil Procedure—including Rule 37.01—to argue that TECA had not satisfied its burden of proving that a motion to compel should be granted. (*See* Response to TECA Mot. to Compel, June 2, 2022, at 9-10.) Petitioner cannot seek review of an argument it failed to make, and Petitioner cannot ask the Hearing Officer to apply Rule 37.01 and then complain that she did so. *See Moses v. Dirghangi*, 430 S.W.3d 371, 381 (Tenn. Ct. App. 2013) (citations omitted) ("It is well settled that issues not raised at the trial level are considered waived on appeal."); *see also State v. Simic*, 2019 WL 5448699, at *4 (Tenn. Crim. App. Oct. 24, 2019) (rejecting argument that was raised for the first time on interlocutory appeal).

every rule filed pursuant to this section and shall approve or disapprove of rules based upon the attorney general's determination of the legality of such rules."). As relevant here, Tennessee Code Annotated § 65-2-102—part of the Commission's enacting statute—empowers the Commission to adopt rules of practice, and requires that "[t]he commission shall adopt rules governing the procedure prescribed or authorized by this chapter or by any other statute applicable to the commission; these rules shall include, but shall not be limited to, rules of practice before the commission, together with forms and instructions." Tenn. Code Ann. § 65-2-102(a)(1). The Commission has done that.[15]

With regard to contested cases, the Commission adopted discovery rules that incorporate all of the Tennessee Rules of Civil Procedure relating to discovery—not just some. Specifically, Section 1220-1-2-.11 of the Rules of the Tennessee Public Utility Commission, titled *Discovery*, states in part that "***discovery shall be*** sought and ***effectuated*** in accordance with the Tennessee Rules of Civil Procedure." And, naturally, the Commission's rules include provisions that allow the Commission to ensure discovery is effectuated: Rule 1220-1-2-.11(9) governs the filing of motions to compel. *See also In Re United Tel. Southeast., Inc.*, No. 98-00626, 1999 WL 33505913 (Tenn. R.A. Apr. 30, 1999) ("Just as Tenn. Code Ann. § 4-5-311 permits discovery, it also permits a party to move to compel discovery.").

B. The Commission Has the Statutory Authority to Decide and Enforce Motions to Compel.

As part of its attempt to overturn an unfavorable decision, and continued effort to hide information from this Commission, Petitioner now asserts the Commission has no power to govern

[15] Petitioner is simply wrong that "[t]he 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)." (Pet'r Br. at 22.)

discovery disputes in its contested cases and can only resolve any discovery disputes by filing an action in a state court. (*See, e.g.,* Pet'r Br. at 22-23 (stating "[t]he UAPA clearly requires that discovery disputes are referred to Circuit or Chancery Court"; "the UAPA has a simple procedure for resolving discovery disputes: refer the matter to the courts").) In support of this assertion, Petitioner cites to Tennessee Code Annotated § 4-5-311(b), which states in part:

> 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.

(Pet'r Br. at 21, 23.) Petitioner's position is nonsensical and, if accepted, would strip all administrative agencies in Tennessee of their ability to effectively conduct discovery in contested cases. It would nullify agency rules—like the Commission's—that permit a motion to compel to resolve discovery disputes. After all, there would be no point to filing such a motion with an agency if only a state court has the power to decide it.

As the Tennessee Court of Appeals has explained, "[t]he contested case provisions of the [UAPA] … are ***designed to limit the involvement of courts with administrative cases*** until there is a full, complete, and final adjudication in the proceedings before an agency." *Tennessee Dep't of Safety ex rel. Harmon v. Bryant*, 2012 WL 3289643, at *4 (Tenn. Ct. App. Aug. 14, 2012) (emphasis added). Requiring state agencies to request that state trial courts, wholly unfamiliar with the facts of the underlying case, weigh in on discovery issues between parties in contested cases would cause innumerable delays in both the trial courts and administrative dockets. *See id.* Moreover, Tennessee appellate courts have repeatedly ruled that the Tennessee Rules of Civil Procedure's discovery rules apply in administrative law cases. *See e.g., Sloane v. Tenn. Dep't of*

State, Bus. Servs. Div., 2019 WL 4891262, at *6-7 (Tenn. Ct. App. Oct. 3, 2019); *Phan v. Tenn. Dep't of Commerce & Ins.*, 2017 WL 829817, at *11 (Tenn. Ct. App. Mar. 2, 2017).

Further, as noted above, the Commission's authority to adopt rules governing the conduct of discovery derive from both the UAPA and Title 65. The Commission's discovery rule references both § 4-5-311 and § 65-2-102 as authority. Tenn. Comp. R. & Regs. 1220-01-02-.11. Title 65 does not include any language obligating the Commission to seek court intervention to enforce discovery orders. And, under Tennessee Code Annotated § 65-2-121, "the chapter shall not be construed as in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or the extent of a power conferred shall be resolved in favor of the existence of the power." Pursuant to § 65-2-121, any doubt as to the existence or the extent of a power conferred by § 65-2-102 must be resolved in favor of the existence of the power.[16]

C. The Tennessee Rules of Civil Procedure Explicitly Authorize the Relief Awarded by the Hearing Officer.

Rule 37 of the Tennessee Rules of Civil Procedure, which governs motions to compel when a party fails to cooperate or make discovery, mandates that, if a motion to compel is granted, "the court shall, after opportunity for hearing, require ***the party*** … ***whose conduct*** necessitated the motion ***or the party or attorney advising such conduct or both*** of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." Tenn. R. Civ. P. 37.01 (emphasis added). Tennessee Code Annotated Sections 4-5-33, 65-2-102, and Commission Rule 1220-1-2-.11 do not restrict the

[16] In arguing to narrow the Commission's discovery-related authority, Petitioner cites to Tenn. Code Ann. § 4-5-326. But, that statute has no application in the context of this docket because it establishes the standards ***a court*** should apply when "presiding over the appeal of a judgment in a contested case." *Id.*

application of Rule 37, and parties litigating before the Commission are entitled to the same interpretation of Rule 37 as litigants in the Tennessee state courts.

Simply put, the Hearing Officer's decision in the Compel Order was a straightforward application of Rule 37. The Hearing Officer appropriately determined that the documents sought in the motions to compel were "relevant to these proceedings because the emails requested deal with efforts to fund the project, communications with potential funding sources, the status of the project, creation of the cooperative, and plans for additional projects, etc." (Compel Order at 12.) As a result, the Hearing Officer ordered Petitioner to search for and produce relevant emails, determining that the "benefit of the emails outweighs the burden of JSC to produce emails. The emails may contain vital information that goes to the heart of the fact determination to be made regarding JSC's status as a not-for-profit electric cooperative exempt from Commission regulation." (*Id*.) In light of its admitted destruction of potentially relevant evidence, the Hearing Officer also properly ordered Petitioner to answer the supplemental interrogatory set forth in TECA's motion to compel regarding said spoliation.[17] (*Id.* at 14-15.)

In this case, it is undeniable that Petitioner never took its discovery obligations seriously. The evidence is clear that Petitioner has not been—and is not being—honest with the Commission and the Intervenors; is withholding and actively deleting potentially relevant information; is unable or unwilling to search for that information; and has failed to produce relevant documents

[17] The Hearing Officer has authority to issue sanctions under Rule 34A.02, which provides that "Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence." Tenn. R. Civ. P. 34A.02; *see also Griffith Servs. Drilling, LLC v. Arrow Gas & Oil, Inc*., 448 S.W.3d 376, 379–81 (Tenn. Ct. App. 2014) (citing Rule 34A.02 and recognizing the trial court's wide discretion to impose sanctions for spoliation of evidence).

responsive to TECA's discovery requests. There is no legitimate excuse for Petitioner's discovery misconduct.[18]

Petitioner attempts to shift blame for its misconduct by complaining there was "no order or direction from the Commission" requiring preservation of documents. (Pet'r Br. at 1.) This is just another distraction. The duty to preserve attaches upon notice that the evidence is relevant to litigation or when it should have been known that the evidence may be relevant to future litigation. *BancorpSouth Bank v. Herter*, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009) (citation omitted). In *Clark Const. Grp., Inc. v. City of Memphis*, the court imposed sanctions upon the City of Memphis for failing to halt its document retention policy in light of impending litigation, noting "the City, either directly or indirectly, allowed relevant documents to be destroyed long after the filing of the Complaint." 229 F.R.D. 131, 137 (W.D. Tenn. 2005). The Court concluded "the City should have known these documents were relevant" because they were "related to discovery requests" made by opposing counsel. *Id.*

Here, the development of the solar project has been conducted by CDE and its venture partners. Those entities, along with JSC, share key executives, including the one person who filed direct testimony in support of the Petition, Dennis Emberling. Petitioner cannot credibly claim it did not know it needed to preserve documents related to this solar project. Of course, Mr. Emberling knew litigation was a possibility when the May 24, 2021 Petition was being prepared,

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[18] Petitioner has made clear that it views discovery as a check-the-box exercise because, in its view, this is just a declaratory action similar to obtaining a building permit. The Commission, however, must be permitted to understand the nature of this project and the consequences of granting the exemption from all regulation that is being requested. The decision issued here will provide a roadmap [redacted] as well as for other entities who believe it will be profitable to target high-volume users of electricity in existing service areas. (TECA Compel Mem. at Ex. 11 at JSC CONFIDENTIAL 500066.)

and he certainly knew that litigation was on-going after the Petition was filed and Intervenors began serving discovery requests. (*See, e.g.,* TECA Compel Mem. at Ex. 31.) Undoubtedly, Petitioner's discovery misconduct falls squarely within the mandate in Tennessee Rule of Civil Procedure 37.01 requiring the party "whose conduct necessitated the motion ***or the party or attorney advising such conduct or both***" to pay TECA its reasonable attorneys' fees and expenses. Tenn. R. Civ. P. 37.01 (4) (emphasis added).

In granting TECA and JEA's motions to compel, the Hearing Officer rightly agreed and refused to take Petitioner's bait in trying to explain away its discovery misconduct. She observed that if these "facts were before any other tribunal, sanctions would certainly be imposed against [Petitioner] for its actions during the discovery process. It is rare that companies appearing before the Commission behave so cavalierly during the discovery process." (Compel Order at 14-15.) As a result of Petitioner's actions, the Hearing Officer—***in accordance with Rule 37***—determined that Petitioner is required to pay JEA's and TECA's attorneys' fees related to the filing of the motions to compel. (*Id.* at 15, 17.) In further accordance with Rule 37, the Hearing Officer ordered the convening of "a separate proceeding where the fees may be presented and [Petitioner] will have an opportunity to contest any amounts it determines to be unreasonable or inapplicable." (*Id.*); *see* Tenn. R. Civ. P. 37.01(4).

Petitioner asserts "[t]hese '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." (Pet'r Br. at 23.) The fatal flaw in this argument, however, is that nothing in the Hearing Officer's reasoning provides for the imposition of "unlimited monetary sanctions for

attorney's fees, payable to any party." Rule 37 provides when attorneys' fees may be recovered, requires an opportunity for a hearing relating to the reasonableness of the fees, and allows for dispensing of the requirement if there is a finding that the opposition was substantially justified or other circumstances make the award unjust. In making her ruling, the Hearing Officer thoroughly explained her findings relating to Petitioner's discovery misconduct. Moreover, she was very careful to limit TECA's and JEA's recovery to those fees and expenses incurred relating to obtaining the order on the motions to compel—specifically excluding any attorneys' fees and expenses associated with obtaining service of process on Northern Reliability or seeking supplemental responses to discovery requests from Petitioner. (Compel Order at 15, 17.) There can be no serious dispute that the Hearing Officer's decision complies with Rule 37.

II. PETITIONER HAS WAIVED ANY RIGHT TO EXCLUDE TECA FROM THIS DOCKET.

In its second review issue, Petitioner asserts the Hearing Officer erred in allowing TECA to intervene. Simply put, Petitioner's request to exclude TECA from this docket is neither timely nor supported by the law, the facts, or basic logic.

A. Petitioner's Opposition to TECA's Participation Is Untimely and Waived.

The Commission should deny Petitioner's request to exclude TECA from this docket as untimely and waived. Along with JEA and TMEPA, TECA filed its Petition to Intervene on June 25, 2021. Two weeks later, Petitioner filed a Motion for Extension of Time seeking additional time to, among other things, "file a response … to the Intervening Petitions and Statements submitted in this matter." (Pet'r Mot. for Extension of Time, July 7, 2021, at 1.) On July 13, 2021, Petitioner filed its response, which focused on addressing defects in its Petition identified by JEA and TVA. (*See* Pet'r Response to Filed Statements, July 13, 2021.) ***This response did not state***

any opposition to TECA's Petition to Intervene (or to any of the other parties' petitions to intervene). (*See id.*)

The Hearing Officer granted TECA's Petition to Intervene on August 20, 2021. (Order Granting the Petition to Intervene Filed by [TECA], Aug. 20, 2021.) Petitioner did not object, ask the Hearing Officer to reconsider, or seek interlocutory review of that decision. Instead, Petitioner actively coordinated with the Intervenors on an agreed procedural schedule that called for TECA and the other Intervenors to participate in discovery, to submit testimony, and to participate in the hearing on the merits. (JSC And TVA Jointly Proposed Procedural Schedule, Aug. 20, 2021.) The Hearing Officer adopted the schedule agreed to by "[JSC], [TVA], [TMEPA], [JEA], and [TECA], the parties in this matter." (Order Establishing Procedural Schedule, Sep. 8, 2021.) Over the next year, Petitioner repeatedly engaged with TECA regarding its discovery requests, participated in multiple status conferences and hearings that included TECA, issued discovery to TECA, and responded to TECA's motion to compel.

Throughout this period, ***Petitioner never asked the Hearing Officer to reconsider or modify*** the order granting TECA's Petition to Intervene and never voiced the objections it now raises. Instead, Petitioner waited until December 12, 2022—a month after the Hearing Officer granted TECA's motion to compel and ***a year and a half*** after the Hearing Officer granted TECA's Petition to Intervene—to argue for the first time that the Hearing Officer erred in allowing TECA to intervene. (*See* Pet'r Appeal Mot. at 8-9.) Petitioner's conduct presents a textbook case of waiver. *See In re Est. of Hendrickson,* 2009 WL 499495, at *3 (Tenn. Ct. App. Feb. 25, 2009) (concluding Defendant waived right to challenge intervention under Tenn. R. Civ. P. 24 when Defendant agreed to the intervention); *Exch. Nat. Bank of Chicago v. Abramson*, 45 F.R.D. 97, 102 (D. Minn. 1968) (concluding Plaintiff waived right to challenge intervention under Fed. R.

Civ. P. 24 when Plaintiff "failed to oppose [the] motion"); *see generally In re M.L.P.,* 281 S.W.3d 387, 394 (Tenn. 2009) (finding appeal issue waived where party's challenge was "late-raised [and] minimally addressed").

Moreover, excluding TECA from these proceedings now would be unfair. Over the past year, TECA has devoted significant resources to analyzing Petitioner's proposal, to understanding how Petitioner's so-called cooperative would function, and to testing the truthfulness of Petitioner's many representations through discovery. While Petitioner is unhappy that TECA is doing that, TECA's efforts have uncovered numerous instances where claims made in the Petition are untrue or unsupported by any evidence. TECA's investment in this docket would be totally undermined if it is excluded now and only because Petitioner has made the self-interested decision that keeping TECA in is not good for Petitioner. The Commission should decline to reward Petitioner's gamesmanship and reject Petitioner's request to oust TECA and the other Intervenors from this docket as untimely and waived.

B. Petitioner's Argument Is Not Supported by the Law, the Facts, or Logic.

Even if Petitioner had not waived its right to challenge TECA's participation in this docket, Petitioner's argument has no merit in the law. At least three considerations support this conclusion.

First, Petitioner argues TECA and its electric cooperative members are supposedly "sub-divisions of the State government," and government entities are supposedly barred by statute from intervening in contested cases before the Commission. (*See* Pet'r Br. at 1.) Both of these premises are false. TECA is a private trade association that serves the needs of Tennessee's consumer-owned electric cooperatives by providing leadership, advocacy, and support. (TECA's Petition to Intervene at ¶ 1.) TECA represents 23 local power distributors, including Tennessee's 22 electric cooperatives and one municipal system. (*Id.* at ¶ 3.) Neither TECA nor its 22 member electric cooperatives are "sub-divisions of the State government." These cooperatives are nonprofit

cooperative membership corporations organized under or subject to Tile 65, Chapter 25 of the Tennessee Code. Tenn. Code Ann. § 65-25-102(4); *see* https://www.tnelectric.org/about/ (last visited Feb. 1, 2023) (explaining "[e]lectric co-ops are owned by the people they serve, not by government"). Thus, Petitioner's argument is totally wrong on the facts.

The legal premise of Petitioner's argument is equally wrong. Petitioner makes the bald assertion that "[c]ounties, municipalities, and local government agencies are not allowed to intervene in Commission cases." (Pet'r Br. at 12.) Past Commission dockets demonstrate this assertion is false. *E.g., In Re: Petition of Tennessee-Am. Water Co.*, No. 14-00121, 2015 WL 927209, at *5 (Feb. 24, 2015) (granting City of Chattanooga's petition to intervene). And, although TECA is not a government entity as Petitioner claims, it is worth noting that the Commission has previously allowed TECA to intervene in a contested case. *See In Re: Petition of 1Tennessee Broadband, TV & Tel. Coop., Inc. for Establishment of Territorial Boundaries,* No. 18-00096, 2019 WL 235162, at *2 (Jan. 14, 2019).

Petitioner next argues if the Commission allows such entities to intervene, it will be violating its duty to achieve "cohesive policy for the State." (Pet'r Br. at 13 (citing Tenn. Code. Ann. § 65-1-113).) This is nonsense. When a petition to intervene is granted, the intervenor participates ***as a party***. Tenn. Comp. R. & Regs. 1220-01-02-.01(2)(b)(3) (defining "Party" as including "Persons who are given leave by the Commission to intervene in a contested case"). Of course, as a party, an intervenor does not somehow obtain the authority to issue orders or make decisions. That power remains with the Hearing Officer and the Commission.

Second, Petitioner argues the legal interests of TECA and its members cannot possibly be affected by this docket—or, presumably, any other contested case before the Commission—

because the Commission does not have jurisdiction over TECA or its members.[19] (*See* Pet'r Br. at 9.) Again, this argument is nonsense. The fact that genuine electric cooperatives are not subject to the Commission's regulatory oversight does not mean decisions of the Commission have no impact on their legal interests. As just one example, if a public utility sought Commission approval to expand into the service area of an electric cooperative, that request would indisputably affect the legal interests of the electric cooperative. Petitioner's core contention does not survive even the slightest degree of scrutiny.

Hypotheticals aside, the regulatory exemption Petitioner seeks would easily affect the legal interests of TECA's electric cooperatives and, thus, gives TECA a right to be in this docket. *See* Tenn. Code Ann. § 4-5-310(a) (stating intervention shall be granted if the "petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding" and "the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention").

As the Hearing Officer concluded, Petitioner intends to provide electric power in the TVA service area and TECA's members purchase their power from TVA. (Order Granting TECA's Petition to Intervene, Aug. 20, 2021, at 2.) Revenue losses by TVA may well impact the rates paid by TECA's members. This is sufficient to satisfy Tenn. Code Ann. § 4-5-310(a). *In Re: Petition of Tennessee Wastewater Sys., Inc.,* No. 14-00136, 2015 WL 4123722, at *2 (June 30, 2015) (allowing intervention by customers where petition could affect rates and charges).

[19] This is a very charitable characterization of Petitioner's argument. As noted above, Petitioner repeatedly makes the false claim that TECA and its member electric cooperatives are subdivisions of the State government and bases its whole argument on that falsehood. (Pet'r Br. at 1, 15.) In fact, Petitioner appears to make the puzzling claim that TECA is an entity controlled by an agency of the Federal Government or municipal-owned utilities. (*See* Pet'r Br. at 9.) Again, none of this is true, and Petitioner's argument should be rejected for the baloney it is.

Further, Petitioner asks the Commission to declare that "it is exempt from regulation as a 'public utility' … because it is a 'cooperative organization … not organized or doing business for profit." (Petition at 17.) Under Tennessee law, a "nonprofit cooperative entit[y] organized under or otherwise subject to the Rural Electric and Community Services Cooperative Act, compiled in chapter 25 of [title 65]" is deemed to be a nonutility. Tenn. Code Ann. § 65-25-101(6)(A)(v). (*See* Petition at 17.) To obtain the declaration it seeks, Petitioner must prove it is, in fact, an electric cooperative under Title 65, Chapter 25. This question necessarily involves the construction and application of the statutes governing electric cooperatives—including TECA's member electric cooperatives—to the "facts" of this case. A decision by the Commission that this chapter allows for-profit companies to create and hide behind a nonprofit electric cooperative by simply drafting organizational documents, hand-picking the members, and tying the members to long-term commitments will have a profound impact on the legal interests of TECA's electric cooperatives. This, too, is sufficient to satisfy Tenn. Code Ann. § 4-5-310(a).

Moreover, it is clear the regulatory exemption sought by Petitioner could have profound consequences on the regulatory scheme governing the generation and distribution of electricity in Tennessee. Despite the fact that Tennessee law mandates exclusive public service in defined geographic territories, *see* Tenn. Code Ann. § 65-34-101 *et. seq.*, Petitioner seeks permission to operate an electric generation and distribution project that targets JEA's high-volume consumers in JEA's existing service area. A declaration that such a project is exempt from all regulation may encourage other opportunists to pursue similar projects in the service areas of TECA's member cooperatives. The exemption sought may well disrupt the distribution of electricity in Tennessee, duplicate facilities, and reduce the revenues to existing providers that are used to maintain facilities across their service areas. Again, this is sufficient to satisfy Tenn. Code Ann. § 4-5-310(a). *See*

In Re: Petition of Frontier Commc'ns of Am., Inc. to Amend Its Certificate of Convenience & Necessity, No. 07-00155, 2007 WL 8453466, at *2 (Dec. 6, 2007) (allowing telephone cooperatives to intervene where petitioner sought to expand operations into areas served by a cooperative).

Third, Petitioner mischaracterizes the law and the Commission's rules by asserting the Commission is prohibited from allowing a third party to intervene in a contested case unless its legal rights will be determined. (Pet'r Br. at 13.) Indeed, Petitioner places great emphasis on this point, writing "the Commission is **barred** from letting a third-party intervene **unless their legal rights will be determined**." (*Id.* (emphasis in original).) No amount of emphasis will make this statement true. In truth, Rule 1220-01-02-.08 states "Petitions for intervention shall be granted in accordance with T.C.A. § 4-5-310 and T.C.A. § 65-2-107." Tenn. Comp. R. & Regs. 1220-01-02-.08. Section 4-5-310(a) requires a petition to state facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined. But, § 4-5-310(b) gives the Commission discretion to allow 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." Tenn. Code Ann. § 4-5-310(b); *see* Tenn. Op. Att'y Gen. No. 11-06 (Jan. 11, 2011) (explaining "[i]n situations not qualifying under subsection (a), the presiding officer may grant the petition to intervene upon making the determination described in subsection (b)").[20]

[20] Petitioner's example of a docket in which the Commission barred a third party from intervening is not relevant or applicable. (*See* Pet'r Br. at 15.) In the case Petitioner cites, the Commission denied the Consumer Advocate's request to intervene in a show cause proceeding. As the Commission explained, "[t]his docket is not simply a contested case proceedings; it is a full-on civil enforcement proceeding" and "[t]he 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." (Pet'r Br. at Ex. B at 17-18.)

III. PETITIONER'S DISPARAGEMENT OF THE HEARING OFFICER IS IMPROPER.

Before concluding, TECA believes it necessary to respond to Petitioner's unfair and improper characterization of the Hearing Officer's conduct in this docket. Petitioner accuses the Hearing Officer of "turn[ing] control of the case over to the Government Intervenors" and being "complicit" in "a prosecution on private enterprise." (Pet'r Br. at 5, 12.) Nothing could be further from the truth. At all times, the Hearing Officer has appropriately managed discovery in this case. The Hearing Officer did not decide to file a second round of direct testimony that required supplemental discovery. Petitioner did that. The Hearing Officer did not fail to produce its emails or lie about and keep hidden the reason so few emails were produced. Petitioner did that. The Hearing Officer did not tell Intervenors that Northern Reliability and CDE's venture partners may have relevant documents. Petitioner did that. To blame the Hearing Officer for the delays caused by Petitioner's own gamesmanship is beyond inaccurate and unfair. It is outrageous.

Likewise, Petitioner's assertion that the Hearing Officer has "edited and exaggerated the cases cited in her proposed order" is an unfair depiction of the Compel Order. Petitioner complains about the Hearing Officer's characterization of *Mercer v. Vanderbilit*, but the Compel Order appropriately includes a "*see"* signal for that citation. Further, Petitioner's assertion that the Hearing Officer failed to cite to *Strickland v. Strickland* is simply wrong. (*See* Pet'r Br. at 17 n.3 (stating "the hearing officer did not provide a case citation").) To the contrary, the Compel Order clearly cites to that case. (*See* Compel Order at 9 n.48.) More importantly, Petitioner simply ignores the multiple pages where the Hearing Officer walks through the Tennessee Rules of Civil Procedure and explains how those rules provide for an award of attorneys fees to a party that succeeds on a motion to compel.

Petitioner also criticizes the Hearing Officer for allegedly failing to review a batch of emails produced by Northern Reliability in response to TECA's subpoena. Petitioner emphasizes the statement in the Compel Order that "[t]he emails **may contain vital information**" and then complains that the Hearing Officer "had 159 days to review these emails." (Pet'r Br. at 5 (emphasis in original).) In a transparent attempt to manufacture controversy, Petitioner has taken the Hearing Officer's words out of context. The emails the Hearing Officer is referring to are all of the emails TECA requested in discovery, not just the emails received from Northern Reliability. The paragraph that precedes the statement says "[w]hen a motion to compel concerns electronic data, Rule 37.06(4) requires the Hearing Officer to first determine that the information sought is discoverable." (Compel Order at 12.) The paragraph then recounts JSC's flawed argument that the information sought was not relevant and explains that the Northern Reliability production included 200 emails involving Mr. Emberling. (*Id.*) The paragraph concludes "the documents sought in the *Motions to Compel* are relevant …." (*Id.*)

The Compel Order ***then*** explains that the benefit of the emails sought by TECA outweighs the burden of JSC to produce them because they may contain vital information. (*Id.*) It is plain this statement refers to more than just the emails produced by Northern Reliability. It refers to all of the emails sought by TECA, which would include emails Northern Reliability never received, such as emails between the key players in the project, emails to other vendors, emails to potential funders, emails to potential customers, *etc*. Petitioner's distorted description of the Compel Order badly misrepresents the Hearing Officer's good work in this docket, and it is telling (and unfortunate) that Petitioner continues to blame others for its current predicament.[21]

[21] To be clear, the Hearing Officer was not obligated to review all of the discovery filed in this matter to reach a decision on TECA's motion to compel. That simply is not what decisionmakers do when deciding discovery motions.

CONCLUSION

For the reasons stated herein, TECA respectfully requests that the Commission deny Petitioner's request in its entirety.

DATED this 2nd day of February, 2023.

Respectfully submitted,

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FOR PUBLIC FILING

CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of February, 2023, the foregoing document was served on the following persons via email, hand delivery, overnight delivery and/or U.S. Mail, postage prepaid:

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