BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

February 10, 2023

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

PETITIONER'S REPLY TO GOVERNMENT INTERVENORS' RESPONSES

Jackson Sustainability Cooperative (the "Petitioner") submits this "Reply" addressing the issues raised by the Tennessee Valley Authority ("TVA"), Jackson Energy Authority ("JEA"), and the Tennessee Electric Cooperative Association ("TECA") (collectively the "Government Intervenors") in their "Responses" to the Petitioner's interlocutory[1] appeal brief ("Petitioner's Brief"), filed on January 20, 2023.

This appeal to the Public Utility Commission (the "Commission") concerns whether the Commission is authorized by law[2] to: 1) impose discovery sanctions on the Petitioner; and 2) let the Government Intervenors intervene. These issues are brought before the Commission pursuant to the Order Granting Motion for Interlocutory Review issued by Hearing Officer Monica Smith-Ashford on January 5, 2023. Where issues raised by the Government Intervenors' Responses

[1] "Interlocutory" refers to an appeal prior to all relevant matters in the case being determined.

[2] Statutes (the written laws passed by the Legislature), Rules (adopted by agencies to clarify statutes), and Case Law (decisions by courts interpreting statutes and rules) are all considered "law." Statutes are the original source for all law discussed herein.

were already addressed in the Petitioner's Brief, such relevant portions have been reasserted here. Petitioner has attempted to keep this Reply brief, but it had over 45 pages of Responses from the Government Intervenors to reply to.

1. The Purpose of the Commission's Rules and Regulations.

Rules are meant to clarify statutes, not broaden them. Both TECA and JEA claim that the Commission can rely on its ability to adopt rules and regulations as the sole authority to enforce those rules and regulations. *See TECA Response* at p. 15, footnote 15. *See also JEA Response* at p. 2. In support of this claim, TECA and JEA cite Tenn. Code Ann. § 65-2-102 (the statute allowing the Commission to adopt rules, shown below)). This statute is cited, in turn, by the Commission as authority under Rule 1220-01-02-.11 (the rule adopting the Tennessee Rules of Civil Procedure for discovery). Unsurprisingly, Tenn. Code Ann. § 65-2-102 is cited for every rule the Commission has adopted, and will likely be cited for any future rule of the Commission.

a. The power to adopt rules does not allow the Commission to extend its Authority.

So, does this statute alone (Tenn. Code Ann. § 65-2-102) give the Commission the ability to expand its authority through adoption of those rules? No, it does not. Simply reading the statute makes this very clear:

> (a) The commission is empowered and directed to adopt rules in the following circumstances and in the following manner:
>
> (1) The 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;
>
> (2) The commission is empowered to **adopt rules implementing, interpreting, or making specific the various laws** which it enforces or administers; **provided, that the commission shall have no power to vary or deviate from those laws,**

> **nor to extend its power or jurisdiction to matters not provided for in those laws**;
>
> . . .
>
> Tenn. Code Ann. § 65-2-102

The purpose is "implementing, interpreting, or making specific the various laws which [the Commission] enforces or administers," as clearly stated in the statute. *See id.* at (2). It is not necessary to look to case law to confirm this, but case law states the same thing:

> **Administrative regulations cannot be inconsistent with statutes on the same subject**. *Kaylor v. Bradley*, 912 S.W.2d 728, 734 (Tenn. Ct. App. 1995). "**The powers of [an administrative agency] must be found in the statutes. If they are not there, they are non-existent**." *Tennessee-Carolina Transp., Inc. v. Pentecost,* 206 Tenn. 551, 556, 334 S.W.2d 950, 953 (Tenn. 1960). Moreover, "**administrative agencies have only such power as is granted them by statute, and any action which is not authorized by the statutes is a nullity**." *General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Bd.*, 560 S.W.2d 910, 913 (Tenn. 1976) (citations omitted).
>
> . . .
>
> A department or agency of the State created by the legislature cannot by the adoption of rules be permitted to thwart the will of the legislature. The legislature is elected by the citizens of Tennessee and as an elected body it speaks for the people on matters of public policy of the state. Unelected officers of **a department or agency cannot adopt rules to circumvent statutes passed by the legislature. The powers to make the laws of the state are vested in the general assembly and not in administrative agencies of the state, even when the administrative agency properly promulgates rules and regulations**.
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> *Tennessee Dep't of Mental Health & Mental Retardation v. Allison*, 833 S.W.2d 82, 85 (Tenn. App. 1992)

It is abundantly clear that the Commission's authority is bounded by the statutes, not the rules. Thus, the Petitioner will not waste time interpreting the Commission's discovery rules when the Commission's relevant statutes control the issue.[3]

b. The Attorney General does not verify the legality of every interpretation of a rule simply by reviewing the rule.

TECA attempts to override the plain language of Tenn. Code Ann. § 65-2-102 (the statute allowing the Commission to adopt rules) because the Office of the Attorney General reviews every proposed rule for its legality and constitutionality. *TECA Response* at p. 14. As a former Tennessee Assistant Attorney General who has reviewed proposed rules in this manner, the Petitioner's counsel is qualified to provide insight on this topic. Reviewing proposed rules does not mean that every possible interpretation of the rule is verified. Neither is such review a certification that the rule is valid. The UAPA makes this clear:

> Any agency rule not adopted in compliance with this chapter shall be void and of no effect and shall not be effective against any person or party nor shall it be invoked by the agency for any purpose.
>
> Tenn. Code Ann. § 4-5-216 [4]

Even if a rule is adopted by an agency (necessarily implying it was reviewed by the Attorney General's Office), it is "void and of no effect" if it was not adopted in compliance with the UAPA. *See* Tenn. Code Ann. § 4-5-216.

[3] The Petitioner's interpretation of the relevant statutes is found in Section 3 of this Reply.

[4] Statutes beginning in "Tenn. Code Ann. § 4-5- . . ." are part of the UAPA.

2. Proceedings on appeal: an appeal to the Commission from the hearing officer vs. an appeal to the courts from the Commission.

The Petitioner took an interlocutory appeal asking the Commission not to adopt the Hearing Officer's Proposed Order. The Proposed Order exceeds the lawful authority of the Commission and does not interpret the relevant statute correctly.[5] There is another type of "appeal" relevant to the Commission's ruling as well. Administrative rulings, like the Commission's future Order, may always be appealed to the court system. For the purposes of this Reply, these appeals are referred to as "UAPA" appeals.[6]

a. Appeal to the Commission from the Hearing Officer.

While this is an "appeal" from a lower tribunal (Hearing Officer) to a higher tribunal (Commissioners), it is not an "appeal" in the same way it applies to courts. The Government Intervenors attempt to restrain the Commission by treating the Hearing Officer as the "trial court" and the Commission as the "appellate court." *See TVA Response* at p. 2. That is simply untrue.

> "**An agency's decision-making authority is not circumscribed in any way by an initial order**. Because an agency possesses its own fact-finding authority, it may make its own factual determinations, and it may substitute its judgment for that of the hearing officer or administrative judge. Thus, when an agency reviews an initial order, it renders its own decision, and **it is the agency's final order, not the initial order, that is the subject of judicial review**."
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> *McEwen v. Tenn. Dep't of Safety*, 173 S.W.3d 815, 822, 2005 Tenn. App. LEXIS 157, *14-15 (internal citations omitted).

[5] The nature of this "appeal" is discussed in the following section "a."
[6] UAPA appeals are discussed in the following section "b."

The appointed Commissioners are the only empowered decision makers for agencies. The Commission either decides on a case (rendering a Final Order) or does not take action on an Initial Order, rendered by a Hearing Officer from the Commission Staff or an Administrative Law Judge. An Initial Order must detail the time it takes effect and the method to appeal it. Although the Hearing Officer labeled it an "Initial Order," it is a "Proposed Order" which must be adopted by the Commission to be valid.

The Commission will make a decision on the correct interpretation of the statute, because in this case the Hearing Officer drafted a "Proposed Order" that will not become "Final" by its own terms; that is, it will not become final if not appealed by a date certain. If the Petitioner disagrees with the Commission's interpretation of the statute in its Final Order, the Petitioner is entitled to appeal the Commission's decision to the court system (broadly, a "UAPA appeal"). During a UAPA appeal the court will be bound by certain decisions of the Commission (determining the facts), but may overrule the Commission on other types of decisions (applying the correct law).

In administrative law, every single argument may be raised for the first time with the Commission, even if it was not raised with the Hearing Officer. It is the Commission, made up of the actual Commissioners, who possess the actual authority. Staff employed by the Commission are there to assist the Commission; they cannot ever overrule or bind the Commission.

The Government Intervenors attempt to view this administrative case through the lens of litigation, and even frequently refer to it as "litigation." This is incorrect, as litigation is a judicial controversy handled in a court of law. See Black's Law Dictionary, 2nd Ed.

("Litigation: A **judicial** controversy. A contest in a **court of justice**, for the purpose of enforcing a right.") The Commission performs an important administrative duty, which necessarily means that it is not a court. "**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.

Pushing administrative law into a litigation framework ignores the important role of administrative agencies using their specialized knowledge to set the policy of the State government. Since they wield such great power courts and judges are much more bound by procedural rules as a safeguard for the rights of citizens. Administrative agencies are not bound by the same procedural limitations, but they also cannot exercise the same authority. They are not created to be additional experts in law, but to bring specialized knowledge where the courts cannot.

Besides disrespecting the important role that administrative agencies serve, continually citing procedure applicable to courts, not administrative agencies, is an attempt to derail this case. The Government Intervenors have experienced counsel who understand administrative law, much less basic statutory interpretation. They know what they are claiming is incorrect. They are making these claims to prevent the Commission from reaching the ultimate issue.

b. UAPA Appeals to a Court

The Commission enjoys a unique statutory scheme for its appeals to courts. The difference between the exact court of law based on the mode of appeal is not particularly useful

for this case. The Court of Appeals and the Chancery Court review a decision by the Commission the same way: high deference determining issues of fact no deference for questions of law. *See CF Industries v. Tennessee Public Service Com.*, 599 S.W.2d 536 (Tenn. 1980) (holding: "[t]he same standard of review imposed by trial courts by this section prevails on appellate level.")

i. Commission's Statutory Authority.

The Commission is created by statute, and any action it takes needs to be authorized by statute. *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,[7] and any action which is not authorized by the statutes is a nullity.") Administrative agencies may have their unique statutory provisions, but in Tennessee, they are all governed by the UAPA, including the Commission.[8]

ii. No waiver of statutory authority in Administrative Law.

The Government Intervenors strenuously argue that the Petitioner has "waived" most of its arguments by not raising them sooner in the proceedings. That is not how administrative law works. The Petitioner cannot "waive" an objection to the Commission exceeding its authority at any level of the administrative process. Either the Commission acts within the authority delegated by statute, or it acts outside of it. If for any reason the Commission acts outside of

[7] This principle is also embodied in the UAPA's plain language:

> (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

[8] "The legislative intent that this act apply to *all* administrative boards and agencies is unmistakably clear." *United Inter-Mountain Tel. Co. v.* ***Public Service Com***., 555 S.W.2d 389, 391, (Tenn. 1977).

statutory authority, any acts taken by the Commission based on that decision will be nullified by the court handling the UAPA appeal. This includes situations where the Petitioner fails to object or does not pursue an issue. Waiver of legal issues is not applicable to Administrative law, because there is a hard boundary of administrative authority. Courts are very quick to protect a general encroachment on the rights of citizens beyond anything the Legislature explicitly authorized.

> An administrative agency cannot enlarge its own jurisdiction, nor can jurisdiction be conferred upon the agency by parties before it. Accordingly, it is held that **deviations from any agency's statutorily established sphere of action cannot be upheld because based upon agreement, contract, or consent of the parties, nor can they be made effective by waiver or estoppel**.
>
> *Seagram Distillers Co. v. Jones*, 548 S.W.2d 667, 671-672, Tenn. App. 1976)

The Petitioner is entitled to assert that the Commission exceeded its statutory authority for the first time **even after the administrative case is complete**.

> As shedding some light on this question, see *Polk County v. State Board of Equalization*, Tenn. App. (1972), 484 S.W.2d 49, where this Court, speaking through Judge Todd, affirmed the Chancellor's decision to the extent that it invalidated the Board's action and held that **no waiver had taken place by the mere failure to raise this issue during the administrative proceedings**.
>
> *Seagram Distillers Co. v. Jones*, 548 S.W.2d 667, 671-672, Tenn. App. 1976)

The Government Intervenors are absolutely correct that the Petitioners did not raise all available defenses at the earliest possible time. The Petitioner allowed discovery into its operations on the basis that it had nothing to hide, since it was merely asking permission to perform a future act, not under investigation for alleged wrongdoing. The problem arose when the Petitioner volunteered whatever information it still had about its decision making for this particular project, but this was distorted into accusations of “causing unnecessary expense and

delay" and a "blatant disregard for the discovery process." *Proposed [styled "Initial"] Order* at p.15. As the Petitioner shows in section 5. of this Reply, declaratory actions are not the proper vehicles for resolving factual disputes anyhow.

At that point, it was clear that the Government Intervenors had been taken advantage of the Petitioner's restraint, and the Petitioner was not getting a fair hearing. So if the Government Intervenors want to derail this proceeding instead of working towards the issues, the Petitioner is entitled to enforce its rights.

iii. Courts will reverse the Commission for exceeding statutory authority.

Courts do not give up the authority to interpret a statute. Conversely, courts defer to the Commission on many issues, such as resolving factual disputes (as long as there is reasonable evidentiary support), but statutory interpretation is not one of them.

> Judicial review of a decision of the PSC is limited. The court may, however, reverse the decision if it **violates statutory provisions or is in excess of the agency's statutory authority**.
>
> *Deaderick Paging Co. v. Tennessee Pub. Serv. Comm'n*, 867 S.W.2d 729, 731, (Tenn. App. 1993).

The UAPA clearly states that:

> 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**.[1]

Tenn. Code Ann. § 4-5-326 (**adopted April 14, 2022**)

Ignoring this very relevant statute, JEA cites old case law, prior to this statute's passing, to assert that a reviewing court will defer to the Commission's interpretation of the statute. *JEA*

Response p. 6, (*citing Wood v. Metro. Nashville & Davidson County Gov't*, 196 S.W.3d 152, 159 (Tenn. App. **2005**)). Whatever deference was given to the Commission's legal interpretation is gone as of April 14, 2022. JEA is leading the Commission down the wrong path.

TECA believes that the Commission should, in fact, not only ignore this provision, but to **interpret the statute in the opposite manner of a reviewing court**. Specifically, TECA argues the statute only "establishes the standards ***a court*** should apply when 'presiding over the appeal of a judgment in a contested case.'" *TECA Response*, p. 17 (emphasis in original). Petitioner's counsel would respectfully advise the Commission to follow that logic a few steps further. If a UAPA appeal is taken, the first question is whether the Commission acted within its statutory authority. Citing this statute, the reviewing court will construe any ambiguity against expanding agency power.

While that legal analysis certainly deserves some respect for creativity, the Petitioner would implore the Commission to mercifully **not intentionally interpret a statute a different way than a court would**. The courts do not want the Commission to intentionally fail. The Commission just gives its best shot at interpreting the statute. If it is incorrect, the court will give a different interpretation. But just because a reviewing court will substitute its own interpretation does not mean that the Commission needs to decide the issue wrong just to get there.

So if the court will apply the statute to reverse the Commission's decision, it would be prudent for the Commission to apply the same statute on the front-end as well. Unless, of course, the goal is to delay any resolution through pointless bureaucratic shuffling. This resolution seems to suit TECA fine.

3. Interpreting the relevant statutes.

Petitioner has listed the principles Tennessee courts use to interpret statutes in section "a." through "c." below. The relevant statute is shown in section "d." with the Petitioner's interpretation.

a. Specific statutes govern over general statutes.

The Government Intervenors devote considerable paper space in an attempt to justify why the Commission should focus on subpart (a) and not subpart (b). The Tennessee Supreme Court is much more concise: A special statute or a **special provision of a particular statute controls** a general provision in another statute or **a general provision in the same statute**." *Strader v. United Family Life Ins. Co.*, 218 Tenn. 411, 403 S.W.2d 765 (Tenn. 1966). "Where there are two provisions, one of which is **special and particular and certainly includes the matter in question**, and the other general and if standing alone would include the same matter and conflict with the special act or provision, **the special must be taken as intended to constitute an exception to the general**." *State v. Safley*, 172 Tenn. 385, 112 S.W.2d 831 (Tenn. 1938).

b. The UAPA prevails over other statutes.

Tenn. Code Ann. § 4-5-326 is the section of the UAPA discussed above that reads "a court . . . shall not defer to a state agency's interpretation of the statute or rule" and "the court shall resolve any remaining ambiguity against increased agency authority." TECA argues that the Commission should liberally interpret its powers under the Civil Procedure Statute. *See TECA Response* at p. 17. That is the wrong interpretation. The terms of the UAPA control, especially over another section of the UAPA.

The UAPA is also very clear that it controls over a conflicting provision in another section, except for one specific section.

> (b) This chapter does not repeal § 65-2-110, and where there is a conflict between this chapter and that section, that section shall control. **In any other case of conflict between this chapter and any statute, whether general or specific, this chapter shall control**; however, compliance with the procedures prescribed by this chapter does not obviate the necessity of complying with procedures prescribed by other provisions of this code.
>
> Tenn. Code Ann. § 4-5-103

The exception mentioned, Tenn. Code Ann. § 65-2-110,[9] allows the Commission to employ a court reporter. That is the only exception for the Commission to apply another statute over the UAPA. It applies only to the Commission, and no other State agency, so the Legislature was clearly aware there were Commission statutes that differed from UAPA statutes. If the Legislature wanted to add more exceptions, it would have done so.

[9] Tenn. Code Ann. § 65-2-110 in its entirety: "The commission is authorized and directed to employ a competent court reporter or stenographer, whose salary shall be paid out of the general appropriations for the commission, and whose duties shall be to attend all sessions of the commission, to take down and transcribe all testimony offered in contested cases, to prepare the official record of all contested cases, which record shall include all petitions, applications, testimony, exhibits and such other matters as required by law or as the commission may direct, and to perform such other duties as the commission may direct; provided, that the commission may, in its discretion, direct the reporter not to transcribe particular proceedings if it appears that no such transcript is necessary; and provided further, that any party to a contested case may obtain copies of the transcript of testimony made by the commission's reporter upon the payment to the commission of the cost of same at such rate as the commission may determine."

c. Conflicting provisions are governed according to their Title.

Tennessee also has statutes for interpreting the other statutes. They are found at the aptly named Title 1, Chapter 3: "Construction of Statutes."[10] Tenn. Code Ann. § 1-3-103 is applicable here:

> If provisions of different titles or chapters of the code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the subject matter of that title or chapter.
>
> Tenn. Code Ann. § 1-3-103

Simply put, each "Title" will be interpreted in light of the other "Chapters" and "Sections" of that Title. Statutes starting with "4" will be interpreted in light of the other statutes starting with "4 - . . ."; statutes starting with "65 - . . .' in light of the other statutes starting with "65".

TECA wants this Commission to ignore these principles, even though a reviewing court will not. The Petitioner would respectfully implore the Commission not to follow this bad advice. It will only lead to additional time and expense. That is TECA's goal. It should not be the Commission's goal.

d. The Statute at Issue.

The statute at issue is Tenn. Code Ann. § 4-5-311, part of the UAPA. It adopts the Tennessee Rules of Civil Procedure for agencies operating under the UAPA. For ease of reference, it will be referred to as the "Civil Procedure Statute." The Civil Procedure Statute also forms the basis for the $89,459.95 of sanctions demanded against the Petitioners.

The two contested subparts of the Civil Procedure Statute read, in their entirety:

[10] Statutes in Tennessee follow the "Tenn. Code Ann. § [Title] – [Chapter] –[Section]" format. Thus Tenn. Code Ann. § 1-3-103 unabbreviated is Title 1, Chapter 3, Section 103 of the Tennessee Code Annotated.

> (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

Subpart (a) adopts the Tennessee Rules of Civil Procedure for contested cases generally, except subpart (b) refers the dispute to a court to enforce any alleged "disobedience to . . . any lawful agency requirement for information." This statute is perfectly clear that an administrative agency may require discovery between parties, but should refer an alleged failure to cooperate in discovery over to a trial court for resolution. All the relevant principles for statutory interpretation lead to this conclusion.

The present case is a good example, where the Government Intervenors are demanding their attorney's fees under Rule 37.01(4) from a motion to compel filed under Rule 37.01(2), but the Petitioner asserts such a sanction is not permitted under Rule 37.06(4) because the only materials "lost" were emails deleted as part of a routine, good-faith operation of an automatic email deletion policy from a vendor, and there is nothing "extraordinary" about the circumstances that obviate Rule 37.06(4).

Simple logic also demands that in front of the Commission, where discovery is first handled informally, the Petitioner should have a chance to comply with an Order to Compel before being sanctioned. The hearing on the Motion to Compel was the first instance where the Hearing Officer ruled on the Petitioner's discovery objections as well.

TECA claims that following the Petitioner's interpretation of the Civil Procedure Statute, that is, referring these matters to a court to impose discovery sanctions, "would cause innumerable delays in both the trial courts and administrative dockets." *See TECA Response*, p. 16. However, Petitioner is not aware of any other agency that has imposed discovery sanctions under the Civil Procedure Statute. The Government Intervenors have not cited any. Yet, miraculously, neither Tennessee's administrative or justice system has imploded.

If the UAPA applies to all the administrative agencies of the State, the Government Intervenors could have cited a case where another agency has awarded another party their attorney's fees under the Civil Procedure Statute. So, either these situations are not so numerous they cannot be counted, or every other agency reads the statute like the Petitioner, where the specialized knowledge of a trial court may be useful to determine discovery sanctions.

4. Clarifying "Subdivisions of the State" and the Commission's ruling affecting intervenor's legal rights.

"Baloney" is how TECA describes the Petitioner's argument that "subdivisions of the State" include municipal electric providers, electric cooperatives, and utility districts. *TECA Response* p. 25, footnote 19. JEA uses the more charitable "legally incorrect . . . as phrased[.]" *JEA Response* at p. 4.

The Petitioner did not make a mistake regarding political subdivisions of the State of Tennessee. Municipal power companies, utility districts, and other local government entities, including JEA, are "subdivisions of the State" because they are organized or given powers by act of the General Assembly. JEA and TECA's members are enacted by the General Assembly. *See JEA Response* at p. 4 (stating: "JEA is an energy authority created by a private act of the Tennessee General Assembly.") *See also TECA Response* at p. 23-24 (stating: "[TECA member] cooperatives are nonprofit cooperative membership corporations organized under of subject to Tile [sic] 65, Chapter 25 of the Tennessee Code.)

In its brief, Petitioner explained the difference between a subdivision of the State (such as JEA and all of TECA's members) and an arm of the State (such as the Commission). *Petitioner's Brief* p. 9-10, 18-19. Petitioner's argument was that "jurisdiction" over a party is synonymous with the "ability to affect the legal rights" of the party. The Commission does not have jurisdiction over subdivisions of the State, and therefore cannot affect their legal rights.

The best way to understand what is included as a "subdivision of the State" is to look at the statutes on how to sue a subdivision of the State.[11] Suits against local political subdivisions of the State are found in the "Government Tort Liability Act." It provides a very thorough guide:

> (A) "Governmental entity" **means any political subdivision of the state of Tennessee including, but not limited to, any municipality, metropolitan government, county, utility district**, school district, nonprofit volunteer fire department receiving funds appropriated by a county legislative body or a legislative body of a municipality, human resource agency, community action agency or nonprofit corporation that administers the Head Start or Community Service Block Grant programs, public building authority, and development district created and existing pursuant to the constitution and laws of Tennessee, or **any instrumentality of government created by any one (1) or more of the named local governmental entities or by an act of the general assembly**. "Governmental entity" also means a nonprofit public benefit corporation or charitable entity . . .
>
> Tenn. Code Ann. § 29-20-102

TECA cites **its own website** to claim its members are not subdivisions of the State. *See TECA Response* at p. 23-24 ("*see* https://www.tnelectric.org/about/ . . . [t]hus Petitioner is totally wrong on the facts"). In contract, JEA does not cite anything in its defense. *See JEA Response* at p. 4. The Petitioner would encourage the Commission to rely on statutory authority, not a self-serving website. It does not matter that TECA believes, deep down in its heart, that its members are not political subdivisions of the State of Tennessee.

[11] While TECA and JEA may want a narrow definition of "subdivisions of the State," that is rarely the case when a subdivision of the State is sued and wants to claim sovereign immunity. The Government Tort Liability Act specifies the extent that a subdivision's sovereign immunity has been waived by the Legislature.

5. Issues raised by Government Intervenors outside of appeal

Government Intervenors raise several issues outside of the interlocutory appeal to the Commission. While the Petitioner considers some of these accusations as "moving the goal posts," it will do its best to respond briefly.

b. "No attempt made by Petitioner to rebut discovery misconduct"

TVA argues "[Petitioner] has not attempted to explain or rebut [the Hearing Officer's] findings of [discovery] misconduct." *See TVA Response* at p. 4. On the contrary, in its Appeal Brief, Petitioner raised the relevant point that neither the Hearing Officer or any Government Intervenors sent a litigation hold notice to stop E A Solar, LLC from deleting emails. *See Petitioner's Brief,* p.1, 22-23. The Hearing Officer followed TECA's lead and ruled that Petitioner "should have known" its obligations. *See Petitioner's Brief*, p.1, 22-23.

c. TECA cannot rely on the Federal Rules of Civil Procedure.

TECA counters that it did not need to send a litigation hold notice because Petitioner has an implied duty to preserve after discovery is issued in litigation. *See TECA Response* at p. 19. Not only is this not litigation,[12] TECA cites only federal case law to support this claim, governed by the **Federal Rules of Civil Procedure**. The Government Intervenors' entire argument is about adopting the Tennessee Rules of Civil Procedure, yet they now want to cite the Federal Rules.

c. Petitioner vigorously objected that discovery requests were not relevant.

If the Commission reviews the Petitioner's written responses to Government Intervenors' discovery requests, the Petitioner vigorously objects to non-relevant discovery. The Petitioner

[12] *See this Reply*, p. 7, above.

argued the same to the Hearing Officer. The Petitioner still argues none of these "missing" documents were relevant, so it had no notice to save them. These allegations are addressed in the Petitioner's Appeal Brief and Section "6." of this Reply, below.

d. Alleged errors in the Petition.

The Government Intervenors raise several issues with the Petition. These issues are clearly outside of this appeal. However, the Petitioner does welcome this change to actually reviewing the merits of the Petition. That will be the first instance of doing so in this case. It is the set of facts in the Petition that solely govern the outcome of this case, so the Petitioner indeed looks forward to the prospect of focusing on the Petition once this frivolous discovery matter is settled. Asking the Petitioner to further defend the Petition in this Reply is simply not feasible, though.

6. Government Intervenors continue to distort the purpose of a Declaratory Ruling.

The Petitioner certainly "cherry-picked" what facts went into its Petition, because that is exactly how a declaratory action proceeds. The Petitioner needs to pick what plan of action it wants the Commission to approve. The Petitioner does not cram in every piece of history, because it does not plan on doing all of those things in the future. Declaratory rulings are simple: Petitioner presents a particular set of facts to the Commission; the Commission rules on the set of facts, and the Petitioner, and only the Petitioner, may rely on that particular set of facts, and only that set of facts.

What the Government Intervenors have tried to prove is that there is not factual "evidence" about what the Petitioner "claims" in the Petition. This argument clearly misses the

point of a declaratory ruling, the Petitioner has attempted to raise the inherent problems respectfully, but it has fallen on deaf ears. It does not matter if there is a shred of "evidence" that "supports" the future actions that are detailed extensively in the Petition. What matters is in the Petition. The only facts that matter are in the Petition. A basic reading of the declaratory ruling statute makes this perfectly clear:

> 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

That is why the Petitioner focused, extensively, on its argument that none of the "missing" documents were relevant. Not only does the Petitioner have zero reason to keep old drafts of contracts for its own purpose, but there is even less of a reason to think that it should keep conflicting information for discovery purposes. The Petitioner has never performed a project like this, **which is why it sought permission first**.

Petitioner operated under the understanding that the Government Intervenors wanted discovery to understand the set of facts in the Petition. Once again, the Petition details how the Facility will operate **in the future**. Even at the time discovery was requested, the Petitioner did

not reasonably see how discovery was applicable.[13] However, in the interest of reasonably accommodating other parties, the Petitioner did not object to discovery because it did not have anything to hide. There is no accusation of wrongdoing inherent in a declaratory ruling action. The entire point of a declaratory action "is to settle important questions of law before the controversy has reached a more critical stage." *See* footnote 11.

There are no similar projects, from a governance point of view, that the Petitioner or key individuals had been involved with. This should be self-explanatory. If a similar project was already completed, there would be little reason to file a declaratory ruling action with the Commission. The Petitioner has always been viewing this action through the lens of whether the Facility would be "affected by and dedicated to public use," because that specific phrase is the crux of this case and the entire reason for filing the Petition.

7. There is no "contradicting" evidence; the entire purpose of this case is because the Petitioner is trying to do something new.

Especially frustrating has been the repeated accusations that the Petitioner somehow needs to "prove" the state of facts in the Petition. TECA claims that it has "uncovered numerous instances" in the Petition that are "unsupported by any evidence." *TECA Response* at p. 23. Clear as day, the Petition states "funders have made **oral commitments** to finance the

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[13] '"Declaratory judgments' are so named because they proclaim the rights of the litigants without ordering execution or performance. **Their purpose is to settle important questions of law before the controversy has reached a more critical stage.** The chief function is one of construction. **While findings of fact are permitted in a declaratory judgment action, 'the settlement of disputed facts at issue between the parties will ordinarily be relegated to the proper jurisdictional forums otherwise provided."'**

Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 837, 2008 Tenn. LEXIS 589, *16-18, 2008 WL 11503727

Facility." *Petition* at 14. To which TECA responds, "[y]et, not a single **document** has been produced to support these statements." *TECA Response* at p. 6. Why on earth should the Petitioner be required to produce documents to support an oral commitment? This case has descended into madness where TECA wants to punish the Petitioner when the **oral commitments** are not supported by **written evidence**.

The reason that Petitioner has received only oral commitments is perfectly clear from the retaliation the Petitioner has faced during this proceeding. From the outset, the Government Intervenors have demanded that this Commission not grant the Petitioner the ability to merely ask if its proposed facility is "affected by and dedicated to the public use."

In 2017, Rep. Gerald McCormick, a former Republican State Representative who represented parts of Chattanooga, asked the Tennessee Attorney General (as all State offices are entitled to do, including the Commission) to interpret relevant statutes as to whether a solar facility would be permitted to sell electricity exclusively to adjacent owners/tenants. The Attorney General gave a detailed opinion explaining that the relevant concern is not the customer's adjacency to the solar facility, but whether the facility is "affected by and dedicated to public use." In relevant part, the Attorney General stated the following:

> 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

The statutes in Tennessee are very clear that companies may operate to supply themselves or others with electricity without regulation if it is not "affected by and dedicated to

public use.". This hearing does not seek to establish that right. It merely seeks to clarify it. If the General Assembly wished to enact a blanket ban on non-public utilities to generate or sell electricity, they would not have included the words "affected by and dedicated to public use."

And yet the sole basis for the Government Intervenors to intervene has been that they may lose revenue (except of course, for TECA, who does not actually have a member in the service area or sells to a public utility in the service area, and whose "injury" would be purely hypothetical if a different solar field happened to be built in its area). But earning a certain amount of revenue or selling a certain amount of electricity is not a legal right. Any business that chooses to be more self-reliant and produce its own electricity will lower the demand from the local public utility. A factory shutting down would have the same effect. Do the Government Intervenors have a right to force a factory to stay in business? To use a certain amount of electricity? Clearly not. The "injuries" are purely hypothetical, and do not support a basis for intervening.

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 on the 10th day of February, 2023.

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