

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

May 8, 2023

IN RE:

**PETITION OF JACKSON SUSTAINABILITY
COOPERATIVE TO DETERMINE IF A
CERTIFICATE OF CONVENIENCE AND
NECESSITY IS NEEDED**

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**DOCKET NO.
21-00061**

**ORDER AFFIRMING HEARING OFFICER’S ORDERS
GRANTING, IN PART, MOTIONS TO COMPEL,
GRANTING INTERVENTIONS, AND SETTING A PROCEDURAL SCHEDULE**

This matter came before Chairman Herbert H. Hilliard, Vice Chairman David F. Jones, Commissioner Robin L. Morrison, Commissioner Clay R. Good, and Commissioner John Hie of the Tennessee Public Utility Commission (the “Commission” or “TPUC”), the voting panel assigned to this docket, during a regularly scheduled Commission Conference held on February 27, 2023, to hear and consider the appeal of Jackson Sustainability Cooperative (“JSC”, “Petitioner”) of several orders of the hearing officer in the docket.

First, JSC challenged the hearing officer’s orders granting intervention to the Tennessee Municipal Electric Power Association (“TMEPA”), Tennessee Electric Cooperative Association (“TECA”), Jackson Energy Authority (“JEA”), and the Tennessee Valley Authority (“TVA”), covering four separate orders, all issued on August 20, 2021:

- *Order Granting the Petition to Intervene Filed by the Tennessee Municipal Electric Power Association* (August 20, 2021);
- *Order Granting the Petition to Intervene Filed by the Tennessee Electric Cooperative Association* (August 20, 2021);

- *Order Granting the Petition to Intervene Filed by the Tennessee Valley Authority* (August 20, 2021); and
- *Order Granting the Petition to Intervene Filed by Jackson Energy Authority* (August 20, 2021).

Second, JSC challenged the procedural schedule of the hearing officer which provided for the intervening parties to take discovery of the Petitioner prior to the filing of intervenor pre-filed testimony and the opportunity of the Petitioner to take discovery. This challenge pertained to one order:

- *Order Establishing a Procedural Schedule* (September 8, 2021).

Finally, JSC challenged the hearing officer's order granting, in part, motions to compel and the imposition of sanctions. This challenge pertained to one order:

- *Initial Order Granting, In Part and Denying, In Part Motions to Compel Filed by Tennessee Electric Cooperative Association and Jackson Energy Authority*, (November 14, 2022).

In summary, the Commission panel voted unanimously to affirm all six (6) orders of the hearing officer for the reasons herein.

BACKGROUND

On May 24, 2021, JSC filed a *Petition For a Solar Facility For Supplemental Energy* (“*Petition*”). In its *Petition*, JSC described its plans for the construction of a solar facility with a battery-energy storage and shared interconnection (“Solar Facility”) located on Roosevelt Parkway in Jackson, Tennessee.¹ The facility is intended to have a capacity of 16.5 MW with an accompanying storage facility of 46MWh.² In its *Petition*, JSC seeks a determination that it is exempt from regulation by the Tennessee Public Utility Commission because it has identified itself

¹ *Petition* at 1.

² *Id.* at 5.

as a non-profit cooperative, and as such, would be exempt from the definition of a public utility under Tenn. Code Ann. § 65-4-101(6)(E).³

In the alternate, if JSC is not exempt as an electric cooperative, then JSC seeks an exemption from TPUC regulation because it is not a “public utility” as it intends to distribute supplemental electricity in a manner that is not “affected by and dedicated to public use.” JSC further requests that if it is indeed a “public utility,” it be granted a Certificate of Public Convenience and Necessity (“CCN”) authorizing construction.⁴

In pre-filed testimony submitted in support of the *Petition*, Mr. Dennis Emberling identified himself as the President of JSC and described the proposed Solar Facility as consisting of fixed solar panels, inverters, batteries, electrical and control equipment, and underground wiring within 3.5 miles of the facility.⁵ According to Mr. Emberling, JSC is a non-profit cooperative organized under the Electric G&T Cooperative Act (Tenn. Code Ann. § 48-69-101, *et seq.*). Further, Mr. Emberling identified Northern Reliability, Inc. (“Northern Reliability”) as the primary contractor to build the facility and the company that will also handle all facility operations and maintenance.⁶

The customers or members that JSC seeks to serve are currently being served by the JEA. Under JSC’s proposal, members of JSC will have smart meters separate from JEA’s meters. Members will continue to draw power from JEA when usage is normal or below normal. When demand rises, members of JSC will be able to draw power from the Solar Facility. According to

³ *Id.* at 1. As found in its *Petition*, JSC’s citation to Tenn. Code Ann. § 65-4-101(6)(E) as providing it exemption from the definition of public utility because it is organized as a cooperative is incorrect. The correct citation is Tenn. Code Ann § 65-4-101(6)(A)(v), which defines “cooperative” as a nonutility for purposes of TPUC’s regulatory jurisdiction.

⁴ *Id.* at 17.

⁵ Dennis Emberling, Pre-Filed Direct Testimony, pp. 2-3 (May 24, 2021).

⁶ *Id.*

Mr. Emberling, no power will backflow onto JEA's power grid.⁷ In addition, according to Mr. Emberling, JSC members will have little expense and pay a cheaper rate for peak demand usage than the rate charged by JEA.⁸ Mr. Emberling testified that members need the Solar Facility for many reasons; ranging from environmental policy issues to cheaper energy on demand. Mr. Emberling also testified that the Solar Facility can help lower the costs to its customers and reduce peak charges from the TVA to JEA.⁹

Mr. Emberling is listed as a Director of JSC on a charter filed with the Secretary of State on May 14, 2021, shortly before the *Petition* was filed with TPUC.¹⁰ In his pre-filed testimony, Mr. Emberling stated that the project is expected to cost 67 million dollars and all equipment, installation, and construction costs will be financed by Community Development Enterprises-Jackson I ("CDE").¹¹ Mr. Emberling identified himself as the President of JSC in his pre-filed testimony and also as CDE's regulatory and service contact, the entity that is expected to finance the project.¹² CDE is a joint venture with three venture partners: EA Solar, LLC; Hunt Solar, LLC; and SynEnergy, Inc.¹³ According to documents produced in discovery, Mr. Emberling is, in fact, the CEO of CDE.¹⁴ In an affidavit submitted on June 2, 2022, Mr. Emberling also identified himself as the CEO of EA Solar.¹⁵ CDE's willingness to finance the project is based on its eligibility for certain tax credits. JSC will obtain capital and lease equipment from CDE.¹⁶

⁷ *Id.* at 3.

⁸ *Id.* at 3.

⁹ *Id.* at 4-5.

¹⁰ *Id.* at Exhibit 1, p. 3.

¹¹ *Id.* at 3.

¹² *Id.* at 1, 8.

¹³ *Petitioner's Responses to Tennessee Electric Cooperative Association's Interrogatories and Requests for Production of Documents*, p. 27 (September 27, 2021).

¹⁴ *Response of SynEnergy, Inc. to Subpoena of Tennessee Electric Cooperative Association*, SYNCONF000008, p. 6 (April 5, 2021)

¹⁵ *Response By Jackson Sustainability Cooperative To The Motions to Compel Filed By The Tennessee Electric Cooperative Association*, Affidavit of Dennis Emberling, p. 1 (June 2, 2022).

¹⁶ Dennis Emberling, Pre-Filed Direct Testimony, p. 7 (May 24, 2021).

Following the filing of the *Petition*, on June 25, 2021, TMEPA, TECA, and JEA each filed a petition to intervene. TMEPA is a trade organization of municipal energy, county electric, and other government utility systems throughout the state that are wholesale customers of TVA.¹⁷ TECA is a trade organization representing twenty-two (22) electric cooperatives and one (1) municipal that are electric power distributors in Tennessee.¹⁸ JEA is an energy authority created by a private act of the Tennessee General Assembly and provides retail electric service throughout the city of Jackson, Tennessee.¹⁹

In the petitions to intervene, TMEPA, TECA, and JEA all expressed opposition to the *Petition*. On July 1, 2021, the TVA filed a statement requesting that the Commission not issue a declaratory ruling and declining to open a contested case proceeding. Later, on August 13, 2021, the TVA filed its petition to intervene in the proceeding. A common thread of opposition expressed by the intervenors in their respective petitions to intervene and statements opposing the *Petition* was that the Solar Facility was prohibited under the Electric G&T Cooperative Act (Tenn. Code Ann. § 48-69-101, *et seq.*) to sell power to TVA retail customers. In response to this contention, JSC amended its request for relief and amended its charter and bylaws to assert that it is a non-profit entity subject to the Rural Electric and Community Services Cooperative Act in Tenn. Code Ann. § 65-25-101, *et seq.*²⁰

Although JSC filed a response to the assertions of TVA and JEA, debating the provisions of the Electric G&T Cooperative Act, JSC did not object to the intervention of any intervening party. The petitions to intervene of TMEPA, TECA, JEA, and TVA were granted by the hearing

¹⁷ *Petition for Leave to Intervene of the Tennessee Municipal Electric Power Association*, p. 1 (June 25, 2021).

¹⁸ *Petition for Leave to Intervene of the Tennessee Electric Cooperative Association*, p. 1 (June 25, 2021).

¹⁹ *Petition for Leave to Intervene of the Jackson Energy Authority*, pp. 1-2 (June 25, 2021).

²⁰ *Response By Jackson Sustainability Cooperative To The Filed Statements*, p. 6 (July 13, 2021).

officer without objection by JSC.²¹ Thereafter, JSC submitted a joint proposed procedural schedule with the intervening parties, which the hearing officer adopted.²²

Pursuant to the procedural schedule, on September 8, 2021, TECA and JEA submitted their first set of discovery requests. On September 27, 2021, JSC filed its responses to the discovery requests of the intervening parties. Included in its response, JSC proffered new pre-filed direct testimony for Mr. Emberling that included additional, new information.²³ After the responses were filed, JEA and TECA raised concerns with the extent of the documentation provided by JSC. During several status conferences with the hearing officer, the parties indicated that there were ongoing discovery issues. Still, the parties indicated a willingness to continue to attempt to resolve the discovery disputes among themselves, which resulted in a suspension of the procedural schedule.²⁴ On January 5, 2022, JSC filed supplemental responses to the discovery. Over the course of several months, stretching from September 2021 to April 2022, JSC and the intervening parties discussed and conferred over what some intervenors described as an alarming lack of discovery documents for a project that is projected to cost \$67 million.²⁵ One specific concern documented by TECA was the production of only a handful of emails, which seemed unusual for a project of such size.²⁶

²¹ *Order Granting the Petition to Intervene Filed by the Tennessee Municipal Electric Power Association* (August 20, 2021); *Order Granting the Petition to Intervene Filed by the Tennessee Electric Cooperative Association* (August 20, 2021); *Order Granting the Petition to Intervene Filed by the Tennessee Valley Authority* (August 20, 2021); *Order Granting the Petition to Intervene Filed by Jackson Energy Authority* (August 20, 2021).

²² *Joint Proposed Procedural Schedule* (August 20, 2021); *Order Establishing a Procedural Schedule* (September 8, 2021).

²³ *Petitioner's Responses to Tennessee Electric Cooperative Association's Interrogatories and Requests for Production of Documents*, pp. JSC-000426-00436, Dennis Emberling, Part II, Pre-Filed Direct Testimony, (September 27, 2021).

²⁴ Transcript of Status Conference (September 30, 2021); Transcript of Status Conference (October 21, 2021); *Order on September 30 and October 21, 2021 Status Conferences* (December 23, 2021).

²⁵ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, pp. 7-13, Exh. 13-16, 22-23 (May 20, 2022).

²⁶ *Id.* at Exh. 14, p. 2; Exh. 16, pp. 3-4.

TECA eventually sought documents from Northern Reliability, a contractor of JSC, with a subpoena perfected in a court in Vermont.²⁷ JSC had agreed to help facilitate this process, however, TECA asserted that JSC did very little to assist Northern Reliability's production. Rather, TECA asserted that it appeared JSC had actively sought to hinder the production of discovery.²⁸ Following modifications to the protective order, Northern Reliability released numerous documents in response to the discovery request. Following review of the production of documents by Northern Reliability, TECA contended that JSC has not provided all responsive documents, has not conducted an adequate search of records, and has been selective in the documents it has produced.²⁹ TECA and JEA each filed a motion to compel requesting relief, including sanctions and legal fees.

TECA'S MOTION TO COMPEL

On May 20, 2022, the *Tennessee Electric Cooperative Association's Motion to Compel Discovery from Jackson Sustainability Cooperative* ("TECA's Motion to Compel") was filed. TECA's Motion to Compel requested that JSC be compelled to comply with its discovery obligations and produce all documents responsive to TECA's First and Second Discovery Requests.³⁰ TECA asserted that JSC produced minimal documents related to its project, including only four emails.³¹ According to TECA, JSC's counsel has repeatedly confirmed that JSC has produced all responsive documents, and no non-privileged documents have been withheld on the basis of an objection.³² However, after receiving the response to the subpoena from Northern

²⁷ *Update on Status of Third-Party Discovery By Tennessee Electric Cooperative Association*, pp. 1-3 (March 18, 2022).

²⁸ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, pp. 10-11; Exh. 21 (Confidential) (May 20, 2022).

²⁹ *Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative* ("TECA's Motion to Compel"), pp. 2-3 (May 20, 2022).

³⁰ *Id.* at 1.

³¹ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, pp. at 2-3 (May 20, 2022).

³² *Id.* at 3.

Reliability, TECA asserted that Northern Reliability produced over 200 emails from, to, or copying Mr. Dennis Emberling and his associate Mr. David Shimon. JSC then informed TECA that Mr. Emberling had deleted potentially responsive emails. TECA's accompanying memorandum of law in support of the motion to compel included confidential exhibits documenting emails produced by Northern Reliability between Mr. Emberling and others dealing with the Solar Facility which were made *after* the filing of discovery by TECA yet were not turned over by JSC.³³

At the hearing on the motions to compel on June 21, 2022, TECA maintained that although the parties have been talking about discovery since the Fall of the previous year and discussing the need to make sure that discovery is thorough and complete, TECA was only informed about the auto-delete document retention policy after *TECA's Motion to Compel* was filed.³⁴ TECA argued that these actions by JSC raise serious concerns about spoliation of evidence.³⁵ In addition, TECA argued that JSC's actions during the discovery process make it impossible for the Commission to have a complete and accurate record in this docket and to obtain the necessary facts to make a decision.³⁶ Therefore, TECA requested that JSC be compelled by the hearing officer to "fully comply with its discovery obligations, perform thorough searches for responsive documents, produce all documents responsive to TECA's discovery requests, and comply with the relief requested in the Motion..."³⁷

In addition, according to TECA, it learned in an email from JSC Counsel to Northern Reliability that JSC's Counsel stated that, "[t]here are lots of ways for you to fight service of

³³ *Id.* at 18-19; Confidential Exh. 33.

³⁴ Transcript of Proceeding, p. 8 (June 21, 2021).

³⁵ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, pp. 3-4 (May 20, 2022).

³⁶ Transcript of Proceedings, p. 9 (June 21, 2022).

³⁷ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, p. 4 (May 20, 2022).

process and argue that the Tennessee Public Utility Commission has no jurisdiction.”³⁸ TECA asserted that the email also says Northern Reliability could try to quash the subpoena or could request an amended Protective Order. TECA eventually had to hire an attorney in Vermont to assist in serving the subpoena on Northern Reliability, then TECA maintains that Northern Reliability delayed responding to the subpoena and sought an amendment to the Protective Order.

According to TECA, based on documents provided by Northern Reliability, it is clear that JSC has “thwarted discovery in this docket”³⁹ and JSC is “purposely withholding responsive, non-privileged information and/or is unable or unwilling to search for the requested information.”⁴⁰ TECA sought relief in the form of an order compelling JSC, CDE, and its principals and agents to perform a thorough search of records, provide details of the search performed, produce all documents relevant to TECA’s requests, and to answer additional interrogatories to the extent that JSC maintains documents were destroyed beginning in July 2020. TECA also sought attorney fees for the filing of the motion to compel and for TECA’s subpoena to Northern Reliability.⁴¹

JEA’S MOTION TO COMPEL

JEA filed *Jackson Energy Authority’s Motion to Compel* (“*JEA’s Motion to Compel*”) on May 20, 2022. In *JEA’s Motion to Compel*, JEA expressed concern that the volume of documents produced by Northern Reliability seems to indicate that JSC has “either failed to conduct a diligent search for records or has destroyed documents which were responsive to the JEA requests.”⁴² According to JEA, *TECA’s Motion to Compel* “clearly connects the dots with respect to documents not produced, and perhaps destroyed, by JSC.”⁴³ JEA states that it joins in TECA’s request for

³⁸ *Id.* at 10-11; Confidential Exh. 21.

³⁹ *Id.* at 18.

⁴⁰ *Id.* at 16.

⁴¹ *Tennessee Electric Cooperative Association’s Motion to Compel*, pp. 2-3 (May 20, 2022).

⁴² *Jackson Energy Authority’s Motion to Compel* (“*JEA’s Motion to Compel*”), p. 1 (May 20, 2022).

⁴³ *Id.* at 2.

relief, which includes sanctions, production of documents, explanation of steps taken to find discoverable documents, and answers to additional interrogatories.

JSC’S RESPONSE TO THE MOTIONS TO COMPEL OF TECA AND JEA

On June 2, 2022, the *Response by Jackson Sustainability Cooperative to the Motion to Compel Filed by Tennessee Electric Cooperative Association* (“JSC’s Response to TECA’s Motion to Compel”) was filed. In *JSC’s Response to TECA’s Motion to Compel*, JSC argued that TECA seeks documents that do not exist and that “the materials sought are not necessary or relevant to a full consideration of the *Petition* filed by Jackson Sustainability Cooperative.”⁴⁴ JSC also alleged that TECA has used the discovery process to delay the proceedings as evidenced by TECA issuing a subpoena to a key contract vendor, Northern Reliability, “then failing to identify any specific document that it requests that is necessary to a full and fair hearing on the *Petition*.”⁴⁵

JSC argued that TECA made claims that JSC withheld documents without any proof and ignores the “document retention policy of Jackson Sustainability Cooperative and its solar developer.”⁴⁶ JSC advised that EA Solar has a document retention policy and does not collect emails unless they are “critical to a project.”⁴⁷ Here, after the filing of motions to compel, JSC revealed for the first time that EA Solar had an auto-delete policy which deletes internal and external emails after thirty (30) days.⁴⁸

According to JSC, “[n]ot only has TECA failed to connect its motion to the purpose of the *Petition*, TECA has not named any class of documents or specific subject matter connected to the

⁴⁴ *Response by Jackson Sustainability Cooperative to the Motion to Compel Filed by Tennessee Electric Cooperative Association* (“JSC’s Response to TECA’s Motion to Compel”), p. 1 (June 2, 2022).

⁴⁵ *Id.* at 1-2.

⁴⁶ *Id.* at 2; Although it appears the auto-delete policy is that of EA Solar, there is no explanation as to whether this policy covers and manages the documents of JSC, CDE, and/or other entities.

⁴⁷ *Id.* at 19.

⁴⁸ *Id.* at Affidavit of Dennis Emberling, p.1 (June 2, 2022).

Petition which will allow it to more effectively respond to the *Petition*.”⁴⁹ JSC maintained that TECA cannot carry its burden on its motion to compel by making general allegations that JSC withheld documents after JSC has produced over one thousand pages of documents, including signed contracts.⁵⁰ JSC emphasizes that it has “made objections to the production of several documents to challenge admissibility [at] a future hearing, but has not withheld documents.”⁵¹

JSC argued that all of those documents are connected to the construction of the solar facility and “not to whether Jackson Sustainability Cooperative in delivering energy outside of the grid and behind the JEA meter is exempt from regulation by express statute.”⁵² According to JSC, “TECA must connect its request for documents to specific sections in the written agreements where there is a possible need to understand the construction of a paragraph or section” and if it fails to do so, TECA “fails to carry its burden of proof that documents exist, and that they are needed to clarify the responsibilities of parties to a written agreement.”⁵³ As such, JSC asserted that *TECA’s Motion to Compel* should be denied.

Similarly, JSC argued that *JEA’s Motion to Compel* should be denied because JEA has not identified specific documents to be produced and “...because they are not identified are not necessary or relevant to a full consideration of the *Petition* filed by Jackson Sustainability Cooperative.”⁵⁴ JSC argued that JEA failed to carry its burden by showing that the material being sought consists of documents and that the material being sought is relevant to the subject matter as stated in the *Petition* or in the intervening petition it filed.⁵⁵ JSC maintained that it has not

⁴⁹ *Id.* at 11.

⁵⁰ *Id.*

⁵¹ *Id.* at 13.

⁵² *Id.* at 13-14.

⁵³ *Id.* at 20.

⁵⁴ *Response By Jackson Sustainability Cooperative to the Motion To Compel Filed By Jackson Energy Authority (“JSC’s Response to JEA’s Motion to Compel”)*, p. 1 (June 2, 2022).

⁵⁵ *Id.* at 9-10 citing *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 525 (Tenn. 2010).

withheld any documents and that additional emails are not available due to EA Solar's document retention policy. Further, JSC argues that any additional emails are not relevant because there are signed contracts in place and that compelling drafts when the final agreement is available, the party seeking the draft must show that the drafts and negotiation correspondence are relevant to the subject matter.⁵⁶ JSC requested that the hearing officer deny *JEA's Motion to Compel* because all agreements were incorporated into final contracts, and the emails requested by JEA are not relevant, nor connected to a specific purpose in the *Petition*, and further, they are not in JSC's possession.⁵⁷

THE ORDER OF THE HEARING OFFICER

In considering the motions to compel, the hearing officer noted the wide scope of the relief sought in the *Petition*. Primarily, JSC seeks a declaratory order that it is not a public utility and not subject to regulation by the Commission as a non-profit electric cooperative.

Making such a determination regarding a company that is new to Tennessee requires a fact specific inquiry to validate that the entity falls within the statutory exemption from Commission regulation. Therefore, documents related to JSC's corporate structure, its members, governance, and financing are crucial to provide the Commission with the information necessary to making a determination.⁵⁸

The hearing officer did not credit JSC's claim that the discovery sought by TECA and JEA was not relevant. Rather, the hearing officer found JSC's claims of relevancy were an attempt to distract from efforts to obfuscate the role played by JSC in the discovery process.⁵⁹ The hearing officer's order addressed JSC's apparent lack of transparency with respect to discovery efforts.

Early in the discovery process, TECA and JEA expressed concern about the lack of emails produced by JSC. According to TECA, this production consisted of only four emails. However, JSC assured the parties that it had produced all of the

⁵⁶ *Id.* at 13-14 citing *Boyd v. Comdata*, 88 S.W. 3d 203, 224 (Tenn. App. 2002).

⁵⁷ *Id.* at 17-18.

⁵⁸ *Initial Order Granting, In Part and Denying, In Part Motions to Compel Filed by Tennessee Electric Cooperative Association and Jackson Energy Authority*, p. 11 (November 14, 2022).

⁵⁹ *Id.*

responsive documents and that no document was not being produced based on an objection by JSC. JSC had maintained to the parties that Mr. Emberling does not email much as an explanation for the lack of emails. From documents obtained from Northern Reliability, TECA discovered that Mr. Emberling, who is President of JSC and on the Board of EA Solar, is actually a prolific emailer and emails from various addresses, including an email address from EA Solar.

In addition to JSC's failure to produce responsive documentation during the progression of this docket, numerous status conferences were held where TECA explained in great detail that there had been many conversations and meetings with JSC regarding discovery and JSC continued to maintain it had produced all responsive documents and did not mention EA Solar's auto delete policy...⁶⁰

As such, the hearing officer found that JSC had not acted in good faith when it failed to disclose the auto-delete policy and concluded that the Petitioner either knew or should have known about the existence of the auto-delete policy and had a duty to disclose the existence of it to the parties.⁶¹

The hearing officer found that the motions to compel of TECA and JEA should be granted in part.

Based on the record in this docket thus far and the arguments of the parties, the Hearing Officer finds that JSC has failed to comply with its discovery obligations, and further, the actions of JSC during the discovery process have thwarted the orderly administration of the proceedings and resulted in the destruction of potentially relevant evidence. JSC's actions have caused delay in the discovery process and increased the expense incurred by the parties involved in this matter....⁶²

The hearing officer ordered JSC, CDE, and its principals and agents to perform a thorough search of its records, provide details of the search performed, and produce all documents responsive to TECA's request. The hearing officer further ordered JSC and CDE to answer specific interrogatories about any discarded documents. In addition, the hearing officer ordered JSC to pay reasonable attorney fees and expenses associated with the filing of the motions to compel by TECA and JEA, the amount of which would be determined after a hearing. The hearing officer denied the requests of JEA for attorney fees for seeking supplemental responses to discovery requests and of

⁶⁰ *Id.* at 13.

⁶¹ *Id.* at 14.

⁶² *Id.* at 10-11.

TECA seeking attorney's fees associated with obtaining service of process on Northern Reliability.⁶³

JSC'S MOTION FOR APPEAL

On December 12, 2022, JSC filed the *Motion for Interlocutory Appeal to the Full Public Utility Commission* ("*Motion for Appeal*"). In the *Motion for Appeal*, JSC sought review of the hearing officer's order granting sanctions, claiming that the order was not based on evidence, but rather on the arguments of counsel. JSC further argued that the hearing officer exceeded the Commission's statutory authority in awarding sanctions and that the Commission does not have the authority of a court.⁶⁴ JSC also sought review of the "Hearing Officer's decision to conduct one way discovery" and to allow the "Government Intervenors" to intervene.⁶⁵

The hearing officer granted the *Motion for Appeal* and set a briefing schedule.⁶⁶

JSC'S INITIAL APPEAL BRIEF

On January 20, 2023, JSC filed its initial appeal brief which addressed a series of claims about the discovery process, the statutory authority of the hearing officer's order on the motions to compel, the legality of allowing the "government" intervenors to intervene, and questions concerning the motives of the intervenors. JSC asserted that regulation of its activities is unnecessary, a claim that goes to the merits of the *Petition* rather than an appeal of a discovery ruling of the hearing officer. JSC further claimed that the hearing officer has been "complicit" in allowing the intervenors to run the "case off of the rails."⁶⁷

⁶³ *Id.* at 15-17.

⁶⁴ *Motion for Interlocutory Appeal to the Full Public Utility Commission*, pp. 4-5 (December 12, 2022).

⁶⁵ *Id.* at 8-9.

⁶⁶ *Order Granting Motion for Interlocutory Review By the Panel of Commissioners* (January 5, 2023).

⁶⁷ *Interlocutory Appeal Brief to the Full Public Utility Commission*, p. 12 (January 20, 2023).

JSC presented three distinct issues to be considered. First, JSC challenged the decision of the hearing officer to grant the intervention of the intervenors. In summary, JSC claims that the rights of the intervening parties are not impacted by this proceeding. JSC asserts that while the Commission has authority over public utilities, the “Commission cannot affect the legal rights, duties, privileges, immunities or other legal interests of the Government Intervenors,” because they are not public utilities.⁶⁸

Next, JSC argues that Tennessee law, specifically the Uniform Administrative Procedures Act (“U.A.P.A.”) (*See* Tenn. Code Ann. § 4-5-101, *et seq.*) does not authorize an administrative agency to impose discovery sanctions. JSC argues that the Commission is not a court of law and has no inherent or common law power.⁶⁹ Rather, JSC argues that the U.A.P.A. “clearly requires that discovery disputes are referred to Circuit and Chancery courts.”⁷⁰

Finally, relying on commentary in the Federal Rules of Civil Procedure, JSC argues that the hearing officer erred by allowing “one way discovery.”⁷¹

REPLY BRIEF OF THE INTERVENORS

A. TECA’s Reply Brief to JSC’s Appeal Brief

In its brief, TECA recounts the long procedural history of JSC’s efforts in responding to discovery. Over a period of eight months, JSC repeatedly informed TECA that all responsive documents in the possession of JSC and CDE had been produced and that no non-privileged documents had been withheld based on objections.⁷² In summary, finding JSC’s efforts and responses lacking, TECA went to great lengths to obtain documents from a contractor of the Petitioner, Northern Reliability. TECA hired counsel in Vermont to perfect the subpoenas and

⁶⁸ *Id.* at 19-20.

⁶⁹ *Id.* at 16-17.

⁷⁰ *Id.* at 22.

⁷¹ *Id.* at 23-24.

⁷² *Interlocutory Review Brief of Intervenor Tennessee Electric Cooperative*, p. 4 (February 2, 2023).

obtain other related relief. Northern Reliability turned over a trove of documents, including 838 pages of emails relating to JSC and CDE’s plans for projects and efforts to obtain regulatory exemptions.⁷³ According to TECA, such documents should have been turned over by JSC in discovery.

TECA asserted that the fact that Northern Reliability had produced documents does not cure JSC’s discovery misconduct as Northern Reliability would not possess internal documents or communications among CDE, EA Solar, and other participants in the project.⁷⁴ With respect to JSC acknowledging the discarding of documents on April 29, 2022, and informing the parties of EA Solar’s auto-delete policy on June 2, 2022, after the motions to compel had been filed, TECA asserted that JSC had not offered an explanation of how EA Solar’s auto-delete policy applied to JSC and CDE documents.⁷⁵

TECA argues that the “appeal” of the hearing officer’s order is baseless. TECA asserts that the Commission has the statutory authority to adopt the Tennessee Rules of Civil Procedure, which the Commission has done by rule.⁷⁶ TECA disputes JSC’s claim that Tenn. Code Ann. § 4-5-311(b) requires the Commission to bring any discovery dispute to a circuit or chancery court for resolution. TECA points out that this theory would leave the Commission and all other administrative agencies without the ability to enforce discovery requirements or otherwise resolve discovery disputes.⁷⁷ It would further nullify the Commission’s rule authorizing motions to compel.

⁷³ *Id.* at 3-5.

⁷⁴ *Id.* at 8, FN 7.

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 14-15.

⁷⁷ *Id.* at 16-17.

TECA argues that the hearing officer correctly applied the provisions of Rule 37 of the Tennessee Rules of Civil Procedure. TECA claims that JSC has not been honest with the Commission and the intervening parties and is withholding relevant information.⁷⁸ With respect to JSC's claim that it was under no litigation hold ordering it to preserve documents, TECA argues that a duty to preserve evidence attaches upon notice that the evidence is relevant to future litigation or the filing of a complaint.⁷⁹ TECA cites to documents that have been designated confidential in this proceeding, that indicate Mr. Emberling anticipated objections and litigation from intervening parties back on May 25, 2021, the day after the *Petition* was filed.⁸⁰ TECA asserts that the hearing officer's decision is well supported and follows the procedures of Rule 37 of the Tennessee Rules of Civil Procedure.

With respect to JSC's claims that the hearing officer erred in allowing TECA to intervene, TECA asserts that this issue is untimely and was waived. TECA asserted that this is a textbook case of waiver in which a party that fails to oppose a motion has waived the issue.⁸¹

With respect to JSC's claims that TECA and its members are subdivisions of "state government," TECA asserted that electric cooperatives are organized under state law, which provides that the cooperatives are owned by the people they serve rather than the government.⁸² TECA argues that the relief sought in the *Petition* in which electric cooperative related statutes are construed to allow an entity to compete with JEA within JEA's service area can impact TECA's

⁷⁸ *Id.* at 18.

⁷⁹ *Id.* at 19 citing *BancorpSouth Bank v. Herter*, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009) & *Clark Construction Group v. City of Memphis*, 299 F.R.D. 131, 137 (W.D. Tenn. 2005).

⁸⁰ *Id.* at 19-20 citing *TECA's Memorandum of Law in Support of the Motion to Compel*, Confidential Exh. 31 (May 20, 2022).

⁸¹ *Id.* at 22-23 citing *In re Estate of Hendrickson*, No. M200801332COAR9CV, 2009 WL 499495*3 (Tenn. Ct. App. 2009); *Exchange National Bank of Chicago v. Abramson*, 45 F.R.D. 97, 102 (D. Minn. 1968); *In re M.L.P.*, 281 S.W. 3d 387, 394 (Tenn. 2009).

⁸² *Id.* at 23-24.

members as it would encourage others to pursue the same course.⁸³ TECA further criticizes JSC for making disparaging claims and statements about the hearing officer.⁸⁴

B. JEA's Reply to JSC's Appeal Brief

First, JEA argues that the Commission has authority to impose sanctions due to the plain language of Tenn. Code Ann. § 4-5-311(a) and (c). As the Commission and the U.A.P.A. have adopted the Tennessee Rules of Civil Procedure, which provide for sanctions through Rule 37, the hearing officer did not exceed the Commission's statutory authority.⁸⁵ JEA disputed JSC's theory that Tenn. Code Ann. § 4-5-311(b) requires the Commission to go to a trial court to resolve discovery disputes that arise in Commission proceedings.

Second, JEA argued that its petition to intervene is timely and was appropriately granted. While JSC has insisted that JEA is a subdivision of state government and its rights and privileges cannot be impacted by the Commission, JEA argues that it has interests at stake. JEA has the exclusive right to provide retail electricity throughout the City of Jackson pursuant to Tennessee law.⁸⁶ JEA claims that JSC's objection to its intervention is untimely as JSC has waited a year and a half to bring the issue.⁸⁷ Nevertheless, JEA asserts that the hearing officer was correct in granting intervention as it recognized JSC's proposal would have a direct impact on JEA.

C. TVA's Reply Brief to JSC's Appeal Brief

TVA argued that JSC has waived the right to appeal the hearing officer's decision to grant TVA's petition to intervene.⁸⁸ JSC did not object to TVA's intervention which was filed on

⁸³ *Id.* at 26.

⁸⁴ *Id.* at 28-29.

⁸⁵ *Response of Jackson Energy Authority to Jackson Sustainability Cooperative's Interlocutory Appeal to the Full Public Utility Commission*, pp. 2-3 (February 2, 2023).

⁸⁶ *Id.* at 4.

⁸⁷ *Id.* at 5.

⁸⁸ *Brief of the Tennessee Valley Authority*, p. 2 (February 2, 2023), citing *Waters v. Farr*, 291 S.W. 3d 873, 918 (Tenn. 2004); *Powell v. Community Health Systems, Inc.*, 312 S.W. 3d 496, 511 (Tenn. 2010).

August 13, 2021. Even if the objection were timely, TVA asserted that the hearing officer's decision to grant intervention was not in error. A decision by the Commission to allow JSC to sell electricity to JEA's customers would impact TVA's wholesale revenues.⁸⁹

With respect to JSC's appeal of the procedural schedule, TVA highlighted that JSC agreed to the schedule jointly with the intervening parties. TVA explains the practical benefits of the Commission's typical procedural schedule in which the petitioner responds to discovery, followed by the pre-filed testimony of the intervenors, who then are subject to discovery by the petitioner.⁹⁰ Each side has the opportunity to see the other's pre-filed testimony before asking for discovery, making the process more efficient.

With respect to the hearing officer's order on the motion to compel, TVA did not file discovery or a motion to compel and did not brief the issue but urged the Commission to affirm the hearing officer's order.⁹¹

JSC'S REPLY BRIEF

JSC argued that the Commission cannot make rules and regulations that go beyond the Commission's statutory authority.⁹² JSC asserts that the Attorney General's review of the Commission's rules cannot be relied upon to assert that a rule is legal.⁹³ JSC further argues that it may raise arguments before the hearing panel that it has not previously raised before the hearing officer, asserting that it has not waived any arguments despite not raising them previously. JSC argues that although it did not assert that the Commission lacked statutory authority to issue sanctions before the hearing officer, it may do so now before the hearing panel.⁹⁴ JSC claims that

⁸⁹ *Id.* at 2-3.

⁹⁰ *Id.* at 3.

⁹¹ *Id.* at 5.

⁹² *Petitioner's Reply to Government Intervenor's Responses*, pp. 3-4 (February 10, 2023).

⁹³ *Id.* at 4-5.

⁹⁴ *Id.* at 7-9.

reviewing courts will reverse the Commission on appeal for exceeding its statutory authority.⁹⁵ JSC asserts that the provisions of the U.A.P.A. control and the Commission is not afforded the benefit of a liberal interpretation of statutory authority.⁹⁶

With respect to the actual U.A.P.A. statute at hand, JSC argues that while Tenn. Code Ann. § 4-5-311(a) grants the general authority of an administrative agency to use the Tennessee Rules of Civil Procedure, Tenn. Code Ann. § 4-5-311(b) requires the Commission to refer any alleged failure to cooperate in discovery to a trial court for resolution.⁹⁷

Although JSC never argued before the hearing officer that it had no obligation under the Tennessee Rules of Civil Procedure, specifically Rule 37.06, to preserve electronic documents or be subject to sanctions, it does so now on appeal to the panel.⁹⁸ With respect to preserving emails and electronic documents, JSC claims there was no litigation hold ordered or required of it to preserve records.

JSC claims that the intervening parties continue to distort the purpose of this proceeding and takes issue with the demand for written documents to support oral commitments JSC has received from potential funders. JSC declares that the proposed Solar Facility does not intend to be dedicated to “public use.”⁹⁹ Finally, JSC argues that the intervenors’ claims of lost revenue are purely hypothetical and cannot be used as a basis for their intervention.¹⁰⁰

⁹⁵ *Id.* at 10-11.

⁹⁶ *Id.* at 12-14.

⁹⁷ *Id.* at 15.

⁹⁸ *Id.* at 16, 19.

⁹⁹ *Id.* at 21-23.

¹⁰⁰ *Id.* at 24.

HEARING

The Hearing on JSC's appeal of several of the orders of the hearing officer was held before the Commission panel assigned to this docket on February 27, 2023, as noticed by the Commission on February 17, 2023. Participating in the Hearing were:

Jackson Sustainability Cooperative – David H. Wood, Esq., Equitus Law Alliance, PLLC, P.O. Box 280240, Nashville, Tennessee 37228.

Tennessee Electric Cooperative Association – W. Brantley Phillips, Jr. Esq., Bass Berry & Sims, PLC, 150 Third Avenue South, Suite 2800, Nashville, Tennessee 37201.

Jackson Energy Authority – Larry L. Cash, Esq. Miller & Martin PLLC, 832 Georgia Avenue, Chattanooga, Tennessee 37402.

Tennessee Valley Authority – Henry M. Walker, Esq., Bradley Arant Boult Cummings, LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203-2754.

Pursuant to the *Notice of Procedure for Oral Arguments* issued on February 6, 2023, the parties presented oral argument before the panel. Following argument, the panel deliberated.

FINDINGS AND CONCLUSIONS

Petitioner sought review of three (3) issues encompassing six (6) different orders issued by the hearing officer. After consideration of the administrative record and arguments of the parties, the panel voted unanimously to affirm all six (6) orders of the hearing officer. Below, the panel considers the issues in the chronological order in which the hearing officer granted the petitions to intervene, imposed an agreed upon procedural schedule, and granted, in part, the motions to compel of TECA and JEA.

I. Whether the Hearing Officer Erred in Granting the Interventions of the Intervening Parties

All four interventions were granted by written order, without any objection, in this docket by August 20, 2021. JSC never raised an objection to any of the petitions to intervene filed by the

intervening parties until December 12, 2022, when it sought review by the panel. Rather than object after the filing of the petitions for intervention by the respective parties, JSC engaged with the intervenors, agreed to a procedural schedule, and spent several months conferring with the intervenors over discovery disputes. Thus, JSC has raised the issue for the first time on “appeal,” well over a year after the hearing officer granted the interventions in the docket. As such, this claim is untimely. Tennessee courts have long recognized as a general proposition that a party is not permitted to withhold objections but is required to make timely objections or motions to remedy or correct an error.¹⁰¹ This principle has been recognized by the Tennessee Supreme Court as being equally valid in administrative proceedings.¹⁰² Sixteen (16) months exceeds any time limit for review of an order under the U.A.P.A. The Petitioner, the intervening parties, and the Commission all invested time and resources in moving the docket forward for a year and a half after the filing of the *Petition*, only for the Petitioner to abruptly protest the basis and legitimacy of the proceedings. This hinders the concept of judicial economy that is the very essence of the concept of waiver.

Even assuming that the objection was timely, the claim is without merit. JSC now classifies the intervenors as arms of “State Government” or “Government Intervenors” and thus have no interest as intervenors. Assuming that the wide net JSC casts with respect to what constitutes an arm of “State Government” is applicable, JSC has not cited any authority that would prohibit the intervention in a Commission docket by a “state” or “government” entity. The Consumer Advocate Division of the Tennessee Attorney General’s Office and the City of Chattanooga have

¹⁰¹ *Eldridge v. Eldridge*, No. 01A01-9808-CV-00451, 1999 WL 767792*3 (Tenn. Ct. App. September 29, 1999) citing and quoting *Glenn v. Webb*, 565 S.W. 2d 876, 879 (Tenn. Ct. App. 1977).

¹⁰² *Emory v. Memphis City School Board of Education*, 514 S.W. 3d 129, 146-148 (Tenn. 2017) (internal citations omitted).

frequently intervened and litigated in Commission dockets. The Commission has adjudicated cases in which the rights and claims of city and county governments acting as parties were determined.¹⁰³

The standard for intervention and the Commission's authority to grant intervention is found in Tenn. Code Ann. § 4-5-310 and Tenn. Code Ann. § 65-2-107. While the right of intervention is not absolute, it is clear that JSC's proposal and its intentions impact the interests of the intervening parties.

The *Petition* itself requested an exemption from regulation or otherwise the granting of a CCN to serve customers in the service area of JEA, a wholesale customer of TVA. The hearing officer's conclusion is further supported by statements made by JSC in its initial *Petition*, which indicate that the Solar Facility can lower peak demand and benefit JEA and TVA.¹⁰⁴ The proposed Solar Facility and whether it is subject to regulation is a matter of first impression in the State of Tennessee. At its core, the proposed facility would provide electricity, in an on-demand or supplemental fashion, to a customer base that is already served by a traditional utility. It would presumably draw revenue away from the traditional utility. The outcome of this docket could lead to similar or identical proposals and ventures across the State of Tennessee. A decision in this docket would implicate and touch upon a number of interests and rights of electric cooperatives, utility districts, and municipal electricity providers of the state. As such, JSC's claim that the hearing officer erred in granting the interventions is without merit.

II. Whether the Hearing Officer Erred With Respect to the Procedural Schedule

In its motion for an appeal and its initial brief, JSC argued that the hearing officer erred in allowing "one way discovery" in which JSC has had to respond to discovery while the intervenors

¹⁰³ See *In re: Complaint of City of Knoxville Against AT&T Tennessee*, Docket No. 12-00082, *Order* (June 7, 2013); *In re: Petition Seeking Revocation of Certificate of Franchise Authority Held by Spirit Broadband, LLC*, Docket No. 20-00006, *Default Judgment Revoking Abandoned Certificate of Franchise Authority* (August 20, 2021).

¹⁰⁴ *Petition*, pp. 7-8 (May 24, 2021).

have not likewise been required to respond to discovery from JSC.¹⁰⁵ It should be noted here that there is nothing in the record to indicate that JSC ever objected to or requested a change to the procedural schedule in the docket. In fact, JSC and the intervening parties submitted an agreed procedural schedule, which the hearing officer adopted.¹⁰⁶ Nor did JSC object to supplemental discovery requests by TECA and JEA related to the supplemental testimony JSC filed as part of its discovery responses.

JSC did not pursue this argument after its initial appeal brief and did not address the issue during oral argument. Nevertheless, this issue is without merit. JSC agreed to the joint proposed procedural schedule in which the first round of discovery is directed at JSC while forgoing propounding discovery on the intervenors until after the filing of the intervenor's pre-filed testimony; testimony in which the intervenors would presumably stake out positions, expert opinions, and/or supporting facts.¹⁰⁷ This format of scheduling is customary in contested case proceedings before the Commission. The schedule the Petitioner and the intervening parties agreed to in this case also allows the opportunity for depositions. As such, it does not result in "one way" discovery or cut off any opportunity for discovery. In the event a party seeks to amend or opposes a procedural schedule, they should first file a motion with the hearing officer before seeking relief from the panel. As such, this matter is without merit, is untimely, and is not properly before the panel.

¹⁰⁵ *Motion for Interlocutory Appeal to the Full Public Utility Commission*, p. 8 (December 12, 2022).

¹⁰⁶ *Joint Proposed Procedural Schedule* (August 20, 2021); *Order Establishing a Procedural Schedule* (September 8, 2021).

¹⁰⁷ *Joint Proposed Procedural Schedule* (August 20, 2021).

III. Whether the Commission has the Statutory Authority to Resolve Discovery Disputes and Impose Sanctions

The Commission is an administrative agency exercising commingled legislative, executive, and judicial functions.¹⁰⁸ Tennessee courts have referred to the Commission as having “practically plenary authority” over public utilities by virtue of Tenn. Code Ann. § 65-4-104 and related provisions.¹⁰⁹ JSC’s challenge frames much of its argument on a jurisdictional claim that it is not a “public utility,” a determination that goes to the very merits of the entire proceeding. The issue of whether JSC is a public utility subject to regulation by the Commission is not properly before the panel. The issue need not be decided to resolve JSC’s appeal. On its own volition, JSC submitted itself to the jurisdiction of the Commission when, pursuant to Tenn. Code Ann. § 4-5-223, it filed a petition that opened this docket. In doing so, it took upon the burden, as does any party before the Commission in a docket, to follow the rules and regulations governing contested case proceedings, the orders of any presiding hearing officer, and the obligations to comply with discovery requirements. These obligations and requirements apply to the intervenors as well.

Next, JSC argued that the Commission has no authority to decide discovery disputes or issue sanctions. JSC’s position explicitly frames portions of the U.A.P.A. as placing severe limits on the Commission and its ability to maintain order in its contested case proceedings. JSC argues that Tenn. Code. Ann. § 4-5-311(b) limits the Commission to asking a circuit or chancery court to issue sanctions or otherwise adjudicate discovery disputes.¹¹⁰ The hearing officer’s order also relied upon Tenn. Code Ann. § 4-5-311(a) as a basis of authority for issuing sanctions. With two competing and conflicting interpretations, this becomes a matter of statutory construction.

¹⁰⁸ *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W. 2d 151, 158 (Tenn. Ct. App. 1992) (cert. denied) (internal citations omitted).

¹⁰⁹ *Id.* at 159.

¹¹⁰ *Interlocutory Appeal Brief to the Full Public Utility Commission*, pp. 20-23 (January 20, 2023); *Petitioner’s Reply to Government Intervenors’ Responses*, pp. 14-15 (February 10, 2023).

The primary purpose of construing statutes is to ascertain and give effect to the intention and purpose of the General Assembly.¹¹¹ In matters of statutory construction it is assumed that the General Assembly chose its words and their placement carefully and meant what it said.¹¹² When statutory authority is clear and unambiguous, Tennessee courts have applied the plain language in its normal and accepted use.¹¹³ A statute must be construed within the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning.¹¹⁴ The Commission must also consider the 2022 enactment of Tenn. Code Ann. § 4-5-326 which provides the following:

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.

In determining that the Commission has the authority to impose sanctions on a party, the hearing officer relied on the General Assembly's directive that a hearing officer shall "effect discovery" in accordance with the Tennessee Rules of Civil Procedure.¹¹⁵

(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....(emphasis added)¹¹⁶

The first sentence of the section above clearly requires a hearing officer to "effect discovery" under the Tennessee Rules of Civil Procedure. When "effect" is employed as a verb such as in the phrase

¹¹¹ *Lipscomb v. Doe*, 32 S.W. 3d 840, 844 (Tenn. 2003).

¹¹² *State v. Medicine Bird*, 63 S.W. 3d 734, 754 (Tenn. Ct. App. 2001) (cert. denied) (internal citations omitted).

¹¹³ *Boarman v. Jaynes*, 109 S.W. 3d 286, 290-291 (Tenn. 2003) (internal citations omitted).

¹¹⁴ *State v. Butler*, 980 S.W. 2d 359, 363 (Tenn. 1998).

¹¹⁵ *Initial Order Granting, In Part and Denying, In Part Motions to Compel Filed by Tennessee Electric Cooperative Association and Jackson Energy Authority*, p. 7 (November 14, 2022).

¹¹⁶ Tenn. Code Ann. § 4-5-311(a).

“to effect,” it means “to bring to pass; to execute; to enforce; to accomplish.”¹¹⁷ Nevertheless, the Petitioner has apparently drawn a line that forbids a hearing officer, the Commission, or any administrative agency from resolving a discovery dispute in a contested case before it.¹¹⁸ This is contrary to the plain language of U.A.P.A.

...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. (emphasis added).¹¹⁹

The third sentence of Tenn. Code Ann. § 4-5-311(a) is unambiguous. Such discovery objections *shall* be decided in accordance with the statutory provisions of the chapter or the provisions of the Tennessee Rules of Civil Procedure. There is no reservation or exclusion of specific rules or practices under the Tennessee Rules of Civil Procedure as it relates to discovery. Motions to compel and sanctions are authorized by Rule 37 of the Tennessee Rules of Civil Procedure.¹²⁰ Rule 37.01(4) explicitly authorizes an award of reasonable fees with respect to motions to compel where appropriate.

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent 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.¹²¹

¹¹⁷ Effect, *Black's Law Dictionary*, (6th Ed. 1991).

¹¹⁸ *Interlocutory Appeal Brief to the Full Public Utility Commission*, pp. 20-23 (January 20, 2023); *Petitioner's Reply to Government Intervenors' Responses*, pp. 14-15 (February 10, 2023).

¹¹⁹ Tenn. Code Ann. § 4-5-311(a).

¹²⁰ See Tenn. R. Civ. P. 37.01; Tenn. R. Civ. P. 37.02.

¹²¹ *Id.* at 37.01(4) (quoted in part).

Nevertheless, JSC relies upon Tennessee Code Ann. § 4-5-311(b) to assert that the Commission must go to a circuit or chancery court to resolve discovery disputes and that it does not authorize the Commission to issue sanctions.

(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. (emphasis added).¹²²

This section begins by establishing the circumstances in which the section *may* be applicable. The General Assembly limited those circumstances to when a party has disobeyed, “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....”¹²³

One could argue, as JSC did during the hearing, that Tenn. Code Ann. § 4-5-311(b) explicitly references any “lawful agency requirement for information” and that this language applies to any requirement for the production of discovery. The phrase “lawful agency requirement for information” is broader and more encompassing than a specific term such as “discovery.”

“In case of disobedience to any subpoena issued and served ***under this section*** or to any lawful agency requirement for information...” (emphasis added).

¹²² Tenn. Code Ann. § 4-5-311(b) (2022).

¹²³ *Id.*

Indeed, the placement of the phrase “under this section” is followed by “or”, indicating that a distinction was made between enforcing a subpoena issued pursuant to Tenn. Code Ann. § 4-5-311(a) and authorizing a petition to enforce other “lawful agency requirement[s] for information” sought by an agency. The Commission itself, like most administrative agencies, has a number of lawful requirements for information separate and apart from discovery requests of intervening parties or the U.A.P.A. As such, one could reasonably conclude that the General Assembly did indeed intend to include discovery disputes in the instances that *may* be enforced by courts on behalf of administrative agencies.

Of no less importance to an analysis of Tenn. Code Ann. § 4-5-311(b) is that an application for a circuit or chancery court order to compel compliance is not the exclusive remedy where the prerequisite qualifications described by the statute have been met. There is no specific language that requires the Commission to petition a court to adjudicate discovery objections or otherwise issue sanctions. The General Assembly selected the permissive term “may” rather than the prescriptive term “shall” for such circumstances. Use of the term “may” conveys an investment of discretion on the part of the agency. If the General Assembly had intended for any and all circumstances of applicable disobedience to be adjudicated by the circuit or chancery court, then the prescriptive term (i.e. *shall*) requiring such adjudication would appear.

In addition to contradicting the plain language of Tenn. Code Ann. § 4-5-311(a), JSC’s narrow and forced construction of Tenn. Code Ann. § 4-5-311(b) would also contradict Tenn. Code Ann. § 4-5-311(c), which states:

The agency may promulgate rules to further prevent abuse and oppression in discovery.

Subsection (c) is straightforward in authorizing an administrative agency to engage in rulemaking to “further prevent abuse and oppression.” Of note, the General Assembly used the modifier “further” to indicate tools to address discovery abuse are already present and provided for in the section, the chapter, and in the Rules of Civil Procedure, as indicated in subsection (a).

Administrative agencies in Tennessee, including the Commission, have adopted rules governing discovery and contested cases pursuant to Tenn. Code Ann. § 4-5-311(c). Like the rules used by the Administrative Procedures Division of the Tennessee Secretary of State, which are utilized by a number of agencies, the Commission has rules that authorize the governing of discovery under the Tennessee Rules of Civil Procedure and includes the availability of the filing and adjudication of motions to compel.¹²⁴ The rules of the Commission and of other administrative agencies are reviewed for legality and constitutionality by the Office of the Tennessee Attorney General.¹²⁵ While counsel for the Petitioner has shared from his personal experience that such reviews are perfunctory and performed by the “low man on the totem pole”,¹²⁶ the Commission’s experience with rule review by the Attorney General has not been the same.

Despite some statements made in the record to the contrary, the Commission has, from time to time, entertained motions for sanctions under Rule 37 of the Tennessee Rules of Civil Procedure. The Commission has made a similar statutory analysis with respect to Tenn. Code Ann. § 4-5-311(a) and (b) when it sanctioned a public utility pursuant to Tenn. Code Ann. § 65-4-120.¹²⁷

¹²⁴ See Tenn. Comp. R. & Regs. 1220-01-02-.11; 1360-04-01-.11.

¹²⁵ Tenn. Code Ann. § 4-5-211.

¹²⁶ Transcript of Commission Conference, pp. 67-68 (February 27, 2023).

¹²⁷ See *In Re: Docket to Determine Compliance of BellSouth Telecommunications, Inc.’s Operations Support Systems With State and Federal Regulations*, Docket No. 01-00362, *Order Imposing Sanctions Against BellSouth Telecommunications, Inc. Pursuant to Tenn. Code Ann. § 65-4-120*, p. 16, FN 42 (June 28, 2002); This order was vacated as part of a settlement agreement, although the Commission maintained its legal position, sanctions were paid, and the order was required to specifically remain as part of the record. See *Order Approving Settlement Agreement and Vacating Order Imposing Sanctions Against BellSouth Telecommunications, Inc. Pursuant to Tenn. Code Ann. § 65-4-120* (September 4, 2003).

The Commission has also considered awarding sanctions pursuant to Rule 37 of the Tennessee Rules of Civil Procedure at the request of the Tennessee Attorney General’s Consumer Advocate Division. In that case, the hearing officer declined to award sanctions, finding that the parties had substantially responded to the request of the hearing officer.¹²⁸

The filing and resolving of motions to compel before the Commission are not rare.¹²⁹ The fact that there are so few instances of considering the imposition of sanctions is perhaps a reflection that the Commission tends to see the same parties, both regulated utilities and otherwise, over and over again and the expectations for discovery are clear. The current docket features parties, and in some cases, counsel, that have little or no experience before the Commission. Nevertheless, whether new to practicing before the Commission or not, the obligations of discovery are well known and not unique to the Commission alone.

Rule 37 of the Tennessee Rules of Civil Procedure authorizes sanctions for failure to make or cooperate in discovery and sets forth penalties for violation of pretrial procedures contained in Rules 26 through 36. Advisory commentary to the rule notes that while the authority for such penalties “probably lie within the inherent power of the trial court to conduct the discovery process,” Rule 37.01 provides guidelines for appropriate action under various circumstances mentioned in the Rule.¹³⁰ Rule 37.01(2) permits parties to move for an order compelling an answer when a party fails to properly respond to a discovery request. Rule 37.01(3) mandates that evasive

¹²⁸ See *In re: Audit of United Cities Gas Company’s Incentive Plan Account (IPA) for the Period April 1, 2000 through March 31, 2001*, Docket No. 01-00704, *Order Denying in Part and Granting in Part the Consumer Advocate’s Motion for Relief Under Rule 37.02 of the Tennessee Rules of Civil Procedure*, pp. 7-8 (May 26, 2004).

¹²⁹ Recent examples include: *In re: Joint Petition of Tennessee-American Water Company and Thunder Air, Inc. d/b/a Jasper Highlands Development, Inc. For Approval of an Asset Purchase Agreement and For the Issuance of a Certificate of Convenience and Necessity*, Docket No. 20-00011, *Order Granting, In Part and Denying In Part, the Motion to Compel Filed by the Consumer Advocate* (September 15, 2020); *In Re: Joint Petition of Superior Wastewater Systems, LLC And TPUC Staff As A Party To Increase Rates and Charges*, Docket No. 22-00087, *Order Denying Motion to Compel Filed By The Consumer Advocate* (February 6, 2023).

¹³⁰ See Tenn. R. Civ. P. Rule 37.01 Advisory Commission Comment.

or incomplete responses be treated as failure to answer. “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”¹³¹ In addition, courts have recognized that tribunals have the authority under the Rules of Civil Procedure to impose sanctions to address a general abuse of the discovery process.¹³² The Court in *Strickland v. Strickland* made clear that “where there has been a violation of Tenn. R. Civ. P. 26.02, the Trial Court has an inherent power to sanction the offending party, and the Trial Court has wide discretion in such matters.”¹³³ The Court of Appeals has recognized that “[r]ules governing discovery would be ineffectual absent the trial court’s authority to sanction their abuse.’ Thus, trial courts possess the inherent authority to impose appropriate sanctions in response to an abuse of the discovery process.”¹³⁴

The Court has recognized that administrative agencies have similar authority to a trial court when conducting contested case proceedings. The Court of Appeals in *Tennessee Dep’t of Env’t & Conservation v. Roberts* recognized that “[s]ignificantly, it is during and leading up to the contested case evidentiary hearing that an administrative judge has wide-ranging authority. The role and scope of authority of an administrative judge during this stage of the proceedings are much like that of a trial judge who presides over a civil action.”¹³⁵ Moreover, the authority vested in administrative agencies under the U.A.P.A. is intended to allow for a final adjudication at the agency level and to limit the involvement of courts with administrative cases. The Tennessee Court of Appeals has noted that the purpose of the contested case framework of the U.A.P.A. in precisely this manner:

¹³¹ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

¹³² *See Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 133 (Tenn. 2004).

¹³³ *See Cornell v. State*, 118 S.W.3d 374, 379 (Tenn. Ct. App. 2003) citing *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981).

¹³⁴ *Pegues v. Illinois Cent. R. Co.*, 288 S.W.3d 350, 353-354 (Tenn. Ct. App. 2008) (internal citations omitted).

¹³⁵ *Tennessee Dep’t of Env’t & Conservation v. Roberts*, No. M202000388COAR3CV, 2021 WL 388611, at *5 (Tenn. Ct. App. Feb. 3, 2021).

The contested case provisions of the Uniform Administrative Procedures Act, Tennessee Code Annotated section 4–5–301 to 4–5–325, 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. Only if there is an adverse final order would the courts need to exercise any substantive review. Therefore, Tennessee Code Annotated section 4–5–311(b) is not, as the appellants would have it, a means to obtain interlocutory judicial review of discovery disputes in the forum of a party's own choosing.¹³⁶

JSC's interpretation of Tenn. Code Ann. § 4-5-311(b) dictating court intervention in every discovery matter before an administrative agency would bind the hands of all Tennessee administrative agencies in contested case proceedings. With respect to the Commission, it would play havoc with any number of ratemaking and related proceedings subject to statutory deadlines. In plain and ordinary language, Tenn. Code Ann. § 4-5-311(a) requires a hearing officer to “effect discovery” using the Tennessee Rules of Civil Procedure. The Commission has adopted the Tennessee Rules of Civil Procedure for purposes of discovery. Rule 37.01(4) of the Tennessee Rules of Civil Procedure authorizes an award against the party whose conduct necessitated filing the motion, or against the attorney advising such conduct, the reasonable expenses incurred in obtaining the order, including attorney's fees. As such, the panel concluded that the Commission has the statutory authority to impose sanctions in accordance with the Tennessee Rules of Civil Procedure.

With respect to the hearing officer's decision on the merits of the motions to compel, the panel does not find any abuse of discretion. The record here paints a perplexing picture. JSC has indicated to the intervenors in correspondence ranging from October 2021 to the end of April of 2022 that it has not withheld documents based on any objection.¹³⁷ Yet the Petitioner never

¹³⁶ *Tennessee Department of Safety v. Bryant*, No. E2011-01295-COA-R3CV, 2012 WL 3289643* 4 (Tenn. Ct. App. 2012).

¹³⁷ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, Exh. 15-17, 22, and 23 (May 20, 2022).

indicated that documents may have been deleted or discarded until April 29, 2022. There was no disclosure that documents were deleted due to an auto-delete policy over the course of months of back and forth between the parties. The auto-delete policy itself was not disclosed until June 2, 2022, over a year after the filing of the *Petition* and nine months after the start of discovery. The record reflects that a number of documents were produced to the intervenors by a third party, Northern Reliability, that should have been in the possession of the Petitioner and preserved and turned over in discovery.¹³⁸

JSC contends that it was not under a litigation hold or order of the hearing officer to preserve documents. Assuming JSC's contention was correct that a duty to preserve documents only attaches when it has been imposed on a party by others, JSC was on notice when it agreed to a procedural schedule with dates for formal discovery submission and deadlines. JSC was on notice after being served with discovery on September 8, 2021 by the intervenors to preserve documents. Correspondence on October 4th, November 11th, and December 15th, of 2021 provided explicit notice of concerns of the intervenors over the production of only a handful of emails and other documents for such a sophisticated and pioneering venture.¹³⁹ JSC provided assurances that all documents had been provided, acknowledged a duty to supplement, and expressed a preference to use personal contacts when recruiting members for JSC.¹⁴⁰ JSC did disclose discarding some documents in a letter on April 29, 2022, yet there is no mention of an auto-delete policy throughout their correspondence and representations to the parties or before the hearing officer until June 2, 2022, after the filing of the respective motions to compel.¹⁴¹ The omission is striking, to say the

¹³⁸ *Id.* at 17-20 in which TECA provides several examples. Other samples of emails created by Petitioner after discovery began in this docket and found in the possession of NRI concern funding, local planning approval, and construction: NRI001233, NRI001242, and NRI001298.

¹³⁹ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, Exh. 13, p. 2; Exh. 14, p. 2; Exh. 16, pp. 2-3 (May 20, 2022).

¹⁴⁰ *Id.* at Exh. 15, pp. 2-3.

¹⁴¹ *Id.* at Exh. 23, pp. 2-3.

least, given the period of months and the back and forth between the parties as they conferred over discovery.

While Rule 37.06 of the Tennessee Rules of Civil Procedure would excuse failing to provide electronically stored information lost as a result of the routine, good-faith, operation of an electronic information system, the record here indicates that documents that were created by or in the possession of the Petitioner were not preserved after JSC had been served with discovery requests seeking such documents. JSC waited until June 2, 2022 to assert that EA Solar had a thirty (30) day electronic deletion policy in place, although no explanation was provided as to why it would continue to allow documents to be deleted after discovery in this docket began in September of 2021.¹⁴² Nor did the Petitioner attempt, pursuant to Rule 26.02 under the Tennessee Rules of Civil Procedure, to claim at any point before the hearing officer that it could not produce electronic materials because it was not reasonably accessible as the result of undue burden or cost.

Rather, on appeal to the Commission, JSC has argued that EA Solar is a “vendor” with an auto-delete policy and is apparently beyond its control. JSC asserts that it is being punished for an auto-delete policy of another company.¹⁴³ This argument requires the hearing officer and the panel to ignore that Mr. Emberling is the CEO of EA Solar and CDE, as well as President of JSC.¹⁴⁴ EA Solar and CDE are partners in the development, funding, construction, and management of JSC.¹⁴⁵ Moreover, the record indicates that JSC itself has conflated precisely what entity has an auto-delete

¹⁴² *Response By Jackson Sustainability Cooperative To The Motions to Compel Filed By The Tennessee Electric Cooperative Association*, p. 19 (June 2, 2022).

¹⁴³ Transcript of Commission Conference, pp. 30-31 (February 27, 2023).

¹⁴⁴ *Response By Jackson Sustainability Cooperative To The Motions to Compel Filed By The Tennessee Electric Cooperative Association*, Affidavit of Dennis Emberling (June 2, 2022); Dennis Emberling, Pre-Filed Direct Testimony, pp. 2-3 (May 24, 2021).

¹⁴⁵ *Petitioner's Responses to Tennessee Electric Cooperative Association's Interrogatories And Requests for Production of Documents*, p. 27 (September 27, 2021).

policy when it claimed that TECA's argument "ignores the document retention policy of Jackson Sustainability Cooperative and its solar developer."¹⁴⁶

The Petitioner frames the proceeding as an academic exercise that has been hijacked by the intervening parties, yet the details of the project are relevant as are the nature of the service to be provided, the nature of the proposed cooperative, and its potential members. Moreover, JSC's managerial, technical, and financial capabilities are relevant to whether the Commission may grant a CCN to serve customers within JEA's service area, as requested by JSC in the alternative. JSC's arguments that they made objections on the basis of relevancy misses the point of the hearing officer's order. The Petitioner has continuously indicated that no documents were withheld on the basis of an objection. Despite evidence of correspondence and conference calls between the Petitioner and TECA and JEA indicating communication back and forth in an attempt to resolve matters of discovery over the course of months, JSC did not disclose that documents were being deleted until over a year after the start of the docket and nine months after the start of discovery. Given the totality of the circumstances, TECA and JEA had little choice but to file motions to compel.

Tenn. R. Civ. P. 37.01(4) expressly authorizes an award against the party whose conduct necessitated filing the motion or against the attorney advising such conduct, and the reasonable expenses incurred in obtaining the order, including attorney's fees. Rule 37.01(4) also sets forth the process to be followed if the motion to compel is granted, denied, or granted in part and denied in part, which includes the opportunity for a hearing on the reasonableness of the expenses incurred, including attorney's fees, unless the court finds that other circumstances make the award of expenses unjust. If the motion is granted in part and denied in part, as the hearing officer did in this

¹⁴⁶ *Response of Jackson Sustainability Cooperative to the Motion to Compel filed by the Tennessee Electric Cooperative Association*, p. 2 (June 2, 2022).

docket, Rule 37.01(4) provides that after the hearing, the court may apportion the reasonable expenses incurred in relation to the motion to compel among the parties in a just manner.

It is important to note here, to ensure the waters of the record are not muddied, that JSC's claim that the hearing officer "instantly fined" JSC "\$90,000.00" is inaccurate.¹⁴⁷ The hearing officer's order at issue here does no such thing.

Further, the Hearing Officer concludes that sanctions should be imposed against JSC in the form of an award of reasonable attorney's fees and expenses for JEA and TECA related to the filing of the Motions to Compel. The Hearing Officer will convene a separate proceeding where fees may be presented and JSC will have an opportunity to contest any amounts it determines to be unreasonable or inapplicable. TECA's request for attorney's fees related to serving the subpoena on Northern Reliability is denied. JEA's request for additional attorney's fees related to seeking Supplemental Responses to Discovery Requests is denied.¹⁴⁸ (emphasis added).

Thus, neither the hearing officer nor the Commission has fined JSC \$90,000.00 at this point in the proceedings. The Petitioner will have the opportunity to challenge any expenses and make arguments about the appropriate apportionment of costs as provided in the order of the hearing officer which relies upon the procedure authorized by Rule 37.04 of the Tennessee Rules of Civil Procedure. As such, the panel voted unanimously to affirm the order of the hearing officer.

Finally, the Commission recognizes that this order does not fully adjudicate all pending issues related to discovery and sanctions. Therefore, the hearing officer is directed to proceed to resolve those related issues. This order shall not be a final order for purposes of appeal until supplemented by entry of an order adjudicating the related remaining issues.

IT IS THEREFORE ORDERED THAT:

1. The *Order Granting the Petition to Intervene Filed by the Tennessee Municipal Electric Power Association* entered in this docket on August 20, 2021, is **AFFIRMED**.

¹⁴⁷ Transcript of Commission Conference, pp. 26, 37 (February 27, 2023).

¹⁴⁸ *Initial Order Granting, In Part and Denying, In Part Motions to Compel Filed by Tennessee Electric Cooperative Association and Jackson Energy Authority*, p. 15 (November 14, 2022).

2. The *Order Granting the Petition to Intervene of Tennessee Electric Cooperative Association* entered in this docket on August 20, 2021, is AFFIRMED.

3. The *Order Granting the Petition to Intervene of Jackson Energy Authority* entered in this docket on August 20, 2021, is AFFIRMED.

4. The *Order Granting the Petition to Intervene of Tennessee Valley Authority* entered in this docket on August 20, 2021, is AFFIRMED.

5. The *Order Establishing a Procedural Schedule* entered in this docket on September 8, 2021, is AFFIRMED.

6. *Initial Order Granting, In Part and Denying, In Part Motions to Compel Filed by Tennessee Electric Cooperative Association and Jackson Energy Authority* entered in this docket on November 14, 2022, is AFFIRMED.

FOR THE TENNESSEE PUBLIC UTILITY COMMISSION:

**Chairman Herbert H. Hilliard,
Vice Chairman David F. Jones,
Commissioner Robin L. Morrison,
Commissioner Clay R. Good, and
Commissioner John Hie concurring.**

None dissenting.

ATTEST:



Earl R. Taylor, Executive Director