

**BEFORE THE
TENNESSEE PUBLIC UTILITY COMMISSION**

NASHVILLE, TENNESSEE

THE APPLICATION OF JACKSON)	
SUSTAINABILITY COOPERATIVE)	
FOR A DETERMINATION OF)	
EXEMPTION AND IN THE)	
ALTERNATIVE, FOR A CERTIFICATE)	Docket No. 21-00061
OF PUBLIC CONVENIENCE AND)	
NECESSITY)	

**STATEMENT OF JACKSON ENERGY AUTHORITY
IN OPPOSITION TO COMMENCEMENT OF A CONTESTED CASE AND
REQUESTING THE DENIAL OF A DECLARATORY ORDER**

Jackson Energy Authority (“JEA”) files this *Statement in Opposition to Commencement of a Contested Case and Requesting the Denial of a Declaratory Order* pursuant to Tenn. R. & Regs. 1200-01-02-.02 and 1220-01-02-.05(4) in response to the *Application of Jackson Sustainability Cooperative for a Determination of Exemption and in the Alternative, for a Certificate of Public Convenience and Necessity*, which is also captioned as a *Petition for a Solar Facility for Supplemental Energy* (the “Application”).

Specifically, Tenn. R. & Regs. 1220-01-02-.02(2) authorizes the Commission not to commence a contested case in a number of situations, including where “(c) [the] relief which the petition seeks is on its face barred as a matter of law.” Furthermore, Tenn. R. & Regs. 1220-01-02-.05(4) “allows persons other than the petitioner to file statements as to whether the Commission should commence a contested case, or refuse to issue a declaratory order as provided in Tenn. Code Ann. § 4-5-223. In response to the Application, JEA would show that the relief requested in the Application is on its face barred as a matter of law, and JEA would urge the Commission not to commence a contested case and to refuse to issue a declaratory order pursuant to Tenn. Code Ann. § 4-5-223(a)(2) based upon the Application that has been presented

to the Commission. In the Application, Jackson Sustainability Cooperative (“JSC”) seeks to establish a competitive electric utility in Jackson, Tennessee and provide retail electric service to various commercial and industrial customers in Jackson, Tennessee in clear violation of State law.

While JSC contends that it has been formed under the Tennessee Electric G&T Cooperative Act (the “G&T Act”), Tenn. Code Ann. § 48-69-101, *et seq*, G&T cooperatives are prohibited from providing services to retail customers under a very explicit provision in the G&T Act:

No G&T cooperative shall provide electrical power and energy services to retail customers in the Tennessee Valley Authority (TVA) area.¹

Tenn. Code Ann. § 48-69-118(a).

Additionally, JSC proposes to serve commercial and industrial customers that are not eligible to become members of a G&T cooperative and proposes to be led by a board of directors each of whom is statutorily ineligible to serve as a director of a G&T cooperative under the plain requirements of the G&T Act. JSC is not authorized to provide the services that it proposes to provide under the G&T Act. It is not authorized to serve members that it proposes to serve. And it cannot be led by the directors that it proposes to lead the organization.

Because the Application is fatally flawed and the relief which JSC seeks is barred as a matter of law, the Commission should decline to convene a contested case in this matter.²

¹TVA’s service area is defined under 16 U.S.C.A. § 831n-4(a), and this area includes Jackson, Tennessee and the surrounding area, along with most of the State of Tennessee. This service area is depicted on page 9 of TVA’s most recent annual report filing with the Securities Exchange Commission (available at [TVA - Financial Information - SEC Filings \(q4ir.com\)](https://www.sec.gov/edgar/data/1744534/000174453421000001/tva-20201231.htm) (visited June 15, 2021)).

²Furthermore, JSC proposes to provide retail services within the electric system service area that the Tennessee General Assembly exclusively assigned to JEA decades ago. Even if JSC were properly formed under the G&T Act (which it was not), JSC would be plainly prohibited

OVERVIEW OF THE APPLICATION

In its Application, JSC proposes to invest nearly \$70 million in a combined solar and battery storage facility to generate, store and sell retail electricity to a number of industrial and commercial customers that are currently located within the electric system service area of JEA. (Application at ¶¶ 2 & 30 and Exhibit 3). The proposed solar project will have a nameplate capacity of 16.5 MW, and the accompanying storage facility will have 46 MWh of capacity. (Application at ¶ 3). According to information contained in the Application of JSC as filed, the facility will have enough capacity to temporarily impact JEA's entire system-wide peak demand by 12.9%. (Pre-filed Testimony of Dennis Emberling, attached as Exhibit 14 to the Application (the "Emberling Testimony") at p. 5). JSC projects generating approximately 25 GWh (25,000,000 kilowatt hours) per year. (Emberling Testimony at p. 2). To serve its customers, JSC plans to extend underground distribution facilities up to 3.5 miles from the solar project. (Application at ¶ 2).

JSC proposes to offer service to potential members that require "at least 100,000 kilowatt hours of electric energy." (Section 2.1 of the Bylaws of JSC, attached as Exhibit 2 to the Application (the "JSC Bylaws")). JSC states that these potential members include a group of "approximately 38 public and private operators" within JEA's service area, including "4 to 8 suitable, heavy users of electricity." (Application at ¶ 11 and Exhibit 3). Among the conditions of membership, a member must agree "to purchase" electric energy generated by the solar facility and may not take a position "on any tax return or in any other filings that [the power purchase] is

from providing the electric services to retail customers that it proposes to provide in the Application. Should the Commission decide to convene a contested case, JEA would expect to file a motion to dismiss seeking a substantive dismissal of the Application based upon the provisions of Tennessee Code Annotated, Title 65, Chapter 34 and other principles of applicable law.

anything other than a purchase of electricity” from the solar facility. (Section 17(n) of the JSC Member Agreement, attached as Exhibit 4 to the Application (the “Member Agreement”). If successful, the JSC project would allow these users to “switch a major portion of their electricity usage to renewables.” (Emberling Testimony at p. 7).

In every sense, JSC proposes to provide electric service to retail customers, which plainly violates State law as explained more fully below.

ANALYSIS

A G&T cooperative formed under the G&T Act is authorized to provide wholesale electric and energy services to member local power companies like municipal and governmental electric systems and electric cooperatives.³ A G&T cooperative is not statutorily authorized to provide services to retail customers, as JSC proposes to do in its Application. Succinctly stated, JSC proposes to provide retail services that Tenn. Code Ann. § 48-69-118 clearly prohibits. It proposes to provide these services to entities that do not meet the statutory qualifications under Tenn. Code Ann. § 48-69-112(a) to become a member of a G&T cooperative. And JSC proposes to be led by directors that are ineligible to serve based upon the express language in Tenn. Code Ann. § 48-69-108(b). These flaws, individually and collectively, are fatal to JSC’s Application and provide a clear basis for the Commission to decline to convene a contested case.

JSC is statutorily prohibited from providing electric and energy services to retail customers. Under the express terms of Tenn. Code Ann. § 48-69-118(a) “No G&T cooperative shall provide electrical power and energy services to retail customers in the Tennessee Valley Authority (TVA) area.” Additionally, Tenn. Code Ann. § 48-69-106 defines the purposes of a G&T cooperative. That statute focuses the purpose of a G&T cooperative on the provision of

³ The G&T Act also provides additional authorization for other ancillary services and transactions that are beyond the scope of matters raised by the Petition.

wholesale services, including the following purposes: “(1) [to] supply and furnish at wholesale electric power and energy services ...; (2) [to] ... otherwise furnish electrical energy and power for the needs of its wholesale customers; [and] (3) [to] supply, furnish and exchange wholesale electrical power capacity energy” Clearly, the purpose of a G&T cooperative is to provide wholesale electric power and energy services and not to provide electricity to retail customers.

A review of the JSC Application and accompanying Exhibits clearly shows that JSC is proposing to provide services directly to retail customers, in clear violation of the G&T Act. For example, and without limitation, numerous provisions of the Application demonstrate that JSC proposes to provide retail electric service:

- JSC “proposes to distribute supplemental electricity to its Members” (Application at ¶ 3);
- JSC’s model “provides cost effective, renewable, supplemental electrical energy to local manufacturers and commercial operators” (Application at ¶ 5);
- JSC “will install underground distribution lines for the power generated from the Facility to participating manufacturers” (Application at ¶ 5);
- JSC’s model will supply “renewable energy that supplements the municipal [retail provider]” (Application at ¶ 8);
- JSC’s facility “will supply additional power seamlessly to the Member” (Application at ¶ 9);
- JSC’s model will provide “a source of renewable supplemental energy for use by 4 to 8 suitable, heavy users of electricity” (Application at ¶ 11); and
- JSC’s facility “will bring supplemental clean energy to a small group of manufacturers and commercial operators” (Application at ¶ 37).

The pre-filed testimony of Dennis Emberling also describes the facility as one that will offer “supplemental energy from renewable sources to its members” (Emberling Testimony at page 2) and indicates that members of the cooperative “will draw power” from the facility (Emberling Testimony at page 3).

The Charter and Bylaws for JSC also reference members “sharing supplemental electrical energy” (Charter of JSC, attached as Exhibit 1 to the Application (the “JSC Charter”) at Section 2(a) and JSC Bylaws at Section 1.1(1). Section 2.1 of the JSC Bylaws limits membership to those potential members that annual require or are expected to require “at least 100,000 kilowatt-hours of electric energy”. The JSC Bylaws require a member “to pay for the Cooperative Services [supplemental electrical energy] used at prices, rates or amounts established in the [cooperative’s] Member Agreement” (JSC Bylaws at Section 2.2(1)(e)).

The proposed Member Agreement, in turn, requires a member “to purchase from [the cooperative] supplemental electric energy generated by” the solar facility (Member Agreement at Section 2), and prohibits a member from taking a position “on any tax return or in any other filings suggesting that it is anything other than a purchase of electricity from the [solar facility]” (Member Agreement at Section 17(n)).

Based on the multiple admissions throughout the Application, the pre-filed testimony, the Charter, the Bylaws and the Member Agreement, there is no doubt that JSC proposes to provide electric and energy services to retail customers in direct violation of the G&T Act.

JSC’s retail customers are not eligible to become members of a G&T cooperative.

In the Application, JSC proposes to serve a group of entities that are not even eligible to become members of a G&T cooperative under the plain language of the G&T Act. Under the G&T Act, municipal and governmental electric systems, electric cooperatives and certain other electric systems are eligible to become members of a G&T cooperative. Retail customers are not eligible. Tenn. Code Ann. § 48-69-112(a) provides that “only distribution cooperatives, governmental electric systems, energy acquisitions, and other G&T cooperative and joint action

agencies created under the laws of this state shall be eligible to be members of a G&T cooperative.”

Article III of the JSC Bylaws defines the membership of JSC. Section 2.1 of the JSC Bylaws is entitled “Eligibility Requirements” and while there is no express definition of who may be a member, Section 2.1 defines an “Entity” as a “domestic or foreign business or non-profit cooperation, limited liability company or any agency or division of the government.” This definition far exceeds the membership limitations set forth under Tenn. Code. Ann. § 48-69-112(b). And in practice, it is clear that JSC proposes to allow entities to become members that are not eligible municipal and governmental electric systems, electric cooperatives or other electric systems. For example, JSC states that these potential members include a group of “approximately 38 public and private operators” within JEA’s service area, including “4 to 8 suitable, heavy users of electricity.” (Application at Paragraph 11). Furthermore, Section 2.1 of the Bylaws allows an applicant to be eligible to seek membership if its plant and facility “annually requires or is expected to annually require at least 100,000 kilowatt-hours (kWh) of electric energy,” and the conditional member agreement and the member agreement both refer to a “small group of manufacturers and commercial operators” as potential members of JSC.

None of the proposed members of JSC are statutorily eligible to become members of a G&T cooperative.

The members of JSC’s board of directors are not eligible to serve as directors of a G&T cooperative under the G&T Act. Under the G&T Act, a director of a G&T cooperative must be a senior management level official of a member electric system. None of JSC’s board of directors meet this requirement. Tenn. Code Ann. § 48-69-108(b) requires that a “director shall be full time employee of a patron member of the G&T cooperative and shall have senior

management level experience for an electric system or a patron member of a G&T cooperative.” Furthermore, that same statute provides that “no person whose employment or appointed responsibilities are not principally limited to utility operations of a patron member shall be eligible to serve as a director.” *Id.*

JSC provides a list and qualifications of its officers or directors in Paragraph 2, on page 4 of its Application. JSC’s initial officers and directors are:

Dennis Emberling, President and Director. Mr. Emberling enjoyed a forty-year career as an internationally-known management consultant. His work has included engagement ranging from small companies to Fortune 100 companies. His innovations in management science and organizational development are in use all over the world, including the United Nations Development Program. He is also an authority on distributed solar, having consulted for solar companies in California for seven years. He is a member of the California Intergovernmental Task Force on Consumer Protection and regularly advises the California Public Utility Commission. He was trained as a mathematician, and he has decades of experience in all aspects of business finance and management.

Dr. Ann Keyl, Director. Dr. Keyl is president of Sacred Heart of Jesus High School in Jackson, Tennessee. Previously, she served as Principle, Center for Research and Education Policy at the University of Memphis. She has an EdD from University of Memphis, an MS in School Counseling from the University of Memphis, and a BA in Education from Lambuth University.

Robert Starr, Secretary and Director. Robert Starr recently retired. Before retiring, he was administrator for the District Attorney General in the 26th Judicial District of Tennessee. He has an MSW from the University of Tennessee at Memphis and a BS from the University of Tennessee at Martin.

Jeff Frieling, Director. Since 1989, Jeff Frieling has served as Vice President and Chief Information Officer for West Tennessee Healthcare. Mr. Frieling has held positions within the system including Administrative Director of West Tennessee Cancer Center, Administrator of Humboldt General Hospital and Director of Applications in Information Systems. He has degrees in Radiation Therapy. Operations Management, Business Management, a certificate in Healthcare Administration and is a Fellow in the American College of Healthcare Executives. He oversees Information Systems, IT Security, HIM, Bio-Med and the Laboratory Services.

David Shimon, Chief Financial Officer. Mr. Shimon was a founder and former owner of a commercial bank in Maryland, serving on its loan committee and board of directors. He also founded several companies that he guided to success.

Currently, he owns and operates a Florida based solar company. Mr. Shimon has expertise in providing opportunities to under-developed empowerment zones in Florida.

None of the listed directors meet the statutory requirements under the G&T Act. As a result, JSC does not even have a properly constituted board of directors to lead the organization.

CONCLUSION

On the face of JSC's Application, the relief which JSC seeks has no legal basis and is barred as a matter of law. JSC proposes to provide services to retail customers that it is not authorized to provide under the G&T Act. It proposes to serve customers that are not eligible to be members under the G&T Act, and it proposes to be led by directors that are not eligible to serve under the G&T Act. Based on each of these fatal flaws on the face of JSC's Application, the Commission should decline commence a contested case and should refuse to issue a declaratory order pursuant to Tenn. Code Ann. § 4-5-223(a)(2) based upon the Application that has been presented to the Commission.

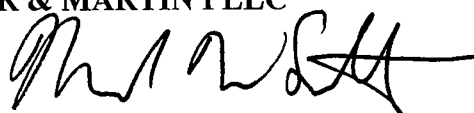
Respectfully submitted,

JACKSON ENERGY AUTHORITY

Teresa Cobb, General Counsel
P. O. Box 68
Jackson, Tennessee 38302
Telephone: (731) 422-7500
Facsimile: (731) 488-7221
E-mail: tcobb@jaxenergy.com

MILLER & MARTIN PLLC

By: _____



Larry L. Cash (BPR No. 9386)
Mark W. Smith (BPR No. 16908)
832 Georgia Avenue, Suite 1200
Chattanooga, Tennessee 37402
Telephone: (423) 756-6600
Facsimile: (423) 785-8480
E-mail: larry.cash@millermartin.com
mark.smith@millermartin.com

Attorneys for: Jackson Energy Authority

Dated: June 25, 2021

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June, 2021, a copy of the foregoing document was served on the following persons via email, hand delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

John A. Beam, III
Equitus Law Alliance, PLLC
P.O. Box 280240
Nashville, TN 37208

A handwritten signature in black ink, appearing to read 'Mark W. Smith', written over a horizontal line.

Mark W. Smith