BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

IN RE: THE APPLICATION OF JACKSON SUSTAINABILITY COOPERATIVE FOR A DETERMINATION OF EXEMPTION AND IN THE ALTERNATIVE, FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY	))))))	**DOCKET NO. 21-00061**

RESPONSE BY JACKSON SUSTAINABILITY COOPERATIVE TO THE FILED STATEMENTS

COMES NOW, Jackson Sustainability Cooperative ("Jackson Sustainability Cooperative" or "Applicant"), and responds to the Statement of Jackson Energy Authority ("JEA") and the Statement of Tennessee Valley Authority ("TVA") filed in response to the Petition filed by Jackson Sustainability Cooperative in support of its request to the Tennessee Utility Commission (the "Commission") to declare the legal rights, duties, or privileges of Jackson Sustainability Cooperative to operate a solar facility with battery-energy storage and shared interconnection (the "Solar Facility") so that a small group of local manufacturing and commercial users, its members, can acquire clean, renewable, stable, supplemental electricity. Even though JEA and TVA will remain the primary source of electric energy to this small group of local users, JEA and TVA oppose the Applicant and the Solar Facility. This response will address the issues JEA and TVA presented and summarize the issues for resolution in a contested case hearing.

I. JACKSON SUSTAINABILITY COOPERATIVE HAS STANDING TO REQUEST EXEMPTION FROM REGULATION AS A PUBLIC UTILITY UNDER T.C.A. 65-4-101(6)(A)(v).

Under Tennessee law, any person may petition the Tennessee Public Utility Commission

for a declaratory ruling on the applicability of any statement of facts that are within the jurisdiction of the Commission to hear utility related issues. (T.C.A. §65-2-104; 1220-01-02-.05(1) and (2)) TVA seeks to limit the jurisdiction of the Commission by asserting that Jackson Sustainability Cooperative lacks standing to seek a declaratory ruling. Specifically, TVA asserts that Jackson Sustainability Cooperative does not have a legal interest that can be determined under T.C.A. 4-5-223(a). (TVA Stmt., p. 2) The statute for declaratory rulings is very broad. It provides that "[a]ny affected person may petition ... for a declaratory order as to the validity or applicability of a statute." T.C.A. 4-5-223. The requested ruling is for a declaration that the Applicant's project is not a public utility. If not a public utility, the Commission may not have jurisdiction over the ongoing operation and rate structure of the Solar Facility which provides supplemental renewable energy.

Jackson Sustainability Cooperative requested that the Commission look at its proposed Solar Facility under T.C.A. 65-4-101(6)(A)(v)[1] and determine that it is not a public utility subject to regulation. (Pet. p.1) The statute the Applicant seeks to construe is stated as follows:

> "Public utility" means every ... [enterprise] ... that own, operate, manage or control, within the state, any ... power ... services, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof.
> T.C.A. 65-4-101(6)(A)

> "Public utility" as defined in this section shall not be construed to include ... [a]ny ... cooperative corporation not organized or doing business for profit. For purposes of this subdivision (6)(A)(v), "cooperative" shall mean only those nonprofit cooperative entities organized under or otherwise subject to the Rural Electric and Community Services Cooperative Act, compiled in chapter 25, part 2 of this title [65].
> T.C.A. 65-4-101(6)(A)(v)

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[1] The Petition incorrectly cites the statute as T.C.A. 65-4-101(6)(E) when the correct citation is T.C.A. 65-4-101(6)(A)(v).

In short, Jackson Sustainability Cooperative requests a declaratory ruling that it is not a "public utility" because it is a non-profit cooperative. This statutory exception in the definition Section of Title 65 is affirmed by T.C.A. §65-25-123, which provides as follows:

> Cooperatives ... transacting business in this state pursuant to this chapter shall be deemed to be not-for-profit cooperatives and nonutilities, and, except as provided in § 65-25-122, **exempt in all respects from the jurisdiction and control of the Tennessee public utility commission.**
> T.C.A. §65-25-123(emphasis added)

TVA argues that this statute removes jurisdiction from the Commission preventing it from making a finding that the Applicant's proposed solar facility is not a public utility. (TVA Stmt., p. 2,3) The Commission has jurisdiction over utility related issues. TVA confuses the judicial principles of standing and jurisdiction. TVA seeks to limit the jurisdiction of the Commission by not allowing a solar facility owner to seek a declaratory ruling that it is not a "public utility."

In support of its position TVA cites the case of Calfee v. TDOT, No. M2016-01902-COA-R3-CV, 2017 WL 2954687 (Tenn. App. 2017). In Calfee, on its second request, the Tennessee Department of Transportation gave the local Industrial Development Board permission to run two water lines along the highway to the Nolichucky River for the private benefit of US Nitrogen, a local chemical producer. TDOT originally denied the request because the proposed pipelines did not benefit the community. Several farmers who adjoined the highway filed an intervening petition with TDOT. It was deemed denied because it was not set for hearing in 60 days. The land owners filed in Chancery Court as affected persons seeking a declaratory ruling. TDOT sought to dismiss the complaint in Chancery Court on the basis the farmers did not have standing. The Court of Appeals denied TDOT's motion because the land owners had a stake in the outcome, stating as follows:

> Standing is a judge-made doctrine that is used to refuse to determine the merits of a legal controversy irrespective of its correctness where the party advancing it is not properly situated to prosecute the action. Knierim v. Leatherwood, 542 S.W.2d 806, 808 (Tenn. 1976). It requires us to determine "`whether a party has a sufficiently personal stake in a matter'" to warrant judicial resolution of the dispute. Metro. Gov't of Nashville v. Bd. of Zoning Appeals of Nashville, 477 S.W.3d 750, 755 (Tenn. 2015)(Id. at *18)

The Court of Appeals found that the six land owners had standing to challenge TDOT issuing the permit for the water lines. The land owners had "alleged distinct and palpable injuries fairly traceable to the permit" for water lines for which there was a likely remedy. (Id. at *36) The Court of Appeals further explained that the land owners are "affected persons within the meaning of the Uniform Administrative Procedures Act" and have standing to pursue this action for a declaratory ruling. (Id. at *36)

In the case at hand, Jackson Sustainability Cooperative is properly situated to prosecute its Petition because it is advancing the construction of a solar facility that will be shared among a small group of members who desire to use supplemental energy from renewable sources for their business. The Commission, as a regulator, has jurisdiction over utilities, and if the applicant is exempt, as in this case, will decline jurisdiction over future operation of the Solar Facility. On the other hand, since JEA is not a member of Jackson Sustainability Cooperative, it lacks standing to challenge the validity of the Applicant's board members and purposes clauses under its bylaws.

II. TVA AND JEA HAVE SELECTIVELY QUOTED PORTIONS OF THE G&T COOPERATIVE ACT, WHICH IS NOT THE STATUTE UNDER WHICH THE APPLICANT SEEKS A DECLARATORY RULING.

Jackson Sustainability Cooperative seeks a ruling that it is not a regulated "public utility" under the statutory scheme. The Petition requesting a declaratory ruling is further supported by

those supplemental Exhibits described as follows:

Exhibit 15	Charter Amendment
Exhibit 16	Amendment to Bylaws of Jackson Sustainability Cooperative
Exhibit 17	State of Tennessee Office of the Attorney General, April 10, 2017, Opinion No. 17-25, Sale of Electricity by a Solar Electricity Generating Facility

JEA argues that the Applicant's proposed Solar Facility is expressly prohibited by statute. JEA and TVA selectively cite part of the restriction under Section 118 of the Electric G&T Cooperative Act without mentioning the exception. (Electric G&T Cooperative Act is T.C.A. 48-69-101 et seq.) JEA and TVA rely on the retail restriction under Section 118(a) of the G&T Act. However, they fail to look at the exception that applies to Jackson Sustainability Cooperative, as follows:

> (b) No G&T cooperative shall provide telephony, cable television, video programming, Internet access or other telecommunications services to retail customers in the TVA area; **provided, however, that nothing *in this section* shall preclude or prevent a G&T cooperative from owning, leasing, operating and maintaining equipment or facilities for its own purposes or for the purpose of enabling one (1) or more members to provide or utilize advance metering infrastructure, load control, appliance monitoring, power exchange, billing, electric services or functions or any other similar or component service now or hereafter developed in connection with the provision of electricity to end-use customers.**

Tenn. Code Ann. § 48-69-118(b)(emphasis added)

The proposed Solar Facility provides supplemental electric service to its members through advanced metering, load control, and equipment monitoring, as part of the components of providing efficient, quality, supplemental electric service. The municipal provider is not replaced. The exception offered under 118(b) states that nothing "in this section" prevents these component services. Jackson Sustainability Cooperative avers that quality supplemental solar energy is a "component service" that is consistent with the legislative purpose of developing renewable, clean

generation sources of electricity. (see T.C.A. § 48-69-102(a))

There is no dispute that the Applicant considered pursuing a request for exemption under T.C.A. § 48-69-119 (exemption from the jurisdiction of the Commission). After careful consideration, the Applicant requested that the Commission issue a declaratory ruling that its proposed Solar Facility is not a public utility subject to regulation because the Applicant is a nonprofit cooperative entity subject to the Rural Electric and Community Services Cooperative Act found in title 65, chapter 25. (Pet. p. 1) No paragraph or section in the actual Petition before the Commission seeks a ruling under T.C.A. § 48-69-119.[2]

The Charter (Exhibit 1) and the Bylaws (Exhibit 2) referenced the Electric G&T Cooperative Act. The Charter and Bylaws were amended so that they are consistent with the request in the Petition. (Exhibits 15 and 16, attached)

III. BY PROVIDING SUPPLEMENTAL RENEWABLE POWER TO A FEW MANUFACTURERS, JACKSON SUSTAINABILITY COOPERATIVE DOES NOT INFRINGE ON THE STATUTORY TERRITORY OF JEA.

The Applicant's Solar Facility project proposes to directly connect nearby members who are end-users to the solar power generation with control systems that prevent any power from the project from entering the municipal distribution by JEA or the wholesale distribution transmission systems from TVA. In Tennessee, almost all electric power in the state is generated and supplied by TVA to municipal utilities like JEA who have contracts with TVA. Municipal utilities who want to increase the amount of renewable energy in their electric power supply are often

[2] Note that the cover letter does reference Section 119, but not the body of the Petition as filed with the Commission.

contractually prohibited from doing so by TVA. TVA operates only a limited amount of wind and solar generation, mostly through power purchase agreements with independent power producers. TVA currently has no programs to support distributed renewable generation.

The Applicant's solar project under consideration operates within a complex set of federal and state statutes defining the powers of municipal utilities and TVA. One of these laws is the Tennessee Geographic Territories Law ("GTL")(T.C.A. §65-34-101 et seq.) The GTL fixes the boundaries of municipal utility service territories and limits the ability of other parties to sell electric power in those service territories. The GTL statute was adopted in 1968 out of concern by the legislature that "duplication of electric system facilities lead to excessive consumer costs and adverse environmental and aesthetic impacts." (T.C.A. §65-34-101(1) Under the GTL, the legislature further declares that:

> (4) Maintenance of ... geographic territories ... [is] in the public interest and promotes the public health, safety and welfare;
> ...
>
> (6) It would be contrary to the public interest to permit utilities that are not consumer owned to expand service into areas already served by consumer owned municipal and cooperative electric systems, as such expansion would result in a duplication of service facilities and the loss of consumer investment in displaced facilities.

T.C.A. 65-34-101(4) and (6)

There are other statutory restrictions under the GTL for non-consumer owned electric systems. Specifically, "[n]o non-consumer owned electric system may construct, acquire, or maintain facilities, ... or other equipment used or useful for the distribution or sale of electricity outside its current geographic territory, nor may any non-consumer owned electric system provide, by sale or otherwise, electricity to any parcel of land located outside its current geographic territory. T.C.A.

§65-34-103 Another restriction gives the municipal utility "power to remove electric systems that located on land outside the non-consumer owned system's territory." T.C.A. §6-43-104

A full understanding the GTL is based on two key statutory definitions.

> (4) Non-consumer owned electric system means any public electric system **other than electric and community service cooperatives** and municipal electric systems; and
>
> (5) Public electric system includes electric and community service cooperatives, municipal electric systems, and every individual, co-partnership, association, corporation or joint stock company, their lessees, trustees or receivers, appointed by any court whatsoever, that own, operate, manage, or control any electric power system, plant, or equipment within Tennessee **affected by and dedicated to public use**.
>
> T.C.A. 65-34-102(4) and (5)(emphasis added)

The Applicant seeks a declaratory ruling that under the analysis provided by the Tennessee Attorney General under its interpretation of the application of the GTL to solar facilities that the operation of an independent renewable energy generation facility for supplemental energy that is not "dedicated to public use" does not violate the restrictions found in the GSL. (State of Tennessee Office of the Attorney General, April 10, 2017, Opinion No. 17-25, Sale of Electricity by a Solar Electricity Generating Facility)(Exhibit 17, attached)

The 2017 opinion of the Tennessee State Attorney General's office describes this situation as it applies to solar facilities as follows:

> In 1968 the Tennessee Legislature enacted a statutory scheme entitled the "Geographic Territories of Electric Utility Systems." Tenn. Code Ann. §§ 65-34-101 through 108. That legislation was designed to prevent duplication of electric system facilities because the Legislature found that such duplication results in excessive consumer costs and environmental and aesthetic problems. Tenn. Code Ann. § 65-34-101. To avoid duplication of electric system facilities and to protect consumer investment in those facilities, the Legislature deemed it in the public interest to keep in place geographic territories it had established in 1968 for electric utilities and to limit "utilities that are not consumer owned" from expanding "service into areas already served by consumer-owned municipal and cooperative electric system." Tenn. Code Ann. § 65-34-101.

To that end, the "Geographic Territories of Electric Utility Systems" statutory scheme prohibits a "non-consumer owned electric system" from constructing, acquiring, and maintaining facilities and equipment for the "distribution or sale of electricity outside its current geographic territory," and from providing, "by sale or otherwise, electricity to any parcel of land located outside its current geographic territory." Tenn. Code Ann. § 65-34-103.

If a solar electricity generating facility is a "non-consumer owned electric system" these statutory prohibitions would apply to it.

A "non-consumer owned electric system" is a "public electric system" (other than a municipal electric system or a community service cooperative). Tenn. Code Ann. § 65-34-102(4). A "public electric system" is any entity or individual that owns, operates, manages, or controls any electric power system, plant, or equipment in Tennessee "affected by and dedicated to public use." Tenn. Code Ann. § 65-34-102(5).

Question 1 assumes that a solar generating facility meets all the definitional elements of a "public electric system" save only the element that its property be "affected by and dedicated to public use." The phrase "affected by and dedicated to public use" is legal shorthand for the concept that "[a] distinguishing characteristic of a public utility is a devotion of private property by the owner to service useful to the public, which has a right to demand such service so long as it is continued with reasonable efficiency under proper charges." 73B C.J.S. Public Utilities § 1 (2016).

Whether an entity should be deemed to have dedicated its property to public use is a question that turns on the specific facts of each particular case. Just because its services are available to the public does not necessarily make the service provider a public utility. Similarly, an entity that sells all its product or services under contract to public utilities (which in turn sell that product to consumers) is not by that fact alone a public utility. On the other hand, the number of customers is not controlling; a facility is not rendered nonpublic just because a limited number of customers may have occasion to buy its services. ... See cases cited in 73B C.J.S. Public Utilities § 2 (2016).

The ultimate question is whether the utility conducts its business in a way that makes it a public concern. Put in a more concrete way, the question is whether the utility holds itself out (expressly or implicitly) as engaged in supplying its product or services to the public in general or to a limited portion of the public, as opposed to holding itself out as serving or prepared to serve only particular individuals. To answer this question, courts will consider the totality of the particular circumstances, including how the company actually conducts business, what the company's articles of incorporation and bylaws provide for, what its stated purpose is, whether it is providing a good or service in which the general public has an interest, whether it accepts substantially all requests for its services, how its service contracts are structured, and whether it is in actual or potential competition with other

entities that are public utilities. See cases cited in 73B C.J.S. Public Utilities § 2 (2016). See also Memphis Natural Gas Co. v. McCanless, 194 S.W.2d 476, 480 (1946) (charter conclusively authorized gas company to do business as a public utility).

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A solar electricity generating facility that comes within the statutory definition of "public electric system" is prohibited from selling power in certain geographical territories. Tenn. Code Ann. § 65-34-102(4), § 65-34-102(5), and § 65-34-103. The question assumes that a solar generating facility meets all of the Tenn. Code Ann. § 65-34-102(5) definitional elements of a "public electric system" save only the element that its property be "affected by and dedicated to public use." Whether its property is "affected by and dedicated to public use" will depend on a variety of factors, specific to each case. The fact that it provides power "directly and exclusively to owners and/or tenants located on the same or adjacent premises" is just one of many factors to be considered but is not alone determinative of whether or not its property is affected by and dedicated to public use.

If the owner of a solar electricity generating facility is a public electric system as defined in Tenn. Code Ann. § 65-34-102(5), it would likewise be a public utility as defined in Tenn. Code Ann. § 65-4-101(6)(A) unless it were to come within one of the many statutory exceptions detailed in Tenn. Code Ann. § 65-4-101(6)(A)(i) through (B)(ii). (6)(A)

The issues stated by JEA under the GTL require a contested case hearing to resolve.(JEA Stmt., p.2, and f.n. 2) JEA states that it will attempt to use the GTL to prevent the construction or operation of a Solar Facility that is directly connected to users and selling power which does not interact with its municipal delivery system. JEA and TVA appear concerned over any project that has the potential to reduce retail and wholesale electricity demand in the JEA service territory. The evidence will show that JEA and TVA are not able to deliver quality, stable power during peak demand, and have frequent outages that result in sending employees home and lengthy restart protocols.

The Applicant's Solar Facility project falls within an exception to the prohibitions of the GTL. Jackson Sustainability Cooperative does not hold itself out to the general public. It offers

complementary services with supplemental energy from renewable sources to a small group of manufacturers and commercial users who have a demonstrated need for consistent, controlled power during peak demand. They also have a demonstrated need to minimize downtime related to weather and other failures of the grid that result in power outages.

While there is no statutory requirement that the Applicant receive any formal approval from JEA or TVA, the Applicant seeks a determination from the Commission that the project does not violate the terms of GTL. The Applicant hopes to work with JEA and TVA. For purposes of this state administrative hearing, the Applicant anticipates that JEA and TVA will argue that they have standing to enforce the GTL because they may lose revenue, and that Jackson Sustainability Cooperative is a public utility. JEA and TVA will likely advocate that the definition of the term "public utility" in the statute is broad and applies to anyone offering electric power services. However, that is only the first step in a fact intensive analysis assessing whether the statute prohibits an independent Solar Facility project from making sales of supplemental power to manufacturing and commercial users in Tennessee who remain customer of JEA. JEA and TVA will also likely aver that the statute discourages a solar project involving construction of distribution lines between the project and its end use customers because such lines duplicate the existing municipal distribution system, who will lose sales that support the capital and operational costs of the distribution system. In this case, the short and limited number of underground power lines from the Applicant's Solar Facility project do not "duplicate" the local distribution system except in a very minor way. In fact, the Applicant hopes to persuade JEA and TVA that a project of this nature positively supports and lowers costs of the local distribution system by deferring capital costs associated with demand growth, lengthening service life of system components and

reducing costs associated with meeting peak system demands. In this regard the impact of the Solar Facility project is more like that of a company that offers energy efficiency services to customers on the distribution system, than it is a competing utility stringing parallel wires to serve a wide range or large number of electric power customers. The Applicant's argument that the legislature did not intend to prevent this kind of Solar Facility project is supported by language in the GTL that creates exceptions to the general idea that duplicate distribution lines are prohibited. The prohibitions in the GTL are limited to service and equipment that, "is affected by and dedicated to the public use." The supplemental output of the Applicant's project will not be offered indiscriminately to the public. It has limited capacity, and its sales will be limited to a few off-takers with specific energy profiles. The Applicant asserts that the Commission can find the Solar Facility project is not "dedicated to the public use." As the state Attorney General's office opinion states:

> Whether its property is "affected by and dedicated to public use" will depend on a variety of factors, specific to each case. The fact that it provides power "directly and exclusively to owners and/or tenants located on the same or adjacent premises" is just one of many factors to be considered but is not alone determinative of whether or not its property is affected by and dedicated to public use. (Id.)

The application of the GTL to distributed solar generation projects is a matter of first impression in Tennessee. Currently, there are no cases in Tennessee where a municipal utility uses the GTL to suppress a solar project. In this case the Solar Facility provides a zero-carbon solar project that benefits employers in a minority community. The Applicant would like to see JEA and TVA agree that a community solar project does not violate their supply agreement so that JEA is free to adopt a community solar policy, a policy similar to statutes adopted by many other states.

CONCLUSION

The Petition, intervening Petitions, and Statements of JEA and TVA have placed the following issues before the Commission:

1. Whether Jackson Sustainability Cooperative has standing because it has a personal stake in obtaining a declaratory ruling from the Commission.

2. Whether Jackson Sustainability Cooperative's Solar Facility project is a "public utility."

3. Whether Jackson Sustainability Cooperative has sufficiently limited the scope and services of its Solar Facility so that it is not "dedicated to public use."

4. Whether the Commission has jurisdiction over the continued operation of the proposed Solar Facility which provides supplemental renewable energy to a few manufacturing and commercial members in the form of a non-profit cooperative.

5. Whether the operation of an independent renewable energy generation facility for supplemental energy violates the restrictions found in the Geographic Territories of Electric Utility Systems statutes, Tenn. Code Ann. §§ 65-34-101 through 108.

Jackson Sustainability Cooperative respectfully requests the Commission to hear these issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail, postage prepaid, and by email to the following this 13th day of July, 2021.

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John A. Beam, III

EXHIBIT 15

ARTICLES OF AMENDMENT TO THE CHARTER

OF

JACKSON SUSTAINABILITY COOPERATIVE

Pursuant to the provisions of T.C.A. § 48-60-101, JACKSON SUSTAINABILITY COOPERATIVE hereby amends it s charter to delete a provision not required in the charter and to add a provision that is permitted in the charter. The Board of Directors of the corporation adopted the following articles of amendment to its charter as permitted under T.C.A. §48-60-102 and in compliance with T.C.A. §48-60-105:

1. The name of the corporation is JACKSON SUSTAINABILITY COOPERATIVE.

2. Section 2, subparagraph (m) of the Charter of Jackson Sustainability Cooperative dated May 14, 2021 is hereby deleted in its entirety and the following inserted in lieu thereof:

2.(m) To do and perform, either for itself or its members, any and all acts and things, and to have and exercise any and all of the foregoing purposes or as may be permitted by the Acts under which the Corporation is formed, for any lawful act or activity necessary or convenient to effect the foregoing purposes, including, but not limited to, the exercise of all powers granted to community non-profit cooperatives under the Rural Electric and Community Services Cooperative Act and by T.C.A. Section 65-25-101 *et seq.*, as amended from time to time.

3. Section 3, subparagraph (a) of the Charter of Jackson Sustainability Cooperative dated May 14, 2021 is hereby deleted in its entirety and the following inserted in lieu thereof:

3.(a) The Corporation is a not for profit corporation organized for the benefit of its members.

4. The corporation is a not-for-profit corporation.

5. The amendment was duly adopted on the 8th day of July, 2021 by the Board of Directors in compliance with the Bylaws and under T.C.A. §48-60-102 which does not require a

vote of the members. Approval of the amendment by persons other than the Board of Directors is not required.

6. In all other respected the Charter of Jackson Sustainability Cooperative dated May 14, 2021 is hereby ratified and confirmed.

JACKSON SUSTAINABILITY COOPERATIVE

Date: July 8, 2021

By: Dennis Emberling
Dennis Emberling, President

EXHIBIT 16

AMENDMENT TO THE BYLAWS
OF THE
JACKSON SUSTAINABILITY COOPERATIVE

This AMENDMENT TO BYLAWS of the Jackson Sustainability Cooperative (this "Amendment") is effective for all purposes as of the 8th day of July, 2021. The Jackson Sustainability Cooperative is a nonprofit corporation organized and operated under the laws of the State of Tennessee (the "Corporation"). Pursuant to Article XV and Article XVI of the Bylaws, the Bylaws may be amended by a vote of the members of the Board of Directors of the Corporation (the "Board") for any reason consistent with the purposes of the Corporation. The Board unanimously approved the amendment as evidenced by their signatures below.

NOW, THEREFORE, the Bylaws are hereby amended as follows:

1. All references to the Tennessee Electric G&T Cooperative Act of 2009 and to T.C.A. § 48-69-101 *et seq* currently in Article I, Section 1.1 shall be deleted in their entirety and following new first sentence inserted into Article I, Section 1.1 in lieu of the current first sentence:

Section 1.1. Purposes and Aims of Corporation. This Corporation was formed and exists to do and perform, either for itself or its Members, any and all acts and things, and to have and exercise any and all of the powers granted to community non-profit membership cooperatives as permitted under Tennessee law, including the Rural Electric and Community Services Cooperative Act and by T.C.A. Section 65-25-101 *et seq*., as amended from time to time, for any lawful act or activity, including, but not limited to, the following:

APPROVED by the Board of Directors effective this 8th day of July, 2021.

David Shimon

Dennis Emberling

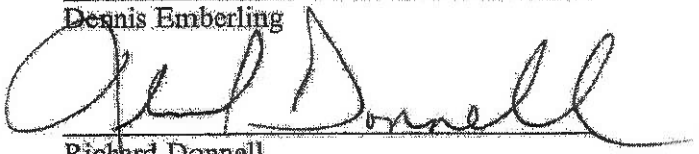
Dennis Emberling

Richard Donnell

Robert Starr

Jeff Frieling

Dennis Emberling



Richard Donnell

Robert Starr

Jeff Frieling

Dennis Emberling

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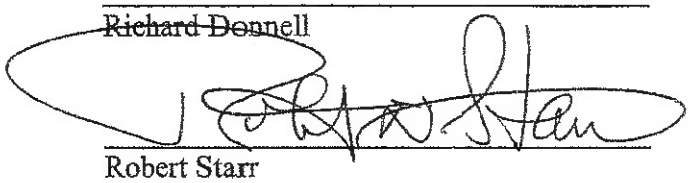

Robert Starr

Jeff Frieling

Dennis Emberling

Richard Donnell

Robert Starr

Jeff Friedling

EXHIBIT 17

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

April 10, 2017

Opinion No. 17-25

Sale of Electricity by a Solar Electricity Generating Facility

Question 1

Is a solar electricity generating facility that provides power directly and exclusively to owners and/or tenants located on the same or adjacent premises "affected by and dedicated to the public use," such that the facility would be prohibited from selling the power to those owners and/or tenants under Tenn. Code Ann. § 65-34-103?

Opinion 1

A solar electricity generating facility that comes within the statutory definition of "public electric system" is prohibited from selling power in certain geographical territories. Tenn. Code Ann. § 65-34-102(4), § 65-34-102(5), and § 65-34-103. The question assumes that a solar generating facility meets all of the Tenn. Code Ann. § 65-34-102(5) definitional elements of a "public electric system" save only the element that its property be "affected by and dedicated to public use." Whether its property is "affected by and dedicated to public use" will depend on a variety of factors, specific to each case. The fact that it provides power "directly and exclusively to owners and/or tenants located on the same or adjacent premises" is just one of many factors to be considered but is not alone determinative of whether or not its property is affected by and dedicated to public use.

Question 2

Is the owner of the solar facility described in the previous question a "public utility" as defined in Tenn. Code Ann. § 65-4-101(6)?

Opinion 2

If the owner of a solar electricity generating facility is a public electric system as defined in Tenn. Code Ann. § 65-34-102(5), it would likewise be a public utility as defined in Tenn. Code Ann. § 65-4-101(6)(A) unless it were to come within one of the many statutory exceptions detailed in Tenn. Code Ann. § 65-4-101(6)(A)(i) through (B)(ii).

ANALYSIS

In 1989 the Tennessee Legislature enacted a statutory scheme[1] entitled the "Geographic Territories of Electric Utility Systems." Tenn. Code Ann. §§ 65-34-101 through 108. That legislation was designed to prevent duplication of electric system facilities because the Legislature found that such duplication results in excessive consumer costs and environmental and aesthetic problems. Tenn. Code Ann. § 65-34-101. To avoid duplication of electric system facilities and to protect consumer investment in those facilities, the Legislature deemed it in the public interest to keep in place geographic territories it had established in 1968 for electric utilities and to limit "utilities that are not consumer owned" from expanding "service into areas already served by consumer-owned municipal and cooperative electric system." Tenn. Code Ann. § 65-34-101.

To that end, the "Geographic Territories of Electric Utility Systems" statutory scheme prohibits a "non-consumer owned electric system" from constructing, acquiring, and maintaining facilities and equipment for the "distribution or sale of electricity outside its current geographic territory," and from providing, "by sale or otherwise, electricity to any parcel of land located outside its current geographic territory." Tenn. Code Ann. § 65-34-103. It also prohibits municipalities from expanding the territories of non-consumer owned electric systems. Tenn. Code Ann. § 65-34-107(b).

If a solar electricity generating facility is a "non-consumer owned electric system" these statutory prohibitions would apply to it. But even if it does meet the definition of a non-consumer owned electric system (i.e., even if it is a public electric system), it may still enter into an agreement with another public electric system serving an adjacent geographic territory to modify the territories and transfer the right to provide service from one to another. Tenn. Code Ann. § 65-34-108.

A "non-consumer owned electric system" is a "public electric system" (other than a municipal electric system or a community service cooperative). Tenn. Code Ann. § 65-34-102(4). A "public electric system" is any entity or individual that owns, operates, manages, or controls any electric power system, plant, or equipment in Tennessee "affected by and dedicated to public use." Tenn. Code Ann. § 65-34-102(5).

Question 1 assumes that a solar generating facility meets all the definitional elements of a "public electric system" save only the element that its property be "affected by and dedicated to public use."[2] The phrase "affected by and dedicated to public use" is legal shorthand for the concept that "[a] distinguishing characteristic of a public utility is a devotion of private property by the owner to service useful to the public, which has a right to demand such service so long as it is continued with reasonable efficiency under proper charges." 73B C.J.S. *Public Utilities* § 1 (2016).

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[1] The Tennessee Court of Appeals has referred to this statutory scheme as a "labyrinth," and one that "leave[s] a large void" in some respects. *Electric Power Bd. v. Middle Tennessee Electric Membership Corp.*, 841 S.W.2d 321, 323, 324 (Tenn. Ct. App. 1992).

[2] We assume that the solar electricity generating facility at issue is not a community service cooperative (as defined in Tenn. Code Ann. § 65-25-102(4)) or a municipal electric system within the meaning of Tenn. Code Ann. § 65-34-102(3).

Whether an entity should be deemed to have dedicated its property to public use is a question that turns on the specific facts of each particular case. Just because its services are available to the public does not necessarily make the service provider a public utility. Similarly, an entity that sells all its product or services under contract to public utilities (which in turn sell that product to consumers) is not by that fact alone a public utility. On the other hand, the number of customers is not controlling; a facility is not rendered non-public just because a limited number of customers may have occasion to buy its services. And an entity that does other business in addition to providing a public service may nevertheless be a public utility subject to regulations. *See* cases cited in 73B C.J.S. Public Utilities § 2 (2016).

The ultimate question is whether the utility conducts its business in a way that makes it a public concern. Put in a more concrete way, the question is whether the utility holds itself out (expressly or implicitly) as engaged in supplying its product or services to the public in general or to a limited portion of the public, as opposed to holding itself out as serving or prepared to serve only particular individuals. To answer this question, courts will consider the totality of the particular circumstances, including how the company actually conducts business, what the company's articles of incorporation and bylaws provide for, what its stated purpose is, whether it is providing a good or service in which the general public has an interest, whether it accepts substantially all requests for its services, how its service contracts are structured, and whether it is in actual or potential competition with other entities that are public utilities. *See* cases cited in 73B C.J.S. Public Utilities § 2 (2016). *See also Memphis Natural Gas Co. v. McCanless*, 194 S.W.2d 476, 480 (1946) (charter conclusively authorized gas company to do business as a public utility).

In sum, whether the property of any particular solar electricity generating facility is "affected by and dedicated to public use" will depend on a variety of factors, specific to each case. The fact that it provides power "directly and exclusively to owners and/or tenants located on the same or adjacent premises" is just one of many factors to be considered but is not alone determinative of whether or not its property is affected by and dedicated to public use.

The "public use" element in the statutory definition of "public electric system" in Tenn. Code Ann. §§ 65-34-102(5) is common in—indeed integral to—most statutory definitions of "public utility."[3] Not surprisingly, "public use" appears as a key element in the statutory definition of "public utility" in Tenn. Code Ann. § 65-4-101(6)(A). The §101(6)(A) definition of "public utility" encompasses providers of other services in addition to providers of electric services, but is otherwise essentially the same as the definition of "public electric system" in Tenn. Code Ann. § 65-34-102(5). A "public utility" includes all individuals and entities that

> own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, *affected by and dedicated to the public use* . . . .

Tenn. Code Ann. § 65-4-101(6)(A) (emphasis added).

[3] In fact, the Tennessee Supreme Court has found it "abundantly clear" that "the terms *'public use'* and *'public utility'* are synonyms." *Memphis Natural Gas Co. v. McCanless*, 194 S.W.2d 476, 479-80 (Tenn. 1946)(emphasis in original).

Thus, if the owner of a solar electricity generating facility is a public electric system as defined in Tenn. Code Ann. § 65-34-102(5), it would likewise be a public utility as defined in Tenn. Code Ann. § 65-4-101(6)(A) unless it were to come within one of the many statutory exceptions detailed in Tenn. Code Ann. § 65-4-101(6)(A)(i) through (B)(ii).

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