

**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**

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Docket No. 21-00061

**MOTION AND REPLY OF THE TENNESSEE VALLEY AUTHORITY  
AND THE JACKSON ENERGY AUTHORITY**

**SUMMARY**

The Tennessee Valley Authority (“TVA”) and the Jackson Energy Authority (“JEA”) jointly move to file a short reply to the “Response” filed July 13, 2021 by the Jackson Sustainability Cooperative (“JSC” or “the Applicant”). TVA and JEA ask again that JSC’s Application be dismissed.

JSC states that it has now changed from one kind of cooperative to another. The Applicant has also changed the relief that it seeks from the Tennessee Public Utility Commission (“the Commission”). Because JSC has substantially amended its Application, TVA and JEA seek permission to file a reply.

Unlike the initial Application, the amended Application asks the Commission to issue a declaratory ruling as to whether JSC’s project “violates the terms of the GTL” (the “Geographic Territories of Utility Systems” laws, T.C.A. § 65-34-101 et seq.). As the Commission has ruled in

prior similar cases, the agency has no jurisdiction to issue a declaratory ruling regarding the application of statutes that are not within the Commission's "primary jurisdiction." T.C.A. § 4-5-223(a). See "In Re: Petition of Tennessee Wastewater Systems, Inc. for Declaratory Ruling," Docket 11-00-199, Initial Order issued January 11, 2012 and Milcrofton Utility District of Williamson County v. Non Potable Well Water, Inc., 2019 WL 2083329 (Tenn. Ct. App., May 10, 2019). Since the Commission has no statutory authority to declare whether JSC's project violates the GTL, the revised Application for a declaratory ruling must be dismissed.

### **MOTION**

In its initial Application, JSC asked that the Commission issue a declaratory ruling that JSC is not a "public utility" under T.C.A. § 65-4-101(6) and therefore not subject to the agency's jurisdiction. In the alternative, JSC asked that if the Commission did have jurisdiction to regulate JSC, the Commission should grant JSC a certificate of convenience and necessity to offer electric service to retail customers in Jackson, Tennessee.

In response to JSC's Application, TVA and JEA argued that the Application should be dismissed for at least two obvious reasons.

First, as stated in JSC's charter and bylaws and in the pre-filed testimony of the company's president, JSC purported to be a "Generation and Transmission Cooperative" ("G&T Cooperative") organized pursuant to T.C.A. § 48-69-101 et seq. It is undisputed that state law expressly exempts a G&T Cooperative from the Commission's regulatory jurisdiction (see T.C.A. § 48-69-119). Consequently, it was clear that JSC had no standing to ask the Commission to issue a declaratory ruling as to JSC's status under T.C.A. § 65-4-101(6) or any other statutes.

Second, given that it is undisputed that a G&T Cooperative is prohibited from providing service to retail customers in Jackson, TVA and JEA explained that the Commission was barred as a matter of law from granting JSC's request for a certificate of convenience and necessity and, therefore, the agency had no legal basis to open a contested case proceeding.

In tacit admission that the arguments of TVA and JEA should prevail, JSC has responded by submitting what is--in essence--an entirely new Application. According to the new Application, JSC now has a fundamentally different legal structure. Specifically, instead of its original plan to operate as a G&T Cooperative, JSC now contends that it will operate as a non-profit cooperative under the "Rural Electric and Community Services Cooperative Act," T.C.A. § 65-25-101, et seq. Response at 3 and 6. The new Application also asks that the Commission answer fundamentally different legal questions regarding JSC's proposed business plan. Instead of asking for a declaratory ruling regarding the Commission's jurisdiction to regulate JSC under T.C.A. § 65-4-101(6), JSC now asks for a determination as to whether its proposal to offer electric service to retail customers in Jackson violates the GTL.

Because JSC has fundamentally changed its Application and now raises new issues not presented in its initial filing, TVA and JEA request the opportunity, pursuant to Commission rules 1220-01-02-.05(4) and 1220-01-02-.06(3), to file the following reply.

## REPLY TO JSC'S NEW APPLICATION

Under both state law and agency's rules, the Commission may issue a declaratory order concerning the "applicability of a statute... within the primary jurisdiction of the agency."

T.C.A. § 4-5-223(a); Rule 1220-01-02-05(1). See also T.C.A. § 65-2-104. (The Commission may "issue a declaratory ruling with respect to the applicability... of any rule or statute enforceable by it.")

Here, JSC seeks a declaratory ruling as to whether the GTL prohibits JSC from selling electricity within the "current geographic territory" of JEA. The GTL defines the "current geographic territory" of municipal electric systems such as JEA and prohibits, except by agreement, other electric systems from encroaching upon the service areas of municipal systems.

In clear recognition that the General Assembly's purpose in passing the GTL was to maintain the "geographic territories" of existing electric systems and prohibit the "duplication of electric system facilities," JSC admits that the GTL would, if applicable, prohibit JSC from selling electricity to retail customers currently being served by JEA. Response, at 7, quoting from T.C.A. § 65-34-101(1) and (4). JSC claims, however, that the GTL is not applicable because JSC's proposed electric system is not "affected by and dedicated to the public use" and therefore not a "public electric system" as defined in Section 102(5) of the GTL. In its own words, JSC "seeks a determination from the Commission that the project does not violate the terms of the GTL." Response at 11. In asking for this interpretation of the GTL, JSC discusses a 2017 opinion of the Tennessee Attorney General (Opinion No. 17-25) that lists the factors a court would consider in determining whether a distributor of solar-generated electricity would be classified as a "public electric system...affected by and dedicated to public use" under the GTL. At page 8 of the

Response, JSC explains that it is asking the Commission to consider the factors listed by the Attorney General in deciding whether the GTL applies to JSC's proposal:

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 GTL.

JSC, in other words, asks the Commission to issue a declaratory ruling as to whether JSC's proposed solar facility is prohibited by the GTL or "falls within an exception to the prohibitions of the GTL" because JSC "does not hold itself out to the general public." Response at 10. JSC adds that the "application of the GTL to distributed solar generation projects is a matter of first impression in Tennessee" (*id.*, at 12) and that the resolution of these issues will "require a contested case hearing to resolve." *Id.*, at 10.

TVA and JEA strongly disagree with the claims and the legal arguments that JSC now makes in its new Application regarding the GTL. It is not necessary to address those issues at this time, however, because once again JSC is asking the Commission to issue a declaratory ruling where the Commission plainly lacks the authority to do so. Thus, like the initial Application, JSC's new Application must also be dismissed as a matter of law.

As previously discussed, the Commission is bound by two statutes and its own rules in deciding whether to accept an application for a declaratory ruling and may not issue a declaratory ruling regarding the application of a state law that is not within the "primary jurisdiction" of the agency or that is not "enforceable" by the Commission.

In this case, the Commission has no authority or jurisdiction to decide whether the GTL prohibits JSC from serving retail customers in Jackson. While the Commission has jurisdiction under Section 105 of the GTL to hear and resolve disputes concerning the boundaries of the

“current geographical territory” of a “non-consumer owned electric system” (i.e., the boundaries, as of February 16, 1989, of areas that were served by a system that is neither an electric cooperative nor a municipal electric system), that is the full extent of the agency’s authority under that statute. The Commission has no other enforcement authority under the GTL, and JSC has not suggested any authority to establish otherwise. Nor can it. Once again, the Commission must reject JSC’s Application because the agency lacks the authority to grant the kind of declaration that JSC now seeks.<sup>1</sup>

## CONCLUSION

The issue of whether the GTL allows a solar company to build duplicative generation and distribution facilities in order to sell electricity to retail customers already being served by the Jackson Energy Authority may, as the Applicant asserts, be a case of first impression. Resolving that issue may also require an evidentiary hearing to evaluate whether the solar company is a “public electric system...affected by and dedicated to public use” as defined by the GTL. Such speculation aside, one thing is clear: whether the GTL applies to JSC’s business plan is not a matter within the Commission’s “primary jurisdiction,” and JSC may not “seek a determination from the Commission that the project does not violate the terms of the GTL” (Response at 11). Thus, JSC’s new Application is no less improper than its initial Application, and the Commission should

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<sup>1</sup> The Commission has declined to issue declaratory rulings in other cases in which the agency was asked to interpret statutes that are not within the Commission’s primary jurisdiction. See “In Re: Petition of Tennessee Wastewater System, Inc. for Declaratory Ruling,” Docket No. 11-00199, and Milcrofton Utility District of Williamson County v. Non Potable Well Water, Inc. et al., 2019 WL 2083329 (Tenn. Ct. App., May 10, 2019). In Milcrofton, the Court of Appeals affirmed the Commission’s ruling that the agency lacked jurisdiction to issue a declaratory ruling as to whether Milcrofton has exclusive rights under T.C.A. § 7-82-301(a)(1)(B) to sell water to retail customers within the utility district’s service area. The Milcrofton case is very similar to the case at bar.

decline to convene a contested case. Questions regarding the interpretation and application of the GTL are for the courts to decide, not the Commission.

Respectfully Submitted,

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### CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing has been served via either U.S. Mail, postage prepaid, or email to the following this 15<sup>th</sup> day of July, 2021:

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