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**IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
EASTERN GRAND DIVISION**

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2015 SEP 21 A 11:46

COMCAST OF THE SOUTH, )  
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 Claimants, )  
 )  
 v. ) **Claims Commission No. T20141691<sup>1</sup>**  
 ) **Regular Docket**  
 STATE OF TENNESSEE et. al., )  
 )  
 Defendant. )

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**ORDER DISMISSING CLAIM**

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**THIS MATTER IS BEFORE** the undersigned, Commissioner for the Eastern Grand Division of the Tennessee Claims Commission.

On February 19, 2015, the Commission held an extensive hearing in this matter in Knoxville, Tennessee. Following that hearing, the Commission signed an Order Denying State's Motion To Dismiss on March 12, 2015. That Order was filed with the Clerk of the Commission on March 23, 2015. However, following the entrance of the Order, the State filed a Motion To Revise Order Entered March 23, 2015, Or, In The Alternative, Permission To Seek Interlocutory Appeal. Subsequently, the State filed a second Motion styled Motion To Dismiss For Lack Of Subject Matter Jurisdiction. On June 25, 2015, Comcast of the South filed its Response To Defendant State Of Tennessee's Motion To Dismiss For Lack Of Subject Matter Jurisdiction.

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<sup>1</sup> Consistent with its argument that Claimants named the wrong entity in their filing of a Notice of Claim with the Division of Claims Administration, the State captions its pleadings using Comcast Cable Communications LLC as the named Claimant. This issue is dealt with in the body of this ruling.

The history of how this claim arose, prior to the filing of the State's most recent motions and Comcast's response, is set out in our earlier Order at pages 1 through 5. The central issue at the February hearing in this matter, and the Order which issued from the Commission following that hearing, dealt with whether we even had jurisdiction over this claim because of an alleged failure by Comcast of the South to file an appropriate protest bond as required by Tenn. Code Ann. § 12-3-514. Extensive briefing of that issue was submitted by the parties prior to the February 2015, hearing, as well as in the motions filed by the State and the Response by Comcast of the South now before the Commission.

A secondary jurisdictional issue addressed in our earlier Order dealt with whether Comcast of the South was even a proper party in this case given the fact that a separate business entity, Comcast Cable Communications, LLC, filed the initial Notice of Claim with the Division of Claims Administration. By agreement of the parties, that issue is not before the Commission for reconsideration at this time in light of the potential disposition of this case under the provisions of Tenn. Code Ann. § 12-3-102.<sup>2</sup>

The circumstances in which the Commission, and the parties, now find themselves is curious.

As just indicated, the predominant thrust of the briefing and arguments submitted and made in connection with our previous Order dealt with whether the Commission even had jurisdiction over this dispute because of an alleged failure by Comcast of the South to comply with the requirements of Tenn. Code Ann. § 12-3-514(c).

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<sup>2</sup> Prior to July 1, 2013, the provisions currently addressed in Tenn. Code Ann. § 12-3-102 were found in Tenn. Code Ann. 12-3-103.

The parties seemed to agree at that time that if we had jurisdiction at all, it would be founded on Tenn. Code Ann. 9-8-307(a)(1)(N) proceeding under the private right of action provided for in Tenn. Code Ann. § 12-3-514(g).<sup>3</sup>

It appears that after April 1, 2012, and perhaps even earlier, Tenn. Code Ann. §12-3-103 [and after July 1, 2013, Tenn. Code Ann. § 12-3-102(a)] read in relevant part for present purposes, as follows:

**12-3-102. Exempt agencies and purchases.**

(a) Procurements and contracts by and for the following state governmental entities shall be exempt from the operation of this chapter:

(3) The University of Tennessee system and the Tennessee board of regents system.

Additionally, although purchases by the University of Tennessee are exempt from the standards set forth in Title 12, Chapter 3, the University had promulgated fiscal

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<sup>3</sup> Tenn. Code Ann. 9-8-307(a)(1)(N) reads as follows:

§ 9-8-307. Jurisdiction; waiver of causes of action; limits on state's liability; immunities; transfer of claims

(a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101, falling within one (1) or more of the following categories:

(N) Negligent deprivation of statutory rights created under Tennessee law, except for actions arising out of claims over which the civil service commission has jurisdiction. The claimant must prove under this subdivision (a)(1)(N) that the general assembly expressly conferred a private right of action in favor of the claimant against the state for the state's violation of the particular statute's provisions;

Tenn. Code Ann. 12-3-514(g) reads as follows:

(g) Should a protest be received by the state subsequent to a contracting completely executed pursuant to a procurement process, the Tennessee claims Commission has exclusive jurisdiction to determine all monetary claims against the state, including, but not limited to, claims for the negligent deprivation of statutory rights pursuant to section 9-8-307(a)(1)(N).

policies, including Fiscal Policy F10410, which included a procedure for the posting of a protest bond by a dissatisfied bidder seemingly modeled on the provisions of Tenn. Code Ann. §12-3-514.

However, in 2013 the present version of Tenn. Code Ann. §12-3-102 was enacted replacing the statutory language previously found in Tenn. Code Ann. 12-3-103. Again, the University of Tennessee's bid protest processes were excluded from compliance with Title 12, Chapter 3, of the Code. Additionally, and this is quite important for present purposes, language previously found in Tenn. Code Ann. § 12-3-103(a)(4), encouraging state universities to "observe the standards and procedures [for] purchasing established and set forth" in Title 12, Chapter 3, was deleted. Thus, after the effective date of the 2013 amendments, which was prior to finalization of the contract at issue in this case, language encouraging state universities to tailor their individual purchasing and protest procedures after the methodology found in Title 12, Chapter 3, was no longer in effect.

#### **APPLICABLE LAW**

The presence or absence of the Commission's subject matter jurisdiction over a claim is "a threshold inquiry ... and should be resolved at the earliest possible opportunity." *In re Estate of Trigg*, 368 S.W.3d 83, 89 (Tenn. 2012). Subject matter jurisdiction is derived from either the Constitution of Tennessee or by virtue of a statute enacted by the Tennessee General Assembly or the Congress of the United States. *Id.*

Determining whether we have subject matter jurisdiction in any given case involves a three-part inquiry. First, we must determine what the gravamen of the action is and secondly, what kind of relief a claimant seeks. Finally, the constitutional or statutory provisions on which a claimant relies in asserting that we have jurisdiction must be

identified. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000). Because of the criticality of the determination of whether or not the Commission even has jurisdiction over a particular claim, a defense raising that issue may be asserted at any time. *Cockrill v. Everett*, 958 S.W.2d 133, 135 (Tenn. 1998); *Freeman v. CSX Transp. Inc.*, 359 S.W.3d 171, 176 (Tenn. Ct. App. 2010) perm. app. d'nd April 18, 2011. The Commission may even dismiss a complaint *sua sponte*. *Huckeby v. Spangler*, 521 S.W.2d 568 (Tenn. 1975). However, should the issue of lack of jurisdiction be overlooked by a trial level court, or this Commission, Tennessee's appellate courts, *sua sponte*, may identify such a problem should a case reach those levels. *Dishmon v. Shelby State Community College*, 15 S.W.3d 477, 480 (Tenn. Ct. App. 1989) perm. app. d'nd April 10, 2000.

“Subject matter jurisdiction is conferred by statute or the Tennessee Constitution; the parties cannot confer it by appearance, plea, consent, silence, or **waiver**.” *In re Estate of Trigg* at 489. (Emphasis supplied). See also *Johnson v. Hopkins*, 432 S.W.3d 840, 843-44 (Tenn. 2013); and *In re Estate Of Ina Ruth Brown*, 402 S.W.3d 193, 198 (Tenn. 2013).

In fact “[j]udgments or orders entered by a court without subject matter jurisdiction are ‘void and bind no one.’” *Freeman v. CSX Transp. Inc.*, quoting *Riden v. Snider*, 832 S.W.2d 341, 343 (Tenn. Ct. App. 1991). (Emphasis supplied). See also *Stamson v. Lillard*, 316 S.W.3d 611, 616 (Tenn. Ct. App. 2009) perm. app. d'nd. April 14, 2010.

Finally, the question of whether this Commission has been granted subject matter jurisdiction over a particular genre of claim presents a question of law. *In re Estate of Trigg*, at 489.

In making a determination of what a statute actually means, “[w]e must (1) give [the words of the statute] their natural and ordinary meaning, (2) consider them in the context of the entire statute, and (3) presume that the General Assembly intended to give each of these words its full effect.” *In re Estate of Trigg*, at 490. “Legislative intent is determined from ‘the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute’s meaning’ ... if the statutory language is clear and unambiguous, we apply the statute’s plain language in its normal and accepted use.” *Chapman v. DaVita Inc.*, 380 S.W.3d 710, 714 (Tenn. 2012). With those principles in mind, we can analyze the issue before us.

### **THE PARTIES’ ARGUMENTS AND DECISION**

The State’s position is clear. It argues that Comcast is overlooking the fact that the provisions of Title 12, Chapter 3 do not apply to it [see Tenn. Code Ann. § 12-3-102] and thus this claim cannot go forward before the Commission under Tenn. Code Ann. § 12-3-514(g).

Comcast’s arguments are extremely well constructed and clever. It opposes the State’s Motion to Dismiss on two basic grounds.

First, Comcast argues that the State’s newly asserted argument that Tenn. Code Ann., Title 12, Chapter 3 does not apply in this case is extremely disingenuous in that earlier it had based a major part of its entire defense on the contention that Comcast had not met the bonding requirements set out in Tenn. Code Ann. § 12-3-514. That is a completely understandable argument but one that the Commission does not accredit.

It appears to us that the various provisions found in Title 12, Chapter 3 of the Code underwent significant amendment between 2010 and 2013. (See Compiler's Notes Tenn. Code Ann. § 12-3-101). The most recent amendment to what was, prior to July 1, 2013, Tenn. Code Ann. § 12-3-103, resulted in language now found in Tenn. Code Ann. §12-3-102. In addition to continuing the exemption for the University of Tennessee from the purchasing requirements found in that Title and Chapter, the 2013 amendments also deleted language previously found in Tenn. Code Ann. § 12-3-103(a) suggesting, but not mandating, that "State agencies, departments and institutions ... shall insofar as may be practicable, observe the standards and procedures of purchasing established and set forth in this chapter;". In this case, the contract at issue was executed after the July 1, 2013, the effective date of the 2013 amendments and thus the suggestion that universities, presumably including the University of Tennessee, model their own fiscal policies after what is found in Title 12, Chapter 3, including the provisions of Tenn. Code Ann. §12-3-514, was no longer a part of Tennessee law.

Nevertheless, it appears that the University left in effect provisions in its Fiscal Policies which mimicked the methodology found in Title 12, Chapter 3, including the provisions of Tenn. Code Ann. §12-3-514, although it was no longer required to do so.

Thus, the Commission observes that not only was the University's exemption from the provisions of Title 12, Chapter 3, in effect on the date the contract at issue here was bid and entered into, the language suggesting universities model their own fiscal policies after Title 12, Chapter 3 [presumably including Tenn. Code Ann. 12-3-514] was no longer part of the law.

That state of affairs of course might have been misleading to individuals or entities bidding on University contracts. Indeed, as evidenced by the arguments now made by both parties, prior to the State filing its most recent attack on our subject matter jurisdiction over this claim, the non-applicability of the provisions found in Title 12, Chapter 3, to the University of Tennessee was something not appreciated by either party to this litigation. We simply do not agree with Comcast that the University's newly asserted, and diametrically opposite argument to what it has previously based its defense on, is some sort of devious litigation tactic.

Clearly, over the past few years there have been somewhat significant amendments made to Title 12, Chapter 3. Surprisingly, the University's original response to Comcast's bid protest was in error and as the Commission stated in our previous Order denying the State's initial motion to dismiss, we are quite suspicious of the alacrity with which the decision was made at all levels of the University concerning Comcast's appeal in a contract involving very large amounts of money.

However, if this Commission or even an appellate court discovers at any stage of a particular case that there is no subject matter jurisdiction over a particular claim, that issue should and must be resolved immediately.

We discern no nefarious intent on the part of the University in the assertion of its admittedly new defense. This was an oversight pure and simple.

Comcast also argues that in light of the University's conduct, vis-à-vis, the applicability of Tenn. Code Ann. §12-3-514, it has waived the immunity it had under Tenn. Code Ann. § 12-3-102. If that waiver is effective, so the argument goes, then we have jurisdiction under our jurisdictional grant found in Tenn. Code Ann. § 9-8-

307(a)(1)(N) with Tenn. Code Ann. § 12-3-514(g) supplying the private right of action necessary under that provision. The pertinent language from both statutes is set out above at page 3.

Comcast goes on to argue that if its wavier argument is not persuasive then the Commission should hold that the State is estopped from asserting a jurisdictional defense at this point, or alternatively, that the State has declined to exercise the exemption given the University in Tenn. Code Ann. § 12-3-102, and the case can continue.

Again, Comcast's position is thoroughly understandable. However, the case authorities set out above make it absolutely clear that under no circumstance can subject matter jurisdiction be waived or somehow conferred by some procedural move devised, and perhaps even agreed to, by the parties. This is a long established principle of Tennessee jurisprudence and should the Commission allow this claim to go forward before us, we believe, with a great amount of certainty, that not only would that decision be reversed on appeal, but also that we would have allowed an expensive and time consuming process to go forward with no jurisdictional justification whatsoever.

It is well established that the jurisdiction of the Commission, being in derogation of the common law, must be narrowly construed. *State ex Rel Allen v. Cook*, 106 S.W.2d 858, 860 (1937); *Stokes v. University of Tennessee*, 737 S.W.2d 545, 547 (Tenn. Ct. App., 1987); *Daley v. State*, 869 S.W.2d 338 (Tenn. Ct. App. 1993). Tenn. Code Ann. § 9-8-307(a)(1)(N) requires that if we are to proceed with a claim brought pursuant to a specific section of the Tennessee Code Annotated, that section must expressly provide for a private right of action.

Here, Tenn. Code Ann. §12-3-102(a) expressly exempts the University of

Tennessee from application of the provisions of Title 12, Chapter 3, including Tenn. Code Ann. § 12-3-514(g).

To proceed in light of those factors would be a gross mistake on the part of this Commission.

The provisions of Tenn. Code Ann. § 12-2-102(a) are exceedingly clear –the bid procedures found in Title 12, Chapter 3 [prior to 2013, Tenn. Code Ann. 12-3-103] do not apply in cases involving the University of Tennessee which of course would include the provisions of Tenn. Code Ann. 12-3-514(g), which affords this Commission jurisdiction over similar claims involving other state entities.

For these reasons, the State’s most recent Motion to Dismiss must be **GRANTED** since we clearly do not have subject matter jurisdiction over this matter.

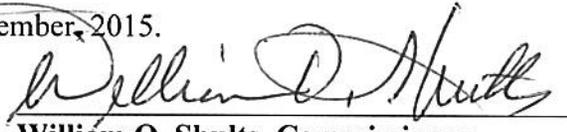
Having said that, it appears to the Commission that Comcast of the South would be entitled, under University Fiscal Policy 10410, to a review of its bid protest at several different levels. We cannot tell from the materials now before whether the University has complied with its own Fiscal Policy in connection with the three step appellate process described there.

However, a resolution of any issues regarding that observation lies, if anywhere, with a body other than the Tennessee Claims Commission.

At this point, it appears that the University of Tennessee, and the colleges and universities making up the board of regents system, along with the General Assembly and the judicial branch of our state government, enjoy an exemption from the bidding processes found in Title 12, Chapter 3, a status not applicable to any other agency, institution or entity within state government. The message is clear –let the bidder beware

when dealing with the State in those contexts.

Entered this the 17 day of September, 2015.



**William O. Shults, Commissioner**

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Newport, TN 37822-0960

**CERTIFICATE**

I certify that a true and exact copy of the foregoing Order has been transmitted to the following:

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On this the 21<sup>st</sup> day of September, 2015.

*Paula Merrifield*  
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**Paula Merrifield, Clerk of the Commission**