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Hon. Herbert H. Hilliard, Chairman
c/o Ectory Lawless, Docket Manager
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
Nashville, TN 37243
tpuc.docketroom@tn.gov

***Re: Petition of Jackson Sustainability Cooperative to Determine if a Certificate of
Convenience and Necessity Is Needed
Docket No. 21-00061***

Dear Chairman Hilliard:

Enclosed please find an original and four copies copy of the following, which was filed electronically on November 23, 2022: Tennessee Electric Cooperative Association's Memorandum Supporting Award of Reasonable Attorneys' Fees from Jackson Sustainability Cooperative, which includes the Declaration of W. Brantley Phillips, Jr. as Exhibit 1.

Should you have any questions concerning the enclosed, please do not hesitate to contact me.

Sincerely,



Matthew J. Sinback

Enclosure

cc: All Counsel of Record (via email)

STATE OF TENNESSEE
BEFORE THE
TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

IN RE:)	
)	
PETITION OF JACKSON)	
SUSTAINABILITY COOPERATIVE TO)	Docket No. 21-00061
DETERMINE IF A CERTIFICATE OF)	
CONVENIENCE AND NECESSITY IS)	
NEEDED)	

**TENNESSEE ELECTRIC COOPERATIVE ASSOCIATION’S MEMORANDUM
SUPPORTING AWARD OF REASONABLE ATTORNEYS’ FEES FROM JACKSON
SUSTAINABILITY COOPERATIVE**

Pursuant to the Initial Order Granting, In Part and Denying, In Part Motions to Compel Filed by Tennessee Electric Cooperative Association and Jackson Energy Authority dated November 14, 2022 (the “November 14 Order”), Tennessee Electric Cooperative Association (“TECA”) hereby submits this memorandum concerning its attorneys’ fees and expenses related to TECA’s Motion to Compel Discovery from Jackson Sustainability Cooperative (“TECA Motion”) and supporting Memorandum of Law (“TECA Memo”), both filed on May 20, 2022.

As set forth in the Declaration of W. Brantley Phillips, Jr., which is attached as *Exhibit 1*, TECA submits that, between April 14, 2022 and June 21, 2022, the compensable attorneys’ fees and expenses it incurred related to the matters addressed in the November 14 Order total

\$67,843.95. TECA respectfully requests the entry of an order requiring JSC and/or JSC's counsel, John A. Beam III, to reimburse TECA for its attorneys' fees and expenses in that amount.¹

ARGUMENT & AUTHORITY

In the November 14 Order, the Hearing Officer ordered that "[JSC] shall pay the reasonable attorney's fees and expenses of [TECA] related to the filing of [TECA's] Motion to Compel Discovery from Jackson Sustainability Cooperative and the Memorandum of Law in Support of [TECA's] Motion to Compel Discovery from Jackson Sustainability Cooperative." (See November 14 Order at 17.) Accordingly, the only remaining question is the specific amount of that award.

In Tennessee, the determination of a reasonable attorney's fee is "a subjective judgment based on evidence and the experience of the trier of facts." *United Med. Corp. of Tenn., Inc. v. Hohenwald Bank & Trust Co.*, 703 S.W.2d 133, 137 (Tenn. 1986). In analyzing this issue, tribunals are guided by the Tennessee Rules of Professional Conduct, which provide a non-exhaustive list of factors to use in determining whether an attorney's fees are reasonable:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

¹ Tennessee Rule of Civil Procedure 37.01 mandates that, if a motion to compel is granted, "the court *shall*, after opportunity for hearing, require *the party* ... 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...." Tenn. R. Civ. P. 37.01 (emphasis added). Thus, JSC or its counsel, John A. Beam III, are responsible for paying TECA's attorneys' fees and expenses to the extent they were a party or attorney advising the sanctioned discovery misconduct. This responsibility extends to Community Development Enterprises-Jackson I ("CDE") and its manager, E A Solar LLC ("E A Solar"). TECA's Memo explains the interrelationship of these entities, including the fact that CDE is the real party in interest. (See TECA Memo at 1-2 n.1.) Indeed, JSC has conceded that E A Solar is responsible for some of the discovery misconduct that led to the award of fees and expenses. (See JSC Response to TECA Motion at 12.) And, Dennis Emberling serves as CEO of E A Solar LLC, CEO of CDE, and President of JSC. (*Id.*; TECA Memo at 1-2 n.1.)

- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

See, e.g., Smith v. All Nations Church of God, 2022 WL 4492199, at *4 (Tenn. Ct. App. Sept. 28, 2022) (citing Tenn. R. Sup. Ct. 8, RPC 1.5).

“Every factor may not be relevant in all cases, but attorney’s time and labor will always be relevant in cases where the court is asked to determine a reasonable fee.” *Id.* (citations and quotations omitted) (emphasis added). Tennessee has “no fixed mathematical rule” for determining a reasonable fee. *Killingsworth v. Ted Russell Ford, Inc.*, 104 S.W.3d 530, 534 (Tenn. Ct. App. 2002). Accordingly, a determination of attorney’s fees is within the Hearing Officer’s discretion. *See Kline v. Eyrich*, 69 S.W.3d 197, 203 (Tenn. 2002).

The above factors relevant to determining TECA’s reasonable attorney’s fees and expenses for obtaining the November 14 Order are Factors 1, 3, 4, 6, and 7, which are discussed further below. The remaining factors are inapplicable to this proceeding.²

² Specifically, the TECA Motion did not preclude TECA’s counsel from other employment (Factor 2); TECA’s counsel fees are not contingent (Factor 8); TECA’s counsel does not advertise its rates (Factor 9); and the fee agreement with TECA is in writing (Factor 10). Factor 5—the time limitations related to the TECA Motion—does not factor directly in the analysis. But, it should be

A. Factor 1: The Time and Labor Required, the Novelty and Difficulty of the Questions Involved, and the Skill Requisite to Perform the Legal Service Properly.

This is a complex matter wherein JSC/CDE seeks permission to establish a competitive electric utility and provide retail electric service to various commercial and industrial customers in Jackson, Tennessee that will be completely exempt from all regulatory oversight by the Commission. Some of the issues that JSC has raised in its Petition—like whether JSC/CDE truly qualifies as an electric cooperative—are fact-intensive, and the Commission cannot simply take JSC’s claims at face value; the Commission needs accurate and appropriate information about the specifics of JSC’s business plans in order to make its determination. TECA’s discovery efforts have been guided by this need for specific information.

The November 14 Order comprehensively details the particulars of the protracted discovery dispute that led the Hearing Officer to grant TECA’s Motion to Compel and award TECA its attorneys’ fees and expenses. Simply stated, JSC/CDE and its counsel, Mr. Beam, engaged in protracted gamesmanship that forced TECA to devote considerable additional time and effort to pursuing discovery.

Among other things, TECA’s counsel was required to: (i) analyze the defects in JSC/CDE’s discovery responses; (ii) communicate with JSC’s counsel about those defects; (iii) participate in multiple status conferences regarding those defects; (iv) submit written updates to the Hearing Officer; (v) obtain, redact confidential information from, and file third-party discovery from entities related to JSC; (vi) obtain and file third-party discovery from Northern Reliability,

noted that TECA’s counsel was forced to review Northern Reliability’s large document production on a tight timeframe because Northern Reliability initially resisted producing relevant emails after receiving communications from JSC’s counsel. (*See* TECA Memo at 10-13.) Under Factor 5, the compressed schedule under which its attorneys were required to work supports the reasonableness of TECA’s fee request.

Inc.; (vii) submit a motion to revise the protective order as requested by Northern Reliability; (viii) carefully analyze Northern Reliability's document productions and compare to JSC's document productions, discovery responses, and correspondence; (ix) research relevant authorities; (x) draft the TECA Motion and TECA Memo; (xi) analyze JSC's response to the TECA Motion and TECA Memo; and (xii) present oral argument at a hearing.³

As the Hearing Officer is aware, these efforts ultimately exposed the fact "that [JSC/CDE] has failed to comply with its discovery obligations, and further, the actions of [JSC/CDE] during the discovery process have thwarted the orderly administration of the proceedings and resulted in the destruction of potentially relevant evidence..., caused delay in the discovery process and increased the expense incurred by the parties involved in this matter." (November 14 Order at 11.) Indeed, the degree of gamesmanship led the Hearing Officer to make the following admonition: "It is rare that companies appearing before the Commission behave so cavalierly during the discovery process. The Commission's authority and its processes must be respected by any party appearing before the Commission. Such a blatant disregard for the discovery process will not be tolerated." (November 14 Order at 15.)

Given their lower hourly rates, Attorneys Sinback and Hogan were primarily responsible for the document analysis, research, drafting and editing relating to the TECA Motion and TECA Memo. The hours expended in successfully identifying and litigating the discovery abuses

³ In accordance with the November 14 Order, *Exhibit 1* does *not* include TECA's attorneys' fees "associated with obtaining service of process on Northern Reliability, Inc." Also, in an attempt to be conservative, TECA's *Exhibit 1* does *not* include any attorneys' fees incurred prior to April 14, 2022—the date of Northern Reliability's first document production—including fees associated with obtaining, redacting, and filing discovery received from other third-parties. In short, the fees TECA has submitted here are only a fraction of the total amount TECA was forced to incur because of JSC/CDE's discovery misconduct.

addressed in the November 14 Order are documented in the Declaration of W. Brantley Phillips, Jr., which is attached as *Exhibit 1*.

B. Factor 3: The Fee Customarily Charged in the Locality for Similar Legal Services.

Bass, Berry & Sims PLC is an established law firm with more than 330 attorneys in four offices in Tennessee and Washington, D.C. Attorneys Phillips, Sinback, and Hogan work from the firm's Nashville office. In determining what constitutes a reasonable hourly rate for purposes of the award of attorneys' fees, it is appropriate to rely on counsel's customary billing rate where that rate falls "within the range of reasonableness for litigators of [counsel's] level of skill and experience in the community." *See e.g., Dowling v. Litton Loan Servicing LP*, 320 Fed. Appx. 442, 447 (6th Cir. 2009). A reduction in an attorney's hourly rate should occur only "*in rare and exceptional circumstances* where specific evidence in the record requires it." *See e.g., Isabel v. City of Memphis*, 404 F.3d 404, 416 (6th Cir. 2005) (emphasis added). There is no such evidence in this docket. Indeed, the Sixth Circuit actually has reversed a decision reducing a fee recovery from the \$400 hourly rate sought on behalf of a leading Nashville litigator to \$250 an hour without sufficient justification. *See Geier v. Sundquist*, 372 F.3d 784, 791-92 (6th Cir. 2004). The Sixth Circuit made that determination *in 2004*, and hourly rates for legal services have only increased in the intervening 18 years.

As set forth in *Exhibit 1*, the customary rates charged by TECA's counsel are reasonable for attorneys of similar skill and experience in the Nashville area, and those rates are regularly paid by Bass, Berry & Sims' clients. Furthermore, as a long-time client of Bass, Berry & Sims, TECA receives the benefit of the firm's "preferred" rate schedule, which discounts the hourly rates by approximately 20% compared to the firm's "standard" or undiscounted rate schedule.

Accordingly, the billing rates for Attorneys Phillips, Sinback, and Hogan fall within the range of reasonableness for litigators of their level of skill and experience in the Nashville community.

C. Factor 4: The Amount Involved and the Results Obtained.

JSC seeks permission to build and operate a \$70 million solar and battery storage facility that JSC claims will generate, store and sell retail electricity to a yet-to-be-determined number of industrial and commercial customers located within Jackson Energy Authority's service territory. (Petition at ¶¶ 2 & 30 and Petition Ex. 3.) JSC claims that it is a rural electric cooperative and, thus, exempt from regulation by the Commission. (See Petition at cover letter, 5-6, and 17.) If JSC is allowed to obtain the relief sought in its Petition, despite many fundamental legal flaws with its structure and operation, the interests of both TECA and its members would be directly and negatively impacted. Indeed, if JSC succeeds, TECA believes that other entities will seek to establish similar sham "cooperatives" to evade regulation. The consequences of the proliferation of sham cooperatives are uncertain, but TECA is deeply concerned that it will diminish the role and reputation of true electric cooperatives, which exist to serve all of the electric customers in their respective geographic territories and not merely to "cherry-pick" customers as JSC proposes to do. The depth of TECA's concerns are demonstrated by the fact that it has intervened in this docket and incurred substantial legal fees simply to try to understand the nature of JSC's proposed solar project.

It is well-settled that where a party has obtained successful results, the attorney should recover a fully compensatory fee. Indeed, when a motion to compel is granted, Tennessee Rule of Civil Procedure 37.01 *requires* payment to the moving party for reasonable expenses incurred in obtaining the order, including attorney's fees, unless the opposition to the motion was substantially justified or other circumstances make an award of expenses unjust—neither being applicable here. In this instance, the discovery gamesmanship and abuses were found to be extraordinary, and the

result obtained for TECA, along with the other intervenors and, ultimately, the Commission, was entirely favorable. As detailed in the November 14 Order, the Hearing Officer awarded virtually all of the relief requested in the TECA Motion, only declining to award fees and expenses associated with obtaining service of process on Northern Reliability. These successful results warrant an award equal to the full amount of attorneys' fees and expenses that TECA incurred in obtaining those results.

D. Factor 6: The Nature and Length of the Professional Relationship with the Client.

Bass, Berry & Sims has regularly served as legal counsel for TECA for over 27 years. As a result, the firm has a good understanding of the client, electric cooperatives, and the regulatory regime governing the generation and distribution of electricity in Tennessee. Thus, whatever TECA might have saved by paying lower rates to other attorneys based in Nashville, that amount would have been more than offset by the time newly retained counsel would have needed to gain expertise about TECA and its members, the electric cooperative industry, and the issues in this docket. The "nature and length of the professional relationship with the client" is recognized as an appropriate factor supporting an award of the full amount of fees claimed in this case. *See Reed v. Rhodes*, 179 F.3d 453, 471-72 n. 3 (6th Cir. 1999) (citing *Johnson v. Georgia Hwy. Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

E. Factor 7: The Experience, Reputation, and Ability of the Lawyer or Lawyers Performing the Services.

The lead attorney for TECA, Attorney Phillips, has 24 years of experience in complex business litigation and serves as the chair of Bass, Berry, & Sims' 100-attorney Litigation & Dispute Resolution Practice Group. He has extensive experience litigating matters in Tennessee. He has served as TECA's litigation counsel since 2003. Attorney Sinback has 18 years of experience in complex litigation and counseling, including experience with utility regulation,

securities exchange regulation, antitrust, and high-stakes appeals. Attorney Hogan has 10 years of experience in complex business litigation and, prior to joining Bass, Berry & Sims, was an associate in the Boston office of an AmLaw 100 firm where he represented clients in federal court, before the U.S. International Trade Commission, and in international arbitration. Furthermore, all three of these attorneys are involved in the community and well-regarded members of the Nashville bar. For example, between 2016 and 2020, Attorney Phillips served on the board of directors of the Nashville Bar Association where he held leadership roles as chair of the NBA's Governance Committee and, in 2020, as its First Vice President.

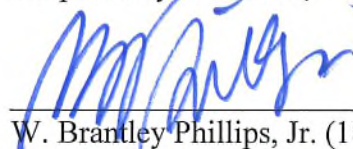
CONCLUSION

For all of the foregoing reasons, as well as those established by the supporting materials submitted herewith, TECA respectfully submits that the attorney's fees and expenses incurred in obtaining the November 14 Order were reasonable and appropriate. TECA therefore requests that the Commission enter an order that requires JSC, Community Development Enterprises-Jackson I, its principals and agents, including E A Solar LLC, and/or JSC's counsel, John A. Beam III, to reimburse TECA for its attorneys' fees and expenses in the amount of \$67,843.95.

Additionally, should JSC decide to challenge the November 14 Order and, thus, delay payment of the award, TECA respectfully requests that any order provide for the recovery of post-award interest at the post-judgment interest rate in effect on the date of the order, as published by the Tennessee Administrative Office of the Courts. *See* Tennessee Judgment Interest Rates, <https://www.tncourts.gov/node/1232344> (last visited Nov. 23, 2022).

DATED this 23rd day of November, 2022.

Respectfully submitted,



W. Brantley Phillips, Jr. (18844)

Matthew J. Sinback (23891)

Caleb H. Hogan (37412)

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*Attorneys for Tennessee Electric
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2022, the foregoing document was served on the following persons via email and/or U.S. Mail, postage prepaid:

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Matthew J. Sinback

EXHIBIT 1

STATE OF TENNESSEE
BEFORE THE
TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE

IN RE:)	
)	
PETITION OF JACKSON)	
SUSTAINABILITY COOPERATIVE TO)	Docket No. 21-00061
DETERMINE IF A CERTIFICATE OF)	
CONVENIENCE AND NECESSITY IS)	
NEEDED)	

DECLARATION OF W. BRANTLEY PHILLIPS, JR.

This Declaration is made pursuant to 28 U.S.C. § 1746 on November 23, 2022.

1. I am a citizen and resident of the State of Tennessee. I am over twenty-one (21) years of age, and I am otherwise competent to give testimony. I have personal knowledge of the facts set forth herein, which are true and accurate to the best of my information and knowledge.

2. I am a partner with Bass, Berry & Sims PLC, and I am one of the attorneys representing Tennessee Electric Cooperative Association (“TECA”) in this matter. I have practiced law in Tennessee since September 1998. Other Bass Berry & Sims attorneys primarily responsible for representing TECA in this case include Matthew J. Sinback, who has practiced law in Tennessee since 2004, and Caleb H. Hogan, who has practiced law in Tennessee since 2019. Other supporting staff were used only as needed and all were qualified to do the work they performed.

3. Between April 14, 2022 and June 21, 2022, TECA incurred fees for attorney and supporting staff time in the amount of \$67,551.00 in connection with the discovery dispute detailed in the Initial Order Granting, In Part and Denying, In Part Motions to Compel Filed by TECA and

Jackson Energy Authority (“JEA”) dated November 14, 2022 (the “November 14 Order”). TECA also incurred expenses in the amount of \$292.95. TECA has been billed for these attorneys’ fees and expenses.

4. The attorneys’ fees detailed below were incurred between April 14, 2022 (the date of Northern Reliability, Inc.’s first document production) and June 21, 2022 (the date of the hearing on the Motions to Compel filed by JEA and TECA) in connection with activities directly relating to the litigation of the discovery dispute detailed in the November 14 Order. Those activities included: (i) reviewing relevant documents; (ii) analyzing the defects in JSC/CDE’s discovery responses; (iii) conducting internal meetings and discussions among counsel; (iv) drafting and reviewing correspondence with JSC’s counsel; (v) preparing for and participating in two status conferences with the Hearing Officer regarding discovery and the need for motions to compel; (vi) analyzing Northern Reliability’s document productions and comparing them to JSC’s document productions, discovery responses, and correspondence; (vii) researching authorities for the Motion to Compel and supporting memorandum; (viii) drafting the Motion to Compel and supporting memorandum; (ix) analyzing JSC’s response to the Motion to Compel and supporting memorandum; and (x) preparing and presenting oral argument at the June 21, 2022 hearing on the Motions to Compel filed by JEA and TECA.

5. Attorneys at Bass Berry & Sims PLC record time worked on client matters using daily time entries. These time entries are regularly entered into the firm’s centralized accounting system, which is used to track attorney time and to generate client invoices. Work performed by our firm for TECA in this matter has been recorded using this same method.

6. The following provides an itemized detail of the attorneys' fees incurred by TECA during the period of 69 days between April 14, 2022, and June 21, 2022, in connection with the discovery dispute addressed in the November 14 Order:

<u>Timekeeper</u>	<u>Title</u>	<u>Hours Worked</u>	<u>Billed Amount</u>
W. Brantley Phillips, Jr.	Partner	18.5	\$12,672.50
Matthew J. Sinback	Senior Litigation Attorney	52.8	\$25,872.00
Caleb H. Hogan	Senior Litigation Attorney	77.9	\$27,654.50
Laura G. Bilbrey	Paralegal	5.2	\$1,352.00
TOTAL		154.4	\$67,551.00

7. Like many law firms, the hourly rates charged for attorneys at Bass Berry & Sims PLC vary depending on the nature of the engagement and client relationship. Certain clients of the firm often receive the benefit of the firm's "preferred" rate schedule, which discounts the attorney hourly rates by approximately 20% compared to the firm's "standard" or undiscounted rate schedule.

8. TECA has received the benefit of the firm's preferred rate schedule throughout this case. Specifically, the hourly rates charged for the work described in this declaration were as follows: (i) W. Brantley Phillips, Jr. at \$685/hour; (ii) Matthew J. Sinback at \$490/hour; (iii) Caleb H. Hogan at \$355/hour; and (iv) Laura G. Bilbrey at \$260/hour. For comparison, the firm's "standard" (*i.e.*, undiscounted) hourly rates for these attorneys and supporting staff are currently \$810/hour, \$580/hour, \$525/hour, and \$305/hour respectively.

9. The attorneys' fees detailed above are recorded on invoices and/or other pro forma invoices that contain itemized, daily time entries by attorney for all work done for TECA in connection with this case. Because these invoices also contain privileged attorney-client

information, TECA has elected not to submit copies of these invoices in connection with its Memorandum Supporting Award of Reasonable Attorneys' Fees. If deemed necessary and appropriate by the Hearing Officer, however, TECA will provide copies of said invoices to the Hearing Officer for purposes of an *in camera* review.

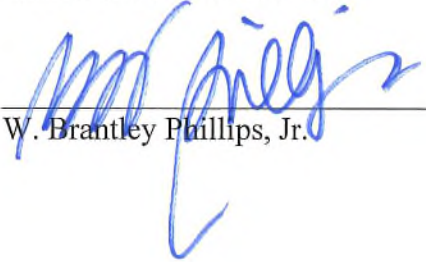
10. The attorneys' fees detailed above are both reasonable and in accordance with Tennessee Rule of Professional Conduct 1.5. The information detailed above accurately reflects the work done by TECA's counsel in connection with this matter. As shown above, the attorneys' fees incurred by TECA also reflect an appropriate and cost-sensitive division of labor in which Attorney Sinback performed approximately 34% of the work and Attorney Hogan—who has the lowest billing rate—performed approximately 50% of the work.

11. TECA also incurred the following expenses in connection with the November 14 Order:

<u>Expense</u>	<u>Billed Amount</u>
Messenger Service for Delivery of TECA's Motion to Compel and supporting memorandum	\$42.00
Court Reporter	\$204.75
Parking for June 21, 2022 Hearing	\$46.20
TOTAL	\$292.95

12. Considering the complex nature of this docket, the many legal issues presented by the protracted discovery dispute addressed by the November 14 Order, the favorable results obtained for TECA, and the nature and length of Bass Berry & Sims PLC's relationship with TECA, the attorneys' fees detailed above are consistent with those customarily charged in Nashville for the same or similar services by attorneys with similar experience, reputation and ability.

I declare under the penalty of perjury that the above is true and correct.



W. Brantley Phillips, Jr.