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September 1, 2023

Via Electronic Filing and U.S. Mail

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

Electronically Filed in TPUC Docket
Room on September 1, 2023 at 12:18 p.m.

***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 September 1, 2023: Tennessee Electric Cooperative Association's Memorandum Supporting Award of Reasonable Attorneys' Fees.

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

Sincerely,



Matthew J. Sinback

cc: Hearing Officer Monica Smith-Ashford, Esq. (via email)
All Counsel of Record (via email)
Steve Lefkovitz (via email)
Dennis Emberling, 1100 Whitehall Street, Jackson, TN 38301 and 5548 Trousdale Dr.,
Brentwood, TN 37027 (via U.S. mail)

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**

INTRODUCTION & BACKGROUND

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”), the Order Affirming Hearing Officer’s Orders Granting, in Part, Motions to Compel, Granting Interventions and Setting a Procedural Schedule dated May 8, 2023 (the “Commission Order”), and the request for briefing made by the Hearing Officer during the August 11, 2023 status conference, 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.

TECA incorporates by reference its previously filed Memorandum Supporting Award of Reasonable Attorneys’ Fees from Jackson Sustainability Cooperative dated November 23, 2022

(“TECA’s First Fee Memo”), as well as the Declaration of W. Brantley Phillips, Jr. (“Phillips Declaration”), which was attached as Exhibit 1 thereto. For the Hearing Officer’s convenience, a copy of TECA’s First Fee Memo and the Phillips Declaration are attached as **Exhibit A**.

As set forth in TECA’s First Fee Memo and the Phillips Declaration, TECA requests a total of \$67,843.95, plus interest, for the compensable attorneys’ fees and expenses TECA incurred related to the matters addressed in the November 14 Order. Further, in light of the extreme measures undertaken by Jackson Sustainability Cooperative (“JSC” or “Petitioner”) to evade payment of this sanction, TECA respectfully requests that JSC; JSC’s counsel, John A. Beam III and Equitus Law Alliance PLLC (“JSC’s Counsel”); and JSC’s President, Dennis Emberling (“Emberling,” and, together with JSC and JSC’s Counsel, the “JSC Parties”), be held jointly and severally liable for reimbursing TECA for its attorneys’ fees and expenses in that amount.

The discovery misconduct that resulted in the entry of the November 14 Order is well-documented in TECA’s prior filings, the November 14 Order, and the Commission Order.¹ The facts of this misconduct were neither rebutted nor disputed. In the interest of efficiency, TECA does not fully recount that history here. Rather, TECA points to the Hearing Officer’s finding that “[i]t is rare that companies appearing before the Commission behave so cavalierly during the discovery process. ... Such a blatant disregard for the discovery process will not be tolerated.” (November 14 Order at 15.)

Unfortunately, the JSC Parties’ cavalier behavior and blatant disregard of the Commission did not stop when the November 14 Order was issued and did not stop when the Commission

¹ TECA incorporates by reference its prior filings and exhibits thereto, including: TECA’s Motion to Compel Discovery from JSC and supporting Memorandum of Law, filed on May 20, 2022; the Interlocutory Review Brief of Intervenor TECA, filed on February 2, 2023; and TECA’s Notice of Filing Transcript of Creditors’ Meeting in JSC’s Bankruptcy Proceeding and Request for Status Conference, filed on July 11, 2023 (“TECA’s Notice of Filing”).

affirmed that order. Instead of abiding by the Hearing Officer's orders, moving forward with the proceeding it commenced, and behaving responsibly, JSC declared bankruptcy and moved to dismiss the proceeding in a transparent effort to force TECA and Jackson Energy Authority ("JEA") to foot the bill for JSC's misconduct. Like their earlier misconduct, the JSC Parties' conduct should not be tolerated. A brief summary of the relevant procedural history follows.

The November 14 Order granted TECA's Motion to Compel, required JSC to take specified steps to comply with its discovery obligations, and awarded TECA and JEA their attorneys' fees and expenses. (November 14 Order at 15-17.) A subsequent order set forth the agreed schedule for determining the amount of fees and expenses that should be awarded, with TECA and JEA to file their requests on November 23, 2022, JSC to file objections on December 12, 2022, and the parties to participate in a status conference on December 20, 2022. (Order on November 8, 2022 Status Conference dated Nov. 23, 2022, at 1-2.) That order also required JSC to comply with the discovery obligations set forth in the November 14 Order by December 19, 2022. (*Id.* at 2.)

In accordance with that schedule, TECA filed TECA's First Fee Memo and the Phillips Declaration on November 23, 2022, and JEA filed its request on that date. On December 12, 2022, JSC moved for an interlocutory review by the Commission of the November 14 Order, arguing that the Commission did not have authority to award attorneys' fees as a discovery sanction, the Hearing Officer erred by allowing "one way discovery," and the Hearing Officer erred by allowing the intervenors to participate in the docket. (*See* JSC Mot. for Interlocutory Appeal dated Dec. 12, 2022.) JSC did not, and has not, filed objections to the attorneys' fees and expenses requested by TECA and JEA. Likewise, JSC did not, and has not, complied with the discovery obligations set

forth in the November 14 Order. JSC did not request that any of the Hearing Officer's orders be stayed while the Commission's interlocutory review was pending.

Briefing and argument of JSC's interlocutory review occurred in early 2023, and the Commission Order was entered on May 8, 2023. Despite failing in its effort to overturn the November 14 Order, JSC did not promptly file objections to the attorneys' fees requested by JEA and TECA and did not promptly comply with the order's discovery obligations (which were more than four months overdue). Instead, at a June 1, 2023 status conference, a bankruptcy attorney, Steve Lefkovitz, informed the parties and the Hearing Officer that JSC had filed for bankruptcy and that all proceedings related to the discovery sanction were thereby automatically stayed.² JSC's counsel of record, Mr. Beam, did not attend this status conference, request that it be rescheduled, or provide a reason for his absence.

JSC filed for bankruptcy on May 24, 2023. (*See* TECA's Notice of Filing, Ex. B.) According to its bankruptcy petition, JSC had no assets and never did. (*Id.* at 7.) The only liability listed in the petition was an \$89,000 debt to the Commission. (*Id.* at 7, 14.) The bankruptcy petition indicates that this debt is not contingent or disputed. (*Id.* at 14.) Emberling signed the petition and swore under penalty of perjury that he had a reasonable belief that this information was true and correct. (*Id.* at 34.) The petition also indicates that Mr. Lefkovitz's fee was paid by JSC's Board President, Emberling. (*See id.* at 35.)

On June 21, 2023, the bankruptcy trustee held a meeting of JSC's creditors by telephone. (*See* TECA's Notice of Filing, Ex. A.) Emberling provided sworn testimony on behalf of JSC. Emberling testified that he read and signed JSC's bankruptcy petition, and that the petition

² Mr. Lefkovitz has been helpful in providing information about the status of JSC's bankruptcy proceeding, but he is not counsel of record for JSC in this docket.

accurately lists all of JSC's assets and liabilities. (*Id.* at 5:19-6:17.) Emberling admitted that JSC does not have—and never has had—a bank account or any assets whatsoever. (*Id.* at 7:24-8:5.) He admitted that JSC has never bought or sold anything and has never paid any money to any person or entity. (*Id.* at 7:22-8:5, 11:4-17, 12:12-17.) And, despite telling this Commission that “JSC will ... obtain start up capital from CDE,” (Direct Test. of Dennis Emberling filed May 24, 2021 (“Emberling Test.”) at 7), Emberling testified that JSC has not requested any funding from CDE to satisfy the discovery sanction levied by the Commission (whenever that sanction becomes final). (*See* TECA's Notice of Filing, Ex. A at 14:10-15:7.)

On July 5, 2023, the Bankruptcy Court entered a Final Decree closing JSC's bankruptcy case, thereby terminating the automatic stay that may have applied to Commission proceedings on the discovery sanction. (TECA's Notice of Filing, Ex. C.) Shortly thereafter, TECA informed the Hearing Officer of this development and requested a status conference. (*See* TECA's Notice of Filing.) The Hearing Officer convened a status conference on August 11, 2023. Once again, Mr. Lefkowitz attended on behalf of JSC, and Mr. Beam failed to appear, request a different date, or provide a reason for his absence. During the status conference, the Hearing Officer set a schedule for further proceedings on the amount of attorneys' fees and expenses to be awarded to TECA and JEA, as well as the persons who should be responsible for payment.

For the reasons discussed below and in TECA's First Fee Memo and the Phillips Declaration, the JSC Parties should be jointly and severally liable for TECA's attorney's fees and expenses in the amount of \$67,843.95 plus interest. This request is reasonable under Tennessee law and fully supported by the record. In addition, JSC has waived any objection to this amount. Further, it is appropriate and just to hold each of the JSC Parties jointly and severally liable for this amount, particularly in light of JSC's bankruptcy and imminent dissolution. JSC's Counsel

and Emberling are responsible for the discovery misconduct that culminated in the discovery sanction and subsequent efforts to avoid the consequences of that misconduct. Unless the JSC Parties are held jointly and severally liable for the sanction, those efforts will succeed, and TECA and JEA will not be able to recover a penny of the money they were needlessly forced to spend in attempting to obtain discovery from the JSC Parties.³

ARGUMENT & AUTHORITY

A. The Hearing Officer Should Award the Full Amount of Attorneys' Fees and Expenses Requested by TECA, With Interest.

As explained in TECA's First Fee Memo, the amount requested by TECA is fully supported by the Phillips Declaration and is reasonable under Tennessee law. (*See* Ex. A.) For the reasons stated therein, which are incorporated by reference here, TECA should be awarded attorneys' fees and expenses in the amount of \$67,843.95 plus interest accruing from the date of November 14, 2022 until full payment is received at the applicable post-judgment interest rate published by the Tennessee Administrative Office of the Courts.⁴

Moreover, JSC has waived its right to contest this amount in three ways.⁵ *First*, JSC failed to file objections on or before December 12, 2022, as required by the Order on November 8, 2022 Status Conference. Although JSC filed a motion for interlocutory review of the November 14 Order, JSC never asked the Hearing Officer to stay any of the Hearing Officer's orders or to

³ To be clear, TECA does not seek to hold Mr. Lefkovitz liable for the discovery sanction.

⁴ *See* Tennessee Judgment Interest Rates, <https://www.tncourts.gov/node/1232344> (last visited August 31, 2023).

⁵ TECA understands the Commission and Hearing Officer seek to provide JSC the opportunity to object to the amount of TECA's attorneys' fees and expense. (*See* Commission Order at 37.) But, if the Hearing Officer concludes that TECA's request is supported by the record and reasonable, there is no harm to JSC's rights if the Hearing Officer additionally concludes that JSC waived its objections.

otherwise modify the deadlines set by the Hearing Officer. This, alone, is sufficient to find that JSC waived its objections.

Second, in its argument to the Commission, JSC took the position that the Hearing Officer had sanctioned JSC in the amount of \$89,459.95 or \$90,000.00. (See JSC Interlocutory Appeal Brief dated Jan. 20, 2022, at 1; Commission Order at 37.) As the Commission observed, the Hearing Officer had not actually set the amount of the sanction when JSC made these arguments. (See Commission Order at 37.) Accordingly, the position taken by JSC should be viewed as an acknowledgement that JSC had not objected to the amounts requested by TECA and JEA and that JSC was proceeding on the understanding that these amounts would be due if its interlocutory review was unsuccessful. Simply put, JSC made a strategic choice to not contest the amounts requested by TECA and JEA as a means of bolstering its arguments to the Commission. Having made that choice, JSC may not now object to the amounts requested by TECA and JEA. See *Baird v. Fid.-Phenix Fire Ins. Co.*, 162 S.W.2d 384, 388 (Tenn. 1942) (explaining that a waiver is an intentional relinquishment of a known right).

Third, in its bankruptcy petition, JSC again indicated it had waived its objections. The bankruptcy petition includes a list of JSC's creditors. (See TECA's Notice of Filing, Ex. B at 12-15.) The Commission is the only creditor for whom a certain amount is stated, and the amount is identified as \$89,000. (*Id.*) The petition indicates that this debt is **not contingent** and is **not disputed**. (*Id.*) Emberling—JSC's President—swore under penalty of perjury that this information was true and correct. (*Id.* at 34.) Given that this amount is nearly identical to the amount of the sanction stated by JSC in its arguments to the Commission, it is clear that the debt listed on the petition is the discovery sanction. In order to gain the benefit of bankruptcy, JSC affirmatively

and conclusively waived any objection to the amounts requested by TECA and JEA. *See Baird*, 162 S.W.2d at 388.

B. The JSC Parties Should Be Jointly and Severally Liable for the Attorneys' Fees and Expenses.

The November 14 Order requires JSC to pay TECA's reasonable attorneys' fees and expenses associated with the TECA Motion and TECA Memo. (Nov. 14 Order at 17.) As a result of the bankruptcy proceeding instigated by the JSC Parties, no amount of fees and expenses can be collected from JSC. To avoid this unjust result, the Hearing Officer should order that JSC's Counsel, who served as JSC's counsel of record and represented JSC during the events giving rise to the discovery sanction, and Emberling, the individual who controlled JSC and served as the driving force of JSC's conduct in this docket, are jointly and severally liable for TECA's attorneys' fees and expenses.⁶

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, Rule 37.01 grants the Hearing Officer the authority to impose joint and several liability upon parties who engage in misconduct and parties and attorneys

⁶ As the Commission Order makes clear, the Commission Order and the November 14 Order are not final orders. (Commission Order at 37.) Under Tennessee law, non-final orders may be amended at any time. *See Fox v. Fox*, 657 S.W.2d 747, 749 (Tenn. 1983) (explaining that under Tenn. R. Civ. P. 54.02, an interlocutory order can be revised at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all parties); Tenn. R. Civ. P. 54.02 ("[A]ny order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.").

advising such conduct. *See, e.g., Rebsom v. Kunnath*, 2022 WL 715711, at *2 (D. Mont. Mar. 10, 2022) (imposing joint and several liability upon party and its counsel under analogous Federal Rule of Civil Procedure 37(a)(5)(A)).⁷

1. JSC's Counsel Should Be Jointly and Severally Liable.

JSC Counsel's position as counsel of record before, during, and after the discovery proceedings, standing alone, is sufficient to warrant the imposition of liability for TECA's attorneys' fees and expenses. Federal courts interpreting an analogous federal rule have held that imposing sanctions against a party and counsel jointly and severally is appropriate even when it is unclear which is less blameworthy. *Rebsom*, 2022 WL 715711, at *2; *Twin Falls NSC, LLC v. S. Idaho Ambulatory Surgery Ctr., LLC*, 2020 WL 5523384, at *17 (D. Idaho Sept. 14, 2020). Further, the decisionmaker need not conclude that the attorney instigated discovery misconduct before imposing sanctions on the attorney. *Devaney v. Cont'l Am. Ins. Co.*, 989 F.2d 1154, 1161-62 (11th Cir. 1993) (explaining that neither the language nor the purpose of federal Rule 37 requires proof of the attorney's responsibility for discovery misconduct); *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 198 (E.D. Pa. 2008) (concluding attorney was jointly and severally liable for discovery sanction where attorney failed to correct client's malfeasance).

In this case, JSC's Counsel served as the primary point of contact during the discovery process. JSC's Counsel sent and received multiple discovery letters, attended multiple status conferences, participated in multiple meet-and-confer teleconferences with counsel for TECA, and filed and argued briefs that attempted to justify the discovery misconduct. (*See* TECA Memo at 7-13 and exhibits cited therein.) JSC's Counsel told TECA that JSC has produced all responsive

⁷ Federal judicial decisions interpreting rules similar to Tennessee's are persuasive authority for purposes of construing the Tennessee rule. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011).

documents when he knew, or should have known, that this statement was untrue. (*See id.*) JSC's Counsel failed to inform TECA—for approximately nine months—that responsive documents had been and were being deleted, supposedly as a result of an auto-deletion policy used by an affiliate of JSC. (*See* Interlocutory Review Br. of Intervenor TECA dated Feb. 2, 2023, at 8-9 and documents cited therein.) And, JSC Counsel engaged in activities that were plainly intended to frustrate TECA's effort to obtain third-party discovery from the solar project's prime contractor, Northern Reliability, Inc. (*See* TECA Memo at 10-11 and exhibits cited therein.) For these additional reasons, the Hearing Officer should order that JSC's Counsel be jointly and severally liable for TECA's attorney's fees and expenses.

2. Emberling Should Be Jointly and Severally Liable.

While not technically a party to this docket, it is clear that Emberling is the person who controls JSC, controlled JSC's conduct in this docket, and bears responsibility for the discovery misconduct that resulted in the November 14 Order. Emberling serves as the President and Director of JSC. (Petition dated May 24, 2021, at 4.) He also serves as the Chief Executive Officer of Community Development Enterprises-Jackson I ("CDE")—the for-profit entity that would have reaped a financial windfall if Emberling's solar project had come to fruition. (*See* TECA's Notice of Filing, Ex. B at 26 (signature block).) Further, Emberling serves as the Chief Executive Officer of CDE's managing partner, E A Solar LLC. (*See* JSC's Response to Motion to Compel, Affidavit of Dennis Emberling filed June 1, 2022, at 1.)

The record shows that Emberling was the driving force behind the proposed solar project. Among other things: he authored the feasibility study that formed the basis of the project (TECA Memo, Ex. 11); he served as the primary point of contact with the project's prime contractor (*see* TECA Memo at 16-19 and exhibits cited therein); he signed the lease agreement between JSC and

CDE (TECA's Notice of Filing, Ex. B at 26); and he signed the conditional member agreements that JSC produced in discovery. (TECA Memo, Ex. 37.)

The record also shows that Emberling controlled JSC's conduct in this proceeding. Emberling was the only person who filed direct testimony in support of JSC's petition. He testified that all requests for information should be directed to him. (Emberling Test. at 8.) He verified all of JSC's discovery responses. (*See, e.g.*, TECA Memo, Ex. 6 at 30, Ex. 7 at 32, Ex. 9 at 16.) And, when JSC tried to blame its failure to produce responsive documents on an auto-deletion policy supposedly used by E A Solar LLC, Emberling filed an affidavit describing that purported policy. (*See* JSC Response to TECA Motion to Compel at 12, 19-20; Affidavit of Dennis Emberling dated June 1, 2022.)

When JSC failed to overturn the Hearing Officer's November 14 Order, Emberling directed JSC to file bankruptcy to evade payment of the discovery sanction. Emberling signed JSC's bankruptcy petition. (TECA Notice, Ex. B at 5, 6, 34.) He paid JSC's bankruptcy attorney from his personal funds. (TECA Notice, Ex. A at 8:10-23.) And, he was the only person from JSC to testify at the meeting of creditors convened by the bankruptcy trustee. (*See* TECA Notice, Ex. A.)

Based on Emberling's control of JSC, his substantial responsibility for the discovery misconduct, and his role in JSC's scheme to avoid paying the discovery sanction, it is appropriate to make him jointly and severally liable. *See Johnson v. Kakvand*, 192 F.3d 656, 661 (7th Cir. 1999) (affirming discovery sanction imposed on company's co-defendant president where president obstructed legitimate discovery efforts); *Boles v. Nat'l Dev. Co.*, 175 S.W.3d 226, 244,

248-50 (Tenn. Ct. App. 2005) (affirming Rule 37.02 discovery sanction imposed on individual defendant who controlled corporate defendant).

Moreover, Emberling should be held liable for JSC's debts under Tennessee's "piercing the corporate veil" doctrine. This doctrine allows a court to disregard the usual presumption that a corporation is a distinct legal entity, wholly separate and apart from its shareholders, officers, directors. *Delta Dev. Corp. v. F. Fani Gulf Int'l*, 393 S.W.3d 185, 195 (Tenn. Ct. App. 2012). Piercing the corporate veil is appropriate where the corporation is a sham or a dummy or where disregarding the separate corporate entity is necessary to accomplish justice. *Id.*; *see also HOK Sport, Inc. v. FC Des Moines, L.C.*, 495 F.3d 927, 936 (8th Cir. 2007) (explaining that courts apply the remedy of piercing the corporate veil to nonprofit corporations). Courts commonly consider eleven factors, but no one factor is conclusive.⁸ *H.G. Hill Realty Co. v. Re/Max Carriage House, Inc.*, 428 S.W.3d 23, 33-34 (Tenn. Ct. App. 2013).

As explained by TECA in its prior briefing and oral argument to the Commission, discovery in this case and the positions taken by JSC in its interlocutory review briefs show that JSC is an undercapitalized sham company whose only purpose was to allow Emberling and his business partners to operate a solar project without regulatory oversight. JSC never had any members. (TECA Memo at 6.) JSC does not have—and never has had—a bank account or any

⁸ Factors to be considered include: (1) whether there was a failure to collect paid in capital; (2) whether the corporation was grossly undercapitalized; (3) the nonissuance of stock certificates; (4) the sole ownership of stock by one individual; (5) the use of the same office or business location; (6) the employment of the same employees or attorneys; (7) the use of the corporation as an instrumentality or business conduit for an individual or another corporation; (8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another; (9) the use of the corporation as a subterfuge in illegal transactions; (10) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and (11) the failure to maintain arms length relationships among related entities. *H.G. Hill Realty Co.*, 428 S.W.3d at 33.

assets whatsoever.⁹ (TECA Notice, Ex. A at 7:24-8:5.) JSC has never bought or sold anything and has never paid any money to any person or entity. (*Id.* at 7:22-8:5, 11:4-17, 12:12-17.) And, despite telling this Commission that “JSC will ... obtain start up capital from CDE,” (Emberling Test. at 7), Emberling testified at the creditors’ meeting in JSC’s bankruptcy proceeding that JSC has not requested any funding from CDE to satisfy the discovery sanction levied by the Commission (whenever that sanction becomes final). (TECA Notice, Ex. A at 14:10-15:2.) The fact that JSC filed for bankruptcy to avoid paying the discovery sanction—a relatively small amount in the context of a \$70 million project—further demonstrates that JSC was grossly undercapitalized.

As discussed above, the record also demonstrates that Emberling controlled JSC and acted as the key player in the solar project. Again, Emberling served as an officer of both JSC and the for-profit entities that stood to benefit if the solar project moved forward.¹⁰ Emberling signed all of JSC’s discovery responses and filed the only testimony in support of JSC’s petition. And, when it came time to find a way to evade responsibility for the discovery misconduct, Emberling signed the bankruptcy petition and paid for the bankruptcy attorney’s services out of his personal funds.

Simply put, holding Emberling responsible for the discovery misconduct that occurred here is necessary to accomplish justice. It would be entirely unfair to allow him to create an

⁹ Emberling’s testimony at the creditors’ meeting in JSC’s bankruptcy proceeding directly contradicts one of JSC’s verified interrogatory responses to TECA. In its supplemental response to TECA’s Interrogatory 14, JSC said “The Petitioner has a bank account. The Petitioner has transacted business.” (Petitioner’s Supplemental Responses to TECA’s Discovery Requests dated October 26, 2021, at 13.) Emberling swore and/or affirmed that the response was true and accurate to the best of his knowledge, information, or belief. (*Id.* at 32.)

¹⁰ Even though he was JSC’s president and director, Emberling signed JSC’s most significant contract—the equipment lease agreement with CDE—on behalf of CDE. (*See* TECA Notice, Ex. B at 26.) This blatant disregard of a clear conflict of interest shows the degree to which JSC existed solely to serve Emberling’s and his partners’ interests.

uncapitalized entity, seek a declaratory judgment from the Commission, engage in discovery misconduct, and then use the bankruptcy process to avoid the consequences of that misconduct. It would also provide a roadmap for further misconduct the next time Emberling or one of his associates petitions the Commission.

CONCLUSION

For the foregoing reasons, as well as the reasons provided in TECA's First Fee Memo and the Phillips Declaration, 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 awards TECA \$67,843.95 plus interest accruing from November 14, 2022 until the date payment is received in full and that holds JSC, JSC's Counsel, and Emberling jointly and severally liable for the amount awarded.

DATED this 1st day of September, 2023.

Respectfully submitted,

/s/ W. Brantley Phillips, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2023, the foregoing document was served on the following persons via email and/or U.S. Mail, postage prepaid:

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/s/ W. Brantley Phillips, Jr. _____

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Via Electronic Filing and U.S. Mail

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Hon. Herbert H. Hilliard, Chairman
c/o Ectory Lawless, Docket Manager
Tennessee Public Utility Commission
502 Deaderick Street, 4th Floor
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cc: All Counsel of Record (via email)

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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.

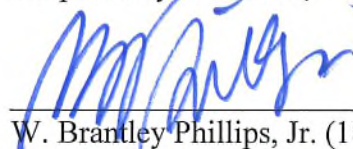
CONCLUSION

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.

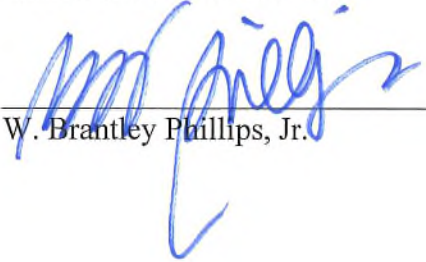
10. The attorneys' fees detailed above are both reasonable and in accordance with Tennessee Rule of Professional Conduct 1.5. The information detailed above accurately reflects the work done by TECA's counsel in connection with this matter. As shown above, the attorneys' fees incurred by TECA also reflect 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.