



Larry L. Cash

Direct Dial (423) 785-8394
Direct Fax (423) 321-1694
Larry.Cash@millermartin.com

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VIA ELECTRONIC FILING AND U.S. MAIL

Hon. Herbert H. Hillard, Chairman
c/o Ectory Lawless, Docket Manager
Tennessee Public Utility Commission
Andrew Jackson State Office Building
502 Deaderick Street, 4th Floor
Nashville, TN 37243-0001

Electronically Filed in TPUC Docket Room
on September 1, 2023 at 1:19 p.m.

RE: **Jackson Sustainability Cooperative**
Docket No. 21-00061

Dear Chairman Hilliard:

Enclosed please find an original and four copies of the following, which was filed electronically on September 1, 2023: Brief in Support of Jackson Energy Authority's Claim for Attorneys' Fees.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

Larry L. Cash

LLC/dac

Enclosures

cc: Hearing Officer Monica Smith-Ashford (via email)
All Counsel of Record (via email)
Mark Smith (via email)

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE**

**IN RE: THE APPLICATION OF)
JACKSON SUSTAINABILITY)
COOPERATIVE FOR A)
DETERMINATION OF EXEMPTION)
AND IN THE ALTERNATIVE, FOR A)
CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY)**

Docket No. 21-00061

**BRIEF IN SUPPORT OF JACKSON ENERGY AUTHORITY'S CLAIM
FOR ATTORNEYS' FEES**

Jackson Energy Authority ("JEA"), by and through counsel, submits this brief in support of its claim for attorneys' fees. An award of attorneys' fees is appropriate based upon the facts of this case and based upon the findings of the Hearing Officer. JSC did not timely respond and object to the attorneys' fees request, and JSC waived any objection to JEA's claim for attorneys' fees in its bankruptcy filing as the fees were listed as not contingent and not disputed.

The Hearing Officer made it abundantly clear in her findings that actions of Jackson Sustainability Cooperative ("JSC") and its President, Dennis Emberling, along with its counsel were the basis of JEA and TECA's attorneys' fee award. For example, among other things, the Hearing Officer found that:¹

"JSC has failed to comply with its discovery obligations," and "the actions of JSC during the discovery process have thwarted the orderly administration of the proceedings and resulted in the destruction of potentially relevant evidence. JSC's actions have caused delay in the discovery process and increased the expense incurred by the parties involved in this matter." (Order at p. 11)

Further, the Hearing officer found that: "JSC's relevancy argument is a distraction ploy used to obfuscate JSC's actions during the discovery process." Further, the Hearing Officer finds that JSC has not acted in good faith during the discovery

¹ The Hearing Office's findings are specifically set out in her Initial Order Confirming, in Part and Denying, in Part Motions to Compel filed by Tennessee Electric Cooperative Association and Jackson Energy Authority, entered November 14, 2022 (the "Order").

process, and its actions have resulted in unnecessary expense and delay. (Order at p. 11)

JEA believes that there is ample authority authorizing and supporting a claim against a company officer or official when that officer or official was responsible for the acts which led to the attorneys' fees award. For example, in *Johnson v. Kakvand*, 192 Fed.3d 656 (7th Cir. 1999), the Seventh Circuit approved discovery sanctions and attorneys' fees against the president of the defendant corporation.

In *Johnson*, the trial court stated that the defendant company and its president, Mr. Kakvand "repeatedly refused to comply with discovery requests and disobeyed court orders requiring them to comply with discovery. Similarly, the Hearing Officer in this docket matter found that JSC and its president, Dennis Emberling, were responsible for numerous discovery abuses when the Hearing Officer awarded sanctions against JSC in its November 14, 2020 Order. In strikingly similar facts to the ones at issue in this litigation, the defendants in *Johnson* claimed that they were unable to produce the plaintiff's loan file which contained a number of documents necessary to the plaintiff's case. After the filing of a Motion to Compel, the court ordered the defendants to produce the plaintiff's loan file and to respond fully to all discovery requests by a date certain. When the defendants failed to do so, plaintiffs filed their Motion for Sanctions. Similarly, in this docket, the Hearing Officer's findings clearly show that JSC and Mr. Emberling and his counsel failed to comply with discovery requests and did not even produce certain relevant and unprivileged documents until JEA and TECA had filed their Motions to Compel and sought sanctions. Again, the Hearing Officer's findings are clear:

JSC had maintained to the parties that Mr. Emberling does not email much as an explanation for the lack of emails. From documents obtained from Northern Reliability, TECA discovered that Mr. Emberling, who is President of JSC and on

the Board of EA Solar, is actually a prolific emailer and emails from various addresses, including an email address from EA Solar. (Order at p. 13)

Additionally, the Hearing Officer found that:

JSC did not act in good faith when it failed to apprise the parties of EA Solar's document retention policy that directly related to discovery requests submitted by JEA and TECA. It was not until the JSC filed the Responses to the Motion to Compel on June 2, 2022, that JSC first revealed a document retention policy and that responsive documents had been destroyed. (Order at pp. 14-15)

In *Johnson*, the plaintiffs were able to show that the defendants did have the plaintiff's loan file in its possession at the time the complaint was filed, and the court admonished Mr. Kakvand for his total disregard of the court process. Similarly, Mr. Emberling and his counsel have shown a total disregard for the authority of the Hearing Officer and the Commission as they have continually engaged in what can only be described as incredibly abusive discovery tactics.

In *Johnson*, the appellate court found that "Kakvand himself repeatedly obstructed legitimate discovery efforts." The district court noted that Mr. Kakvand was liable for the defendants' misconduct in discovery and his own participation provides a solid basis for individuals sanctions. Similarly, the actions of Mr. Emberling and JSC counsel clearly illustrate a basis for individual liability as well.

On November 23, 2022, and supplemented by its filing of November 28, 2022, JEA submitted its claim for attorneys' fees with the appropriate Affidavit. The fees charged to and paid by JEA were reasonable and necessary in light of the discovery abuses found and articulated by the Hearing Officer. Accordingly, JEA's counsel's claim for attorneys' fees should be approved as the fees were necessary, reasonable and warranted.

Respectfully submitted,

MILLER & MARTIN PLLC

By: **/s/Larry L. Cash**

Larry L. Cash (BPR No. 9386)

larry.cash@millermartin.com

Mark W. Smith (BPR No. 16908)

mark.smith@millermartin.com

Erin Steelman (BPR No. 038463)

erin.steelman@millermartin.com

832 Georgia Avenue, Suite 1200

Chattanooga, Tennessee 37402

Telephone: (423) 756-6600

Attorneys for Jackson Energy Authority

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, a copy of the foregoing document was served on the following persons via email, hand delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

John A. Beam, III
beam@equituslaw.com
Equitus Law Alliance, PLLC
P.O. Box 280240
Nashville, TN 37208

Henry Walker
hwalker@bradley.com
Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, TN 37203

W. Brantley Phillips, Jr.
bphillips@bassberry.com
Matthew J. Sinback
msinback@bassberry.com
Caleb H. Hogan
caleb.hogan@bassberry.com
Bass Berry & Sims PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201

Jeremy L. Elrod
jelrod@tmepa.org
Director of Government Relations
Tennessee Municipal Electric Power
Association
212 Overlook Circle, Suite 205
Brentwood, TN 37027

Steven L. Lefkovitz
slefkovitz@lefkovitz.com
Lefkovitz and Lefkovitz, PLLC
908 Harpeth Valley Place
Nashville, TN 37221

MILLER & MARTIN PLLC

By: /s/Larry L. Cash