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October 30, 2023

To: Chairman Kenneth C. Hill  
Attn: Ectory Lawless, Esq.  
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Tennessee Public Utility Commission  
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Electronically Filed in TPUC Docket Room  
on October 30, 2023 at 4:01 p.m.

Re: Docket No. 21-00061  
Motion to Dismiss and Memorandum of Dennis Emberling

Mrs. Lawless,

Please find the attached Motion to Dismiss and Memorandum in Support of the Motion and Opposition of the TECA and JEA briefs to be filed in Docket No. 21-00061.

Thanks,  
/s/ Shea Forgety

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

<b>IN RE: THE APPLICATION OF JACKSON</b>	)	
<b>SUSTAINABILITY COOPERATIVE</b>	)	<b>DOCKET: 21-00061</b>
<b>FOR A DETERMINATION OF EXEMPTION</b>	)	
<b>AND IN THE ALTERNATIVE, FOR A</b>	)	
<b>CERTIFICATE OF PUBLIC CONVENIENCE</b>	)	
<b>AND NECESSITY</b>	)	

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**MOTION TO DISMISS PURSUANT TO T.R.C.P. 12.02(1)(2)(4)(5) AND 1220-01-02-  
.03(2)(a)(b)(c)(d)**

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Dennis Emberling (“Mr. Emberling”) moves this body to dismiss any claim or claims asserted against him personally based upon:

1. Lack of subject matter jurisdiction.
2. Lack of personal jurisdiction.
3. Insufficiency of process.
4. Insufficiency of service of process.

Mr. Emberling further asserts the following affirmative defenses: (1) Insufficiency of process, Mr. Emberling has not been served with a summons (2) insufficient service of process, Mr. Emberling has not received personal service of pleadings, and has not received notice required by due process. (2) Personal Jurisdiction, Mr. Emberling is has not been served with process in this matter, has not received personal service of pleadings, and has not submitted himself to the jurisdiction of this Court. (3) Subject Matter Jurisdiction, the PUC does not have subject matter jurisdiction to pierce the corporate veil of JSC to hold Mr. Emberling individually liable for a sanction against JSC.

Submitted by

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**CERTIFICATE OF SERVICE**

I certify a true and exact copy of the foregoing Motion to Dismiss was sent to the following persons on the 30<sup>th</sup> of October 2023 via: U.S. Mail and Email

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/s/ William Shea Forgety

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

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<b>AND NECESSITY</b>	)	

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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO  
BRIEFS OF JEA AND TECA**

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Dennis Emberling (“Mr. Emberling”) in his individual capacity and without waiving personal jurisdiction, responds in opposition to an award of attorney fees against him individually by the Public Utilities Commission (“PUC”). Mr. Emberling incorporates and adopts by reference the Applicant’s Response Argument to Motion to Assess Fees and Expenses in this Case (R. Applicant’s Response of 09/29/2023) and the Response by John Beam and Equitus Law Alliance (R. Response of John Beam 10/02/23).

The PUC partially granted Jackson Energy Authority (“JEA”) and Tennessee Electric Cooperative Association (“TECA”) Motions to Compel on November 14, 2022 (R. Order of 11/14/2022). The PUC ordered Jackson Sustainability Cooperative (“JSC”) to pay attorney fees of JEA and TECA related to the Motions to Compel. (R. Order of 11/14/2022). A full panel of the PUC affirmed the hearing officer’s ruling on May 8, 2023 upholding the award of attorney fees against JSC. (R. Order of 05/08/23). On June 2, 2023 JSC filed for bankruptcy. (R. Notice of Chapter 7, 06/02/2023). On August 14, 2023 a Motion to Dismiss with Prejudice was filed by JSC<sup>1</sup>. (R. Motion to Dismiss, 08/14/23). On September 1, 2023 TECA filed a memorandum

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<sup>1</sup> While styled as a “Motion” the pleading should be considered a Notice of Nonsuit pursuant to T.R.C.P. 41.01.

supporting award of attorney fees. (R. TECA Memorandum 09/01/2023). TECA, through its memorandum, sought to pierce the corporate veil of JSC to hold Mr. Emberling personally liable for the award of attorney fees against JSC. On September 1, 2023 JEA also filed a memorandum seeking to pierce the corporate veil of JSC to hold Mr. Emberling personally liable for the award of attorney fees against JSC. (R. JEA Memorandum 09/01/2023). On September 8, 2023 the Hearing Officer ordered JSC, Counsel for JSC, and Dennis Emberling to file reply briefs and to establish hearing dates to determine the amount of reasonable attorney fees. (R. Order of 09/08/2023).

Mr. Emberling's position is: (1) Mr. Emberling was not subject to a motion to compel or a sanction. (2) he is not a party to an action before the PUC. (3) He has not been personally served with process to appear before the PUC. (4) The PUC does not have personal jurisdiction of him. (5) The PUC does not have subject matter jurisdiction to pierce the corporate veil of JSC. (6) The subject matter jurisdiction of the PUC is limited to disputes concerning the geographic boundaries of nonconsumer electric systems. For these reasons, the PUC cannot hold Mr. Emberling personally liable for an award of attorney fees against JSC.

#### **A. RULES OF CIVIL PROCEDURE**

None of the parties to this action have moved to compel anything from Mr. Emberling. Mr. Emberling cannot be individually liable for failing to provide responses to the motions to compel that sought to compel discovery from the "Petitioner" related to "Petitioner's discovery failures". (R. TECA Motion to Compel 05/20/2022 and JEA Motion to Compel 05/20/2022).

T.R.C.P. 37.01(2) states: if a deponent, corporation, or other entity fails to make a designation under 30.02(6) or 31.01... or a party fails to answer an interrogatory... the discovering party may move for an order compelling an answer.

The moving parties, TECA and JEA, sought an order compelling JSC, a party, to provide answers to their discovery. The movants did not ask for Mr. Emberling, in his individual capacity, to produce anything. Nor could they have asked for such relief because pursuant to rule 37.01(2) Dennis Emberling is not a deponent, corporation or entity that failed to make a designation, or a party who failed to answer an interrogatory (or other discovery response).

Mr. Emberling, individually, cannot be responsible for a sanction because T.R.C.P. 37.01(4) only allows sanctions against a party; a deponent whose conduct necessitated the motion to compel; or the party or attorney advising such conduct.

Mr. Emberling is not a party, a deponent, or an attorney advising conduct which necessitated a motion to compel and cannot be individually liable for a sanction against JSC.

## **B. PERSONAL JURISDICTION**

The PUC does not have personal jurisdiction of Mr. Emberling. He is not a party to an action before the PUC and has not submitted himself to the jurisdiction of the PUC. Mr. Emberling has not been personally served with process or any of the pleadings in this matter. Mr. Emberling asserts as an affirmative defense that the PUC lacks personal jurisdiction.

Personal jurisdiction “refers to a court's authority to adjudicate the claim as to the person.” *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994). The PUC lacks personal jurisdiction over Mr. Emberling because he has not waived personal jurisdiction, is not a party to this matter, and

has not been provided notice through service of process of any potential personal liability in this matter.

The lawful authority of a court to adjudicate a controversy brought before it depends upon that court having jurisdiction of the subject matter and jurisdiction of the parties." *Turner v. Turner*, 473 S.W.3d 257, 269 (Tenn. 2015). A court 'without personal jurisdiction of the defendant' is wholly 'without power to proceed to an adjudication' binding on that defendant, regardless of the specific reason such jurisdiction is lacking. *Id.* at 271 (quoting *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 381, 57 S. Ct. 273, 81 L. Ed. 289 (1937)). A court obtains personal jurisdiction by service of process. **A defendant's actual knowledge of attempted service does not render the service effective if service was not accomplished in accordance with the rules.** *Ramsay v. Custer*, 387 S.W.3d 566, 568 (Tenn. Ct. App. 2012). (Emphasis Added)

The Tennessee Rules of Civil Procedure mandate that service of process shall be made by delivering a copy of the summons and complaint to the individual personally<sup>2</sup>.

Mr. Emberling, in his individual capacity, has not been personally served with ANY pleading in this matter. Mr. Emberling has not waived personal jurisdiction or service of process and does not submit himself to the jurisdiction of the PUC. See *State v. Bailey*, No. M2022-01386-COA-R3-CV, 2023 Tenn. App. LEXIS 298, at \*20-21 (Ct. App. July 27, 2023)

responding in opposition to plaintiff's motion to strike its response, seeking to withdraw, responding to request for admissions, and seeking to quash certain discovery requests were not actions that recognized the proper pendency of the conversion claim to waive objection to personal jurisdiction for lack of service.

In addition to the rules of civil procedure T.C.A. § 4-5-308(c) states: A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by agency rule. There is no summons or complaint naming Dennis Emberling as a party and indicating personal service in this matter. None of the pleadings contain a certificate of

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<sup>2</sup> See *T.R.C.P. 4.04*



service stating Dennis Emberling was personally served with any item filed in this matter<sup>3</sup>. The PUC does not have personal jurisdiction of Mr. Emberling to order him responsible for a third party intervenor's attorney fees in this matter.

### **C. DUE PROCESS**

An order holding Mr. Emberling personally liable for an award of attorney fees against JSC would violate his constitutional right to due process. Due process has been defined as:

Whenever difficulty may be experienced in giving to the term 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, it has been said that there can be no doubt of its meaning when applied to judicial proceedings, and as so applied due process of law has been variously held to mean a law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial; law in its regular course of administration through courts of justice, in accordance with the fundamental principles of free government. *Tenn. C. R. Co. v. Pharr*, 183 Tenn. 658, 663-64, 194 S.W.2d 486, 488 (1946).

Mr. Emberling did not receive any notice that TECA and JEA sought to hold him personally liable for attorney fees nor an opportunity to respond. Notice is an essential element of due process:

Adequate notice is an essential element of due process, and the burden is on the State to satisfy due process. *Redd v. Tennessee Dep't of Safety*, 895 S.W.2d 332, 335 (Tenn. 1995) (citing *Greene v. Lindsey*, 456 U.S. 444, 449, 102 S. Ct. 1874, 1877-78, 72 L. Ed. 2d 249 (1982)). Notice must be given in a manner reasonably calculated to notify all interested parties of the pending forfeiture of the property in order to afford the opportunity to object to the State's taking. *Toyota Motor Credit Corp. v. State Dep't of Safety*, No. M2003-00147-COA-R3-CV, 2003 Tenn. App. LEXIS 792, (Ct. App. Nov. 7, 2003)

Neither of the Motions to Compel filed by JEA and TECA sought payment of attorney fees by Mr. Emberling. (R. Motions to Compel). The order granting JEA and TECA's

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<sup>3</sup> TECA's brief contains a certificate of service indicating it was mailed first class mail to Dennis Emberling at two different addresses. Personal service would require at minimum certified mail return receipt along with a green slip indicating it had been received.

Motions to Compel did not order Mr. Emberling to pay attorney fees. (R. Order of 11/14/22). The Order of the full commission did not order Mr. Emberling to pay attorney fees. (R. Order of 05/08/23). Any order for Mr. Emberling to be personally liable for a sanction against JSC would be totally outside the pleadings before this administrative body. Such an order would violate Mr. Emberling's constitutional right to due process and be fundamentally unfair. Mr. Emberling had no notice TECA and JEA sought to hold him personally liable for a sanction against JSC until after the sanction was granted.

#### **D. SUBJECT MATTER JURISDICTION OF THE PUBLIC UTILITY COMMISSION**

The PUC lacks subject matter jurisdiction to pierce the corporate veil of JSC; and to hold Mr. Emberling individually liable for an award of attorney fees against JSC. The PUC is an administrative body whose jurisdiction is statutorily defined. The legislature has not conferred jurisdiction to "pierce the corporate veil" of JSC upon the PUC. Mr. Emberling is not a party to a dispute before the PUC and has not made an appearance before the PUC.

Subject matter jurisdiction refers to a Court's "lawful authority to adjudicate a controversy brought before it" *Northland Ins. Co. v. State* 33 S.W.3d 727, 729 (Tenn. 2000). A Court's subject matter jurisdiction is derived "either explicitly or by necessary implication" from the state constitution or statute. *Benson v. Herbst*, 240 S.W.3d 235, 239 (Tenn. Ct. App. 2007). The existence of subject matter jurisdiction depends on "the nature of the cause of action and the relief sought" *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994). The subject matter jurisdiction of the PUC is defined generally by T.C.A. § 65-4-104 Commission's jurisdiction and control of public utilities:

The commission has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter. However, such general supervisory and regulatory power and jurisdiction and control shall not apply to street railway companies. (emphasis added)

Jurisdiction of the PUC is defined more specifically by T.C.A. § 65-34-105 Tennessee

Public Utility Commission — Jurisdiction — Powers:

**The Tennessee public utility commission has jurisdiction to hear and resolve any disputes concerning the boundaries of the current geographic territories of nonconsumer owned electric systems.** The commission may promulgate and enforce appropriate rules not inconsistent with this chapter. (emphasis added)

Non-Consumer owned electric systems are defined by T.C.A. § 65-34-102(4) as:

any public electric system other than electric and community service cooperatives and municipal electric systems.

Public electric systems are defined by T.C.A. § 65-34-102(5) as:

"Public electric system" includes electric and community service cooperatives, municipal electric systems, and every individual, co-partnership, association, corporation or joint stock company, their lessees, trustees or receivers, appointed by any court whatsoever, **that own, operate, manage, or control any electric power system, plant, or equipment within Tennessee affected by and dedicated to public use.** (emphasis added)

Rules promulgated by the PUC are contained in the Rules of the Public Utility

Commission Chapters 1220-01-01 to 1220-01-04<sup>4</sup>.

Mr. Emberling is not a party to a dispute concerning the boundaries of the current geographic territories of nonconsumer owned electric systems. Nor does he own, operate, manage, or control any electric power system, plant, or equipment within Tennessee affected by and dedicated to public use. TECA acknowledges Mr. Emberling is not a party in its brief of September 1, 2023 stating: "**While not technically a party to this**

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<sup>4</sup> 1220-01-01-.01(3)(h)

docket, it is clear that Emberling is the person who controls JSC”. (R. Brief of TECA, Pg. 10, Ln 1, 09/01/23). TECA’s brief also acknowledges the PUC lacks subject matter jurisdiction to “pierce the corporate veil” of JSC:

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). (R. Brief of TECA, Pg. 12, Ln 3-6, 09/01/23) (emphasis added)

As stated by TECA Tennessee law allows Courts to “pierce the corporate veil” under certain circumstances. The PUC is not a Court though and cannot “pierce the corporate veil” of JSC:

By statute the Tennessee Public Service Commission is given control over public utilities, property, property rights, facilities and franchises. It also has the power to impose conditions as to equipment, maintenance and level of service. However, **the commission is not a "court"**, but an administrative body. See, *McCollum v. Southern Bell Telephone & Telegraph Co.*, 163 Tenn. 277, 280, 43 S.W.2d 390(1931). *GBM Communications, Inc. v. United Inter-Mountain Tel. Co.*, 723 S.W.2d 109, 111-112 (emphasis added)

**The authorities hold without exception that Utility Commissions are administrative bodies and not courts**, and that the power conferred upon them to fix rates is legislative and not judicial. In *re Cumberland Power Co.*, 147 Tenn. 504, 515, 249 S.W. 818, this Court, after reviewing the authorities, said: From the foregoing it is apparent that the broad general purpose of the acts in question is to confer upon the Railroad and Public Utilities Commission powers and functions which are primarily legislative and executive, and that the power to hear and determine controversies, the quasi-judicial power, is merely incidental thereto. The proposition that the legislature intended or attempted to create a court by the acts above referred to and to vest it with the power to make rules, interpret and execute them, cannot be successfully maintained. *McCollum v. S. Bell Tel. & Tel. Co.*, 163 Tenn. 277, 280, 43 S.W.2d 390, 390-91 (1931) (emphasis added)

The PUC does not have jurisdiction to “pierce the corporate veil” of JSC because the Tennessee legislature has not specifically granted it such powers:

The powers of the Commission must be found in the statutes. If they are not there, they are non-existent. *Tennessee- Carolina Transport, Inc. v. Pentecost*, 206 Tenn. 551, 556, 334 S.W.2d 950, 953 (1960)

The jurisdiction and powers of the PUC are codified at T.C.A. § 65-34-105 and do not include the power to “pierce the corporate veil” of corporations such as JSC.

Both TECA and JEA assert that *Johnson v. Kakvand* 192 F.3d 656 supports their position that the corporate veil of JSC can be pierced by the PUC. Their reliance upon *Johnson* is misplaced. The Plaintiff in *Johnson* sued both Liberty Mortgage and Liberty Mortgage President Mike Kakvand individually. The *Johnson* court had personal and subject matter jurisdiction over both Liberty Mortgage and Mike Kakvand individually. The District Court in *Johnson* did not need to pierce the corporate veil. The Seventh Circuit recognized this in their opinion when they held:

“The district court did not need to “pierce the corporate veil” to hold Kakvand liable for the defendants' misconduct in discovery.” *Johnson v. Kakvand*, 192 F.3d 656, 661 (7th Cir. 1999).

Unlike the Federal District Court in *Johnson* the PUC is an administrative body with extremely limited subject matter jurisdiction. *McCollum*, 435 S.W.2d 390 at 390-391. The legislature has not granted the PUC jurisdiction to “pierce the corporate veil” of JSC or any other corporation.

Pursuant to the Rules of Tennessee Public Utility Commission Mr. Emberling has not made an “Appearance” before the PUC pursuant to 1220-01-02-.01(2)(a):

“Appearance” means any act during the course of a contested case by which a person, either in person or by counsel, recognizes and submits to the jurisdiction of the Commission for all purposes except where it is expressly stated to be limited to a particular purpose, such as challenging the jurisdiction of the Commission.

Mr. Emberling has never recognized and submitted himself to the jurisdiction of the PUC. Mr. Emberling, by filing this response, is making a limited appearance expressly

for the particular purpose of challenging the jurisdiction of the commission to order him personally liable for an award of attorney fees against JSC. Pursuant to the rules governing the PUC, Mr. Emberling is not a “Party” to an action before the Commission. See, § 1220-01-02-.01(2)(b):

“Party” means any person having a right, under the provisions of the laws applicable to the Commission, to appear and be heard in a contested case and includes:

1. Persons who initiate a contested case by the filing of an initial petition;
2. Persons against whom relief is sought or against whom action by the Commission is directed; and
3. Persons who are given leave by the Commission to intervene in a contested case in accordance with applicable law and these rules.

Mr. Emberling cannot be liable for a sanction against JSC because he has never was a “Party” to this matter. Neither can he be made a party to this action because he is not a public utility and he does not own, operate, manage, or control any electric power system, plant, or equipment within Tennessee affected by and dedicated to public use.

A trial court has "no authority to issue orders against persons who are not parties to the action." Larry E. Parrish, P.C. v. Dodson, No. M2011-00349-COA-R3-CV, 2011 Tenn. App. LEXIS 534, 2011 WL 4529607, (Tenn. Ct. App. Sept. 29, 2011); see Henderson v. Mabry, 838 S.W.2d 537, 541 (Tenn. Ct. App. 1992) (removing injunction against non-parties). **Our courts have never pierced the corporate veil to reach the assets of a non-party alter ego. The alleged alter ego has always been either named as a party in the original complaint or added as a party in an amended pleading.** See, e.g., *H.G. Hill Realty Co., L.L.C. v. Re/Max Carriage House, Inc.*, 428 S.W.3d 23, 28 (Tenn. Ct. App. 2013) *Hasty v. Greyhawk Dev. Corp.*, No. M2021-01217-COA-R3-CV, 2023 Tenn. App. LEXIS 359, at \*3-4 (Ct. App. Aug. 30, 2023)

Mr. Emberling has not and cannot satisfy the requirements for the PUC to exercise jurisdiction over him thus he cannot be held individually liable for a sanction against JSC.

because he is not a public utility. (1220-01-01-.08)

**E. SUBJECT MATTER JURISDICTION JACKSON SUSTAINABILITY  
COOPERATIVE**

The PUC lacks subject matter jurisdiction over this matter because JSC itself is not a public utility. JSC does not own, operate, manage, or control any electric power system, plant, or equipment within Tennessee affected by and dedicated to public use. It is also an impossibility that JSC could be a public utility because JSC has been dissolved through bankruptcy<sup>5</sup>. Any further proceedings in this matter would be moot:

Mootness is a doctrine of justiciability. Justiciability, in turn, is a doctrine by which courts determine whether a particular case presents a legal controversy. As the Tennessee Supreme Court has explained, a case must remain justiciable (remain a legal controversy) from the time it is filed until the moment of final appellate disposition. While the doctrines of standing and ripeness focus on the suit's birth, the doctrine of mootness focuses attention on the suit's death. A moot case is one that has lost its justiciability either by court decision, acts of the parties, or some other reason occurring after commencement of the case. A case will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. *ISI Holdings of TN, LLC v. Mount Pleasant Reg'l Planning Comm'n*, No. M2016-01607-COA-R3-CV, 2017 Tenn. App. LEXIS 610, (Ct. App. Sep. 12, 2017)

The gravamen of the third-party intervenors actions in this matter was to prevent the construction of a solar power facility that would provide supplemental power to certain manufacturing facilities in Jackson, Tennessee. (R. TECA Petition to Intervene, TMEPA Petition to Intervene, To that end the intervenors have prevailed. JSC no longer exists and thus no longer seeks relief in any form from this administrative body. JSC's original requests for relief have become non-justiciable:

To be justiciable, an issue must be cognizable not only at the inception of the litigation but also throughout its pendency. *Norma Faye Pyles Lynch Family Purpose LLC*, 301 S.W.3d at 203-04. An issue becomes moot if an event

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<sup>5</sup> JSC was declared bankrupt by final decree of the bankruptcy court July 5, 2023. (R. TECA Notice of Filing 07/11/2023)

occurring after the commencement of the case extinguishes the legal controversy attached to the issue, *Lufkin v. Bd. of Prof'l Responsibility*, 336 S.W.3d 223, 226 (Tenn. 2011), or otherwise prevents the prevailing party from receiving meaningful relief in the event of a favorable judgment. *Northshore Corridor Ass'n v. Knox Cty.*, 633 S.W.3d 561, 571-72 (Tenn. Ct. App. 2021).

JSC's bankruptcy was an event occurring after commencement of this case that extinguished any legal controversy. Because JSC no longer exists there is no controversy for this administrative body to decide.

#### **F. AFFIRMATIVE DEFENSES**

Mr. Emberling further asserts the following affirmative defenses: (1) Insufficiency of process, Mr. Emberling has not been served with a summons (2) insufficient service of process, Mr. Emberling has not received personal service of pleadings, and has not received notice required by due process. (2) Personal Jurisdiction, Mr. Emberling is has not been served with process in this matter, has not received personal service of pleadings, and has not submitted himself to the jurisdiction of this Court. (3) Subject Matter Jurisdiction, the PUC does not have subject matter jurisdiction to pierce the corporate veil of JSC to hold Mr. Emberling individually liable for a sanction against JSC.

#### **G. CONCLUSION**

Denis Emberling did not receive notice and opportunity to be heard before sanctions were granted. TECA and JEA now seek to hold him liable for the sanctions after they were granted even though he was not and is not a party to this action. Additionally, the PUC lacks jurisdiction of the person and subject matter to hold Mr. Emberling personally liable for a sanction against JSC. TECA and JEA's request should be denied.



Submitted by

/s/ William Shea Forgety

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### **CERTIFICATE OF SERVICE**

I certify a true and exact copy of the foregoing Memorandum was sent to the following persons  
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