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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

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 of the following, which was filed electronically on November 17, 2023: Tennessee Electric Cooperative Association's Response to Dennis Emberling's Motion to Dismiss and Opposition to Briefs of JEA and TECA.

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 RESPONSE TO DENNIS EMBERLING'S MOTION TO DISMISS AND OPPOSITION TO BRIEFS OF JEA AND TECA

Tennessee Electric Cooperative Association ("TECA") hereby submits this memorandum in response to Dennis Emberling's Motion to Dismiss and Memorandum in Support of Motion to Dismiss and in Opposition to Briefs of JEA and TECA, filed on October 30, 2023 ("Emberling's Brief"). 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"), the Declaration of W. Brantley Phillips, Jr. ("Phillips Declaration"), which was attached as **Exhibit 1** thereto, and TECA's Memorandum Supporting Award of Reasonable Attorneys' Fees dated September 1, 2023 ("TECA's Second Fee Memo").

As mandated by the Tennessee Public Utility Commission ("Commission"),[1] and in accordance with Tennessee Rule of Civil Procedure 37.01, the Hearing Officer established a

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[1] *See* 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").

procedural schedule for briefing and a hearing to determine the amount of reasonable attorneys' fees and expenses to be awarded to TECA and Jackson Energy Authority ("JEA") following their successful motions to compel, as well as to determine whether Dennis Emberling ("Emberling") and John Beam and Equitus Law Alliance PLLC ("Former Counsel") should be jointly and severally liable with Jackson Sustainability Cooperative ("JSC") for these attorneys' fees and expenses.[2]

After receiving multiple extensions, Emberling filed a motion to dismiss and a memorandum that includes both argument in support of that motion and argument in response to TECA's Fee Memos. (*See* Emberling's Br.) Despite being given the opportunity to do so, Emberling ***does not contest*** the reasonableness of the attorneys' fees and expenses requested by TECA, and, accordingly, TECA's arguments are undisputed. Instead, Emberling makes three broad assertions as to why he cannot be jointly and severally liable with his company, JSC, for the attorneys' fees and expenses TECA incurred in connection with its successful motion to compel: (i) TECA seeks to hold him jointly and severally liable after sanctions were granted and he did not receive notice and opportunity to be heard before sanctions were granted; (ii) the Commission lacks personal jurisdiction to hold Emberling liable for a sanction against JSC; and (iii) the Commission lacks subject matter jurisdiction over this matter entirely as well as the ability to "pierce the corporate veil."

As set forth below, Emberling's arguments are not supported by the law.

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[2] On November 14, 2022, the Hearing Officer issued the Initial Order Granting, In Part and Denying, In Part Motions to Compel Filed by Tennessee Electric Cooperative Association and Jackson Energy Authority (the "November 14 Order").

ARGUMENT & AUTHORITY

A. Emberling Does Not Contest the Reasonableness of TECA's Attorneys' Fees and Expenses.

Emberling's Brief ***does not contest*** the reasonableness of the attorneys' fees and expenses being requested by TECA under Rule 37.01(4). For the unrebutted reasons set forth in TECA's First Fee Memo, the Phillips Declaration, and TECA's Second Fee Memo, the Hearing Officer should find that the $67,843.95 of attorneys' fees and expenses TECA incurred in relation to TECA's Motion to Compel Discovery from Jackson Sustainability Cooperative are reasonable and appropriate.[3]

B. Emberling's Due Process Rights Have Not Been Violated.

Emberling asserts that "[a]n order holding [him] personally liable for an award of attorney fees against JSC would violate his constitutional right to due process [because he] did not receive any notice that TECA and JEA sought to hold him personally liable for attorney fees nor an opportunity to respond." (Emberling's Br. at 5.) This is a bogus assertion.

Due process requires notice and an opportunity to be heard.[4] *Phillips v. State Bd. of Regents of State Univ. & Cmty. Coll. Sys. of State of Tenn.*, 863 S.W.2d 45, 50 (Tenn. 1993). The purpose of these requirements is to assure that persons who may be affected by a court's ruling are "'informed that the matter is pending and can choose for [themselves] whether to appear or default,

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[3] Former Counsel and JSC likewise do not contest the reasonableness of the attorneys' fees and expenses requested by TECA.

[4] Emberling focuses his due process arguments on "notice" and provides no support for the assertion that he is being denied the opportunity to be heard. Nor could Emberling make any such argument. Among other things, he has: (i) exchanged emails with the Hearing Officer regarding contesting personal liability; (ii) submitted an affidavit as to why he should not be liable; (iii) had the procedural order deadlines for his submissions contesting liability moved twice; (iv) been provided the opportunity to pre-file testimony in advance of the November 30, 2023 hearing; and (v) filed a motion to dismiss and opposition to TECA's Fee Memos; and (vi) been provided the opportunity to argue his positions at the November 30, 2023 hearing.

acquiesce or contest.'" *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

"The notice required by the Due Process Clause is that which is 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Wilson v. Blount Cnty.*, 207 S.W.3d 741, 748 (Tenn. 2006) (quoting *Mullane*, 339 U.S. at 314). To effectuate the required notice, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315. Due process, however, "does not require that a party receive actual notice; it requires only that [a party] choose a method of notification that is reasonably calculated to provide notice." *Wilson*, 207 S.W.3d at 749 (citing *Mullane*, 339 U.S. at 314).

At multiple points over the past 12 months, TECA has given notice that was reasonably calculated to apprise Emberling that it intended to hold him jointly and severally liable for reimbursing TECA for the reasonable attorneys' fees incurred in obtaining the November 14 Order. On November 23, 2022, TECA requested 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." (TECA's First Fee Memo at 9 (emphasis added).) As the President of JSC and the Chief Executive Officer of Community Development Enterprises-Jackson I ("CDE"), Emberling is an agent of both of those entities. (*See* JSC Petition at 4-5; TECA Notice of Filing, dated July 11, 2023 ("Bankruptcy Transcript Filing Notice"), Ex. A at 13:12-15.)

Following JSC's bankruptcy proceedings, TECA continued to provide notice that it was seeking to hold Emberling jointly and severally liable for the Rule 37.01 award.[5] On July 11, 2023, TECA served the Bankruptcy Transcript Filing Notice on Emberling,[6] and that notice stated a status conference was necessary to "discuss the next steps in finalizing the award of attorneys' fees and expenses, including discussion of the persons who should be liable for that award." (Bankruptcy Transcript Filing Notice at 2.) TECA further noted therein that "[a]s described in TECA's prior arguments, it is clear that JSC's counsel and Mr. Emberling are responsible for JSC's discovery misconduct in this docket and, thus, should be made liable under Rule 37.01 for payment for the discovery sanction in the wake of JSC's bankruptcy, which was filed by Mr. Emberling to avoid payment of the sanction. Indeed, TECA submits that—but for the discovery sanction—JSC would not have filed for bankruptcy protection." (*Id.* at 2 n.2.)

On August 21, 2023, TECA responded to JSC's Motion to Dismiss with Prejudice and sent a copy to Emberling.[7] In its response, TECA noted that "[a]s discussed during the Status Conference held on August 11, 2023, the proceedings to determine the amount of, and the persons or entities responsible for paying, the reasonable attorneys' fees and expenses are pending." (TECA Response to JSC's Motion to Dismiss, filed Aug. 21, 2023, at 1.) Finally, on September 1, 2023, TECA filed TECA's Second Fee Memo (which attaches TECA's First Fee Memo and the

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[5] In addition to the notices discussed below that were sent to Emberling at known or reasonably ascertained addresses, TECA also notified counsel reasonably believed to be representing JSC during status conferences held on June 1, 2023, and August 11, 2023, that TECA intended to request that Emberling be held jointly and severally liable with JSC and Former Counsel for the Rule 37.01 award.

[6] A copy was mailed to Emberling at ***his*** business address as identified in his pre-filed direct testimony: 1100 Whitehall Street, Jackson, TN 38301. (Bankruptcy Transcript Filing Notice at Certificate of Service; Direct T of Dennis Emberling, dated May 24, 2021, at 1.) Emberling never amended this testimony.

[7] Emberling was again served at his business address.

Phillips Declaration as Exhibit 1) and again sent a copy to Emberling.[8] TECA's Second Fee Memo sets forth in detail the reasons Emberling may be held jointly and severally liable for the Rule 37.01 award. (*See* TECA's Second Fee Memo at 8-14.)

Setting aside the notice that should have been given by counsel to Emberling as JSC's President, TECA's mailings to Emberling were ***actual notice*** and constitute sufficient notice under Tennessee law. *See Wilson*, 207 S.W.3d at 750. Here, TECA mailed notices to Emberling at his reasonably ascertained home address and his business address as identified in his pre-filed direct testimony. Nothing more was required by the Due Process Clause.

And, there can be no question that Emberling received this notice—he has appeared and filed a brief arguing that he may not be held jointly and severally liable for the Rule 37.01 award. Indeed, whether Emberling will be jointly and severally liable for the Rule 37.01 award ***has yet to be determined***. Certainly, Emberling is not faced with a situation where he learned that he might face liability for the Rule 37.01 award at the same time that he learned that he would be held jointly and severally liable. Emberling has known for months that TECA seeks to hold him jointly and severally liable for the Rule 37.01 award, he has been given an opportunity to contest that liability, and he has filed a brief lodging his opposition. Because Emberling has received appropriate notice and is being afforded the opportunity to be heard ***prior to any determination*** of his liability, his due process rights have not been violated.

C. The Tennessee Rules of Civil Procedure Give the Commission Jurisdiction to Hold Emberling Jointly and Severally Liable for the Rule 37.01 Award.

The only question in this matter involving Emberling in his individual capacity is whether he can be held jointly and severally liable with JSC and Former Counsel for the reasonable

[8] TECA's Second Fee memorandum was served to Emberling at both his business address and his home address. (*See* TECA's Second Fee Memo at Certificate of Service.)

attorneys' fees and expenses incurred by TECA in obtaining an order granting a Rule 37.01 motion to compel. This is not a separate claim that results in a summons and complaint that must be filed and served on an individual personally, and Emberling cites no authority for his proposition that the fee-shifting provision contained in Rule 37.01(4) requires a new formal pleading and personal service. Indeed, this question of liability is accounted for by Tennessee Rule of Civil Procedure 37.01.

Tenn. R. Civ. P. 37.01(4) expressly provides that if a motion to compel is granted the court shall require "the party or deponent 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(4) (emphasis added). Later, that same rule makes clear that an award of attorneys' fees may be made against the more general category of "persons." *See* Tenn. R. Civ. P. 37.01(4) ("If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties ***and persons*** in a just manner.") (emphasis added). There can be no question that Emberling is a party or person who was advising JSC in this matter, and his conduct (along with Former Counsel's) necessitated TECA's motion to compel.[9] *Cf. In re Foreign Ct. Subpoena*, 2012 WL 2126960, at *1 (Tenn. Ct. App. June 12, 2012) (finding trial court did not abuse its

[9] 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 T at 8.) He verified all of JSC's discovery responses. (*See, e.g.*, TECA Compel 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.) Indeed, Emberling's October 2, 2023 Affidavit confirms that he was at the center of JSC's discovery conduct. He says that he read all of the discovery materials and located all paper and electronic documents that seemed to be responsive. (Aff. of Dennis Emberling, Oct. 2, 2023, at ¶¶ 21-26.)

discretion in requiring a non-party deponent to pay attorneys' fees in accordance with Tenn. R. Civ. P. 37.01(4) and affirming trial court's decision to impose personal liability on the non-party following defendant's successful motion to compel). It is therefore clear that under Rule 37.01(4) a non-party can be liable for a Rule 37.01 award of attorneys' fees and expenses incurred in connection with a successful motion to compel.

Moreover, Emberling's conclusory assertion that the Commission does not have jurisdiction over him and that he is immune from sanctions as a non-party is contrary to law. Courts applying other sanction powers have concluded that a non-party corporate officer may be subject to severe sanctions or personal liability where the non-party aids or abets a named corporate party. *See e.g., Life Techs. Corp. v. Govindaraj*, 931 F.3d 259, 267 (4th Cir. 2019), *as amended* (Aug. 7, 2019) (finding a non-party corporate officer's obstructionist discovery behavior should be addressed through Federal Rule of Civil Procedure 37); *Elec. Workers Pension Trust v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 382 (6th Cir. 2003) (holding that the owner of a small electrical services company, as an officer of the corporation responsible for its affairs, may be held in contempt for the company's noncompliance with a court order even though he was not a named defendant or named in the relevant portions of the order); *Chicago Truck Drivers v. Bhd. Lab. Leasing*, 207 F.3d 500, 507 (8th Cir. 2000) (court's payment orders in ERISA case were binding upon the named corporate defendant's sole shareholder and corporate officer and agent, even though the order made no specific reference to him); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930) (explaining that while no court can make a decree that binds "the world at large," a non-party "may be punished if he either abet[s] the defendant or [is] legally identified with him."); *Anchondo v. Anderson, Crenshaw, & Assocs., L.L.C.*, 2010 WL 2517167, at *2 (D.N.M. June 18, 2010) (awarding discovery sanctions jointly and severally against corporate defendant, its non-

party president, and its non-party attorney, including attorneys' fees and costs plaintiff incurred in connection with a motion to compel), *report and recommendation adopted*, 2010 WL 2812983 (D.N.M. July 12, 2010).

In the unique circumstances of the present matter, Emberling was ***the person*** who controlled JSC and served as the driving force of JSC's conduct in this docket. Rule 37.01 permits, and it is appropriate for, the Hearing Officer to make him jointly and severally liable for the attorneys' fees and costs TECA incurred in connection with its successful motion to compel.

D. <u>The Commission Has Subject Matter Jurisdiction Over This Matter.</u>

Finally, Emberling attempts to re-litigate whether the Commission can enforce the discovery rules of the Tennessee Rules of Civil Procedure by asserting that the Commission does not have subject matter jurisdiction either over this matter in its entirety or does not have the power to pierce JSC's corporate veil and hold Mr. Emberling jointly liable with JSC. (Emberling's Br. at 10-16.)

Emberling's assertion that the Commission does not have subject matter jurisdiction over this matter because JSC is not a public utility is incredible. ***We are here because JSC and Emberling filed a Petition with the Commission and, by doing so, submitted to and acknowledged the Commission's jurisdiction.***[10] On May 24, 2021, JSC filed its *Petition For a Solar Facility For Supplemental Energy*—verified by Dennis Emberling—seeking a determination that it is exempt from regulation by the Commission or, in the alternative, seeking

[10] There can be no doubt that the discovery rules contained in the Tennessee Rules of Civil Procedure apply to contested cases and that the discovery rules are to be enforced—including the fee-shifting provision contained in Rule 37.01(4). The Commission considered an argument over the applicability of these rules, and conclusively decided that they do, indeed, apply in this case. (*See generally* Commission Order at 25-37.)

a Certificate of Public Convenience and Necessity. (JSC Petition at 1.) Simply put, JSC submitted to and acknowledged the Commission's jurisdiction when it sought relief from the Commission.[11]

Emberling attempts to use JSC's bankruptcy and motion to dismiss as a sword, arguing that these events make it "an impossibility that JSC could be a public utility" and extinguished any legal controversy for the Commission to decide. But it is well-settled that ancillary matters—such as the reasonableness of and liability for attorneys' fees—may be decided even after a case is voluntarily dismissed. *See e.g., Menche v. White Eagle Prop. Grp., LLC*, 2019 WL 4016127, at *8-10 (Tenn. Ct. App. Aug. 26, 2019). Emberling's effort to use JSC's bankruptcy to supposedly deprive the Commission of jurisdiction over a contested case that he spearheaded is meritless.

Emberling's argument that the Commission lacks subject matter jurisdiction to pierce the corporate veil of JSC is equally unconvincing. "Usually, corporate veils are pierced—that is, the legal entity disregarded and the true owners of the entity held personally liable—when the corporation is liable for the debt but is without funds due to the skullduggery or downright fraud on the part of the directors and officers." *Anderson v. Durbin*, 740 S.W.2d 417, 418 (Tenn. Ct. App. 1987). In this matter, there can be no doubt that JSC is without funds due to the actions of JSC's President, Emberling. (*See* Bankruptcy Transcript Filing Notice at 1-2; TECA's Second Fee Memo at 4-5, 10-13.)

Here, TECA is not seeking to pierce the corporate veil to hold Emberling liable for a claim that would have required the filing of an action against JSC and Emberling personally. This is a contested case before the Commission in which JSC is not a defendant and there are no contract,

[11] It is irrelevant that the merits of JSC's question have not been decided because of Emberling's decision to put JSC in bankruptcy and abandon this docket. The blatant discovery misconduct, motions to compel, requests for attorneys' fees and expenses, and orders awarding and affirming the Rule 37.01 award all occurred during a duly commenced contested case initiated by JSC and Emberling.

tort, or statutory claims filed by TECA against JSC or Emberling.[12] Stated differently, there is no service of process or personal service of pleadings for claims to which Emberling could have been added and served. Rather, TECA is seeking to hold Emberling jointly liable for discovery misconduct that necessitated TECA's motion to compel, which is properly addressed through the fee-shifting provision found in Rule 37.01(4). The Commission has previously, and correctly, concluded that the General Assembly granted it the statutory authority to apply the discovery rules of the Tennessee Rules of Civil Procedure, including Rule 37.01(4). (Commission Order at 25-33.)[13]

There is no support for the notion that the Commission may not look to Tennessee judicial precedent when exercising this authority. For example, when deciding a discovery dispute involving trade secrets, the Commission may apply Tennessee's statutory definition of "trade secret" and judicial precedent regarding trade secrets even though the Commission does not have authority and jurisdiction over the Tennessee Uniform Trade Secrets Act. Indeed, the Commission has done just that. *See In Re: Petition of the Consumer Advoc. to Open an Investigation to Determine Whether Atmos Energy Corp. Should Be Required by the Tennessee Regul. Auth. to*

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[12] Emberling cites *Hasty v. Greyhawk Dev. Corp.*, 2023 WL 5597914, at *2 (Tenn. Ct. App. Aug. 30, 2023) for the proposition that "[o]ur 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." (Emberling's Br. at 10.) *Hasty*, however, involved a ***final merits judgment*** against a corporate defendant. After the judgment became final, the plaintiff filed a motion to pierce the corporate veil and asked the court to authorize execution of the judgment against a non-party corporate shareholder. *Hasty*, 2023 WL 5597914, at *1. In the present case, there is no merits judgment against JSC, much less a final one. Further, as discussed above, Rule 37 specifically contemplates and provides that a person like Emberling may be required to reimburse attorneys' fees and expenses incurred in connection with a motion to compel. Accordingly, TECA submits that *Hasty* is inapposite to these proceedings.

[13] Emberling is also simply wrong that the Commission's jurisdiction and powers are limited to the powers set forth in Tenn. Code Ann. § 65-34-105. *See, e.g.,* Tenn. Code Ann. § 4-5-311; Tenn. Code Ann. § 65-2-102; Tenn. Code Ann. § 65-4-104.

Appear & Show Cause That Atmos Energy Corp. Is Not Overearning in Violation of Tennessee L. & That It Is Charging Rates That Are Just & Reasonable, No. 05-00258, 2006 WL 7358668 (Tenn. Pub. Util. Comm'n June 14, 2006). The application of the veil-piercing doctrine to determine liability for a discovery sanction is no different. The Hearing Officer may use Tennessee's well-established "piercing the corporate veil" doctrine as an alternative means to hold Emberling jointly and severally liable for the Rule 37 award.[14]

CONCLUSION

For the foregoing reasons, as well as the reasons provided in TECA's Second Fee Memo, TECA respectfully submits that Emberling can—and should—be held liable, jointly and severally with JSC and Former Counsel, for the attorneys' fees and expenses TECA incurred in connection with its motion to compel. As set forth in TECA's First Fee Memo, the Phillips Declaration, and TECA's Second Fee Memo, TECA further submits that the attorneys' fees and expenses incurred in obtaining the November 14 Order were reasonable and appropriate and, therefore, requests that the Hearing Officer enter an order that awards TECA $67,843.95 plus interest accruing from November 14, 2022, until the date payment is received in full.

DATED this 17th day of November, 2023.

[14] Emberling's assertion that the Commission may not use legal doctrines because it is not a court of law should be rejected. It is clear that the Hearing Officer and Commission perform a quasi-judicial function when they hear a contested case under the Administrative Procedures Act. *See Moody v. State Dist. Pub. Defs. Conf.*, 980 S.W.2d 385, 387 (Tenn. Ct. App. 1998) (characterizing contested cases as "judicial or quasi-judicial" in nature).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of November, 2023, the foregoing document was served on the following persons via email, hand delivery, overnight delivery and/or U.S. Mail, postage prepaid:

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