

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

May 30, 2024

IN RE:

PETITION OF JACKSON SUSTAINABILITY
COOPERATIVE TO DETERMINE IF A
CERTIFICATE OF CONVENIENCE AND
NECESSITY IS NEEDED

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DOCKET NO.
21-00061

ORDER DENYING EMBERLING *MOTION TO DISMISS*

This matter is before the Administrative Judge¹ of the Tennessee Public Utility Commission (“Commission” or “TPUC”) for consideration of the *Motion to Dismiss Pursuant to T.R.C.P. 12.02(1)(2)(4)(5) and [TPUC RULE] 1220-01-02-.03(2)(a)(b)(c)(d)* (“*Emberling Motion to Dismiss*”) filed by Mr. Dennis Emberling on October 30, 2023. Along with the *Emberling Motion to Dismiss*, Mr. Emberling filed a *Memorandum in Support of Motion to Dismiss and in Opposition to Briefs of JEA and TECA* (“*Memo on Motion to Dismiss*”). Oral arguments on the *Motion to Dismiss* were held November 30, 2023, as set forth in the *Order Establishing Second Amended Hearing Procedural Schedule* issued on November 9, 2023, and as noticed on November 17, 2023.

RELEVANT BACKGROUND

A condensed review of the background of this docket is necessary to put this *Motion to Dismiss* in the proper context. On May 24, 2021, Jackson Sustainability Cooperative (“JSC”) filed its *Petition For a Solar Facility For Supplemental Energy* (“*Petition*”) indicating it had plans for the

¹ References to “Hearing Officer” have been changed to “Administrative Judge” consistent with a title change within the Commission pursuant to Tenn. Code Ann. § 4-5-102.

construction of a solar facility with a battery-energy storage and shared interconnection located in Jackson, Tennessee.² The *Petition* sought a determination that JSC is a non-utility, exempt from regulation by the Commission because it has identified itself as a non-profit cooperative under Tenn. Code Ann. § 65-4-101(6)(E).³ The Administrative Judge partially granted Motions to compel filed by Tennessee Electric Cooperative Association (“TECA”) and Jackson Energy Authority (“JEA”), including awarding reasonable attorney fees.⁴ Subsequently, that Order was affirmed by the Commission in an Order issued May 8, 2023.⁵

Thereafter, TECA and JEA sought to hold John Beam III (counsel for JSC), Equitus Law Alliance, PLLC, and Dennis Emberling jointly and severally liable for the awarded attorney fees. On June 2, 2023, the Commission received Notice that JSC had declared bankruptcy. During a telephone status conference held on August 11, 2023, a hearing date of September 12, 2023, was established for the hearing to determine the amount of the attorney fees for TECA and JEA and who should be liable for such fees. During the Status Conference, JSC was represented by its bankruptcy attorney, Mr. Steve Lefkovitz. Subsequently, Mr. Beam asked that the hearing date be changed. On September 8, 2023, another status conference was held, and the date of the attorney fee hearing was changed to Oct 17, 2023. Mr. Beam stated he was going to recommend that Mr. Emberling seek outside counsel.⁶ On October 2nd, the day briefs were due, Mr. Emberling sent a letter to the Administrative Judge asking for additional time to find representation because he didn’t receive information about the

² *Petition*, p. 1 (May 24, 2021).

³ *Id.*

⁴ See *Initial Order Granting in Part, and Denying, in Part, Motions to Compel Filed by Tennessee Electric Cooperative Association and Jackson Energy Authority* (November 14, 2022).

⁵ See *Order Affirming Hearing Officer’s Orders Granting, In Part, Motions to Compel, Granting Interventions, and Setting a Procedural Schedule* (May 8, 2023).

⁶ Transcript of Telephone Status Conference, p. 11 (September 8, 2023).

schedule from Mr. Beam until September 25th. Along with his request, Mr. Emberling filed an Affidavit setting forth various facts supporting why he should not be held personally liable.⁷

On October 27, 2023, the Administrative Judge issued an Amended Procedural Order establishing that Reply Briefs were due October 30, 2023, and the hearing on the attorney fees and liability would be held November 30, 2023. On October 30th, Mr. Emberling filed the *Motion to Dismiss*. The Administrative Judge issued a Second Amended Procedural Schedule on November 9, 2023, establishing dates for filing responses to the *Motion to Dismiss*, filing pre-filed testimony, holding a pre-hearing conference, and setting oral argument on the *Motion to Dismiss* and the hearing on the attorney fees for November 30, 2023.

MOTION TO DISMISS

In the *Motion to Dismiss*, Mr. Emberling seeks to dismiss any claims asserted against him personally based on 1) lack of subject matter jurisdiction; 2) lack of personal jurisdiction; 3) Insufficiency of process; and 4) Insufficiency of service of process. In addition, Mr. Emberling asserts the following affirmative defenses: 1) insufficiency of process; 2) insufficient of service of process; 3) personal jurisdiction; and 4) subject matter jurisdiction.⁸

Mr. Emberling argues he cannot be held responsible for sanctions imposed pursuant to TRCP Rule 37.01(4) because it only allows sanctions against a party, a deponent whose conduct necessitated the Motion to Compel, or the party or attorney advising such conduct.⁹ Because Mr. Emberling does not fall into any of those categories, he maintains he cannot be liable for sanctions imposed against JSC. In addition, Mr. Emberling argues he is not a party to this docket and has not submitted himself

⁷ Although Mr. Emberling was on the Commission docket service list for the Procedural Order and the Administrative Judge emailed him a copy of the Procedural Order, the Administrative Judge changed the hearing schedule again to allow time for Mr. Emberling to find an attorney.

⁸ *Emberling Motion to Dismiss* (October 30, 2023).

⁹ *Memo on Motion to Dismiss*, unnumbered p. 3 (October 30, 2023).

to the jurisdiction of the Commission, nor has he been personally served with any pleadings in this matter.¹⁰ Therefore, Mr. Emberling maintains the Commission lacks personal jurisdiction.

TECA'S RESPONSE TO *MOTION TO DISMISS*

TECA filed *Tennessee Electric Cooperative Association's Response to Dennis Emberling's Motion to Dismiss and Opposition to Briefs of JEA and TECA* ("TECA's Response") on November 17, 2023, asking that the *Emberling Motion to Dismiss* be denied. TECA maintains that even though Mr. Emberling had ample opportunity, he has not contested the reasonableness of the attorney fees sought by TECA. TECA asserts that Mr. Emberling's due process rights have not been violated because due process does not require actual notice but rather notice reasonably calculated to provide notice.¹¹ TECA argues that due process requires notice and an opportunity to be heard to assure that those potentially impacted by a ruling can choose whether to appear on the matter and contest it or default.¹² TECA notes that Mr. Emberling does not and cannot argue he has been denied an opportunity to be heard because Mr. Emberling has:

(i) exchanged emails with the Hearing Officer [Administrative Judge] 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 23, 2023 hearing.¹³

TECA states that due process does not require actual notice but notice that is reasonably calculated to let interested parties know of a matter that may affect them and give them an opportunity to present their objections.¹⁴ Nevertheless, TECA argues that Mr. Emberling received actual notice that TECA

¹⁰ *Id.*

¹¹ *TECA's Response*, p. 4 (November 17, 2023) (citing *Wilson v. Blount Cnty.*, 207 S.W.3d 741, 748 (Tenn. 2006)).

¹² *Id.* at 3-4 (citing *Phillips v. State Bd. Of Regents of State Univ. & Cmty. Coll. Sys of State of Tenn.*, 863 S.W.2d 45, 50 (Tenn. 1993) and *Greene v. Lindsey*, 456 U.S. 444, 449 (1982)).

¹³ *Id.* at 3, fn. 4.

¹⁴ *Id.* at 6.

sought to hold him personally liable for paying its reasonable attorney fees because this fact was stated in various filings that were mailed to Mr. Emberling's home and business addresses, and Counsel reasonably believed to be representing JSC was also notified.¹⁵ TECA maintains that there is no question that Mr. Emberling received the notice because he appeared and filed a brief arguing he should not be held jointly and severally liable for the Rule 37.01 award. TECA concludes that because Mr. Emberling received notice and is being given an opportunity to be heard prior to a determination on the amount of the attorney fee award, his due process rights have not been violated.¹⁶

In addition, TECA asserts the Commission has subject matter jurisdiction over this matter because "JSC submitted to and acknowledged the Commission's jurisdiction when it sought relief from the Commission."¹⁷ According to TECA,

[i]t 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.

HEARING ON *MOTION TO DISMISS*

The hearing was held before the Administrative Judge assigned to this docket on November 30, 2023, as noticed on November 17, 2023. The following parties appeared and/or participated in oral arguments during the hearing:

Jackson Sustainability Cooperative – Steven L. Lefkovitz, Esq., 908 Harpeth Valley Place, Nashville, Tennessee 37221.

Dennis Emberling – William S. Forgety, Esq. & Karl E. Pulley, Esq., 115 Shivel Drive, Hendersonville, Tennessee 37075.

¹⁵ *Id.* at 5-6.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 10.

John Beam – John Beam, Esq., Equitus Law Alliance, PLLC, P.O. Box 280240, Nashville, Tennessee 37228.

Tennessee Electric Cooperative Association – W. Brantley Phillips, Jr. Esq., Matthew J. Sinback, Esq., & Caleb H. Hogan, Esq., Bass Berry & Sims, PLC, 150 Third Avenue South, Suite 2800, Nashville, Tennessee 37201.

Jackson Energy Authority – Larry L. Cash, Esq., Miller & Martin PLLC, 832 Georgia Avenue, Chattanooga, Tennessee 37402.

Tennessee Valley Authority – Henry M. Walker, Esq., Bradley Arant Boult Cummings, LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203-2754.

FINDINGS AND CONCLUSIONS

PERSONAL JURISDICTION

Mr. Emberling argues that the Commission does not have personal jurisdiction over him because he is not a party to the action before the Commission and has not waived personal jurisdiction or submitted himself to the jurisdiction of the Commission, nor has he been provided notice of his potential liability through service of process. Emberling maintains he was not served with a summons and complaint as required by the Tennessee Rules of Civil Procedure.

The Administrative Judge finds that service of process before the Commission is governed by the Uniform Administrative Procedures Act (“U.A.P.A.”) which provides in pertinent part that “[a] party shall serve copies of any filed item on all parties, by mail or any other means prescribed by agency rule.”¹⁸ Further, the following Commission Rule regarding service of process provides:

1220-01-01-.10 SERVICE. (1) Unless these rules otherwise provide, or the Commission or a Hearing Officer otherwise orders, all filings made in any formal proceeding, including all notices and orders, shall be served on each of the parties to that proceeding. (2) Whenever under these rules, service is required or permitted to be made upon a party represented by counsel, service shall be made upon such counsel, unless service upon the party is ordered by the Commission. Service upon counsel or upon a party shall be made by delivering to the office of such person a copy of the document to be served, or by mailing it to such person’s address as shown on a mailing or service list furnished by the Chair of the Commission. Service upon all parties of

¹⁸ See Tenn. Code Ann. § 4-5-308(c).

record shall be made in the same manner. Service by first class mail is complete upon mailing.

In addition to counsel for JSC, Mr. Emberling has personally been on the Commission docket service list for this docket and therefore, he is emailed all of the docket filings. On August 21, 2023, TECA mailed Mr. Emberling its response to JSC's Motion to Dismiss with Prejudice. In this response, TECA refers to the issue of the persons or entities responsible for paying the attorney fees. Also, on September 1, 2023, TECA mailed Mr. Emberling its Second Fee Memo in which TECA sets forth its arguments regarding why Mr. Emberling should be held personally liable. In fact, Mr. Emberling acknowledges that TECA's Second Fee Memo contains a certificate of service that it was mailed first class to Mr. Emberling at two different addresses. Mr. Emberling erroneously suggests that "[p]ersonal service would require at a minimum certified mail return receipt along with a green slip indicating it had been received."¹⁹ However, these are simply not the requirements under the U.A.P.A. or the Commission's rules.

The Administrative Judge finds that Mr. Emberling properly received service in accordance with the U.A.P.A. and Commission rules sufficient to apprise him that TECA and JEA sought to hold him personally liable for the awarded reasonable attorney fees. The Administrative Judge concludes that Mr. Emberling was properly served relevant filings and was aware of the proceedings and responded to those filings. Therefore, Mr. Emberling's claim of a lack of personal jurisdiction is untimely and without merit.

DUE PROCESS

The Administrative Judge finds Mr. Emberling's arguments, in which he states that he has not been afforded due process, to be wholly without merit. Mr. Emberling argues that he "did not receive any notice that TECA and JEA sought to hold him personally liable for attorney fees nor an

¹⁹ *Memo on Motion to Dismiss*, unnumbered p. 5, fnnt. 3 (October 30, 2023).

opportunity to respond.”²⁰ This argument is quite puzzling since Mr. Emberling filed an affidavit denying he should be held personally liable and requesting additional time to obtain independent representation. The Administrative Judge granted the request and changed the hearing date to allow Mr. Emberling to obtain counsel. Once Mr. Emberling was represented, his counsel filed the current *Emberling Motion to Dismiss*, and the Administrative Judge developed a procedural schedule that established dates for oral arguments on the *Emberling Motion to Dismiss*, the filing of pre-filed testimony, and the hearing on the award of attorney fees. The Administrative Judge concludes Mr. Emberling has been afforded due process in this matter.

SUBJECT MATTER JURISDICTION

Mr. Emberling argues that the Commission lacks subject matter jurisdiction over both him and over JSC. Mr. Emberling maintains that he is not a party, and the Commission does not have the statutory authority to “pierce the corporate veil” of JSC to hold him personally liable for the TECA and JEA attorney fee award. In addition, Mr. Emberling argues that the Commission lacks subject matter jurisdiction over JSC because JSC is not a public utility. According to Mr. Emberling, it is impossible for JSC to be a public utility because it has been dissolved through bankruptcy and any further proceedings would be moot.²¹ Mr. Emberling asserts that “[b]ecause JSC no longer exists there is no controversy for this administrative body to decide.”²²

The Administrative Judge is not persuaded by this argument. JSC came before the Commission seeking a determination that it was not a public utility. Simply because JSC declared bankruptcy does not void the matter before the Commission and automatically make

²⁰ *Id.* at unnumbered 5.

²¹ *Id.* at unnumbered 11.

²² *Id.* at unnumbered 12.

it moot. Nor does JSC's bankruptcy relieve the Commission of its responsibility to determine the amount of the attorney fees to be awarded to TECA and JEA and complete the process set forth in TRCP Rule 37. Therefore, the Administrative Judge concludes that the Commission continues to have subject matter jurisdiction over JSC.

Commission Rule 1220-01-02-.22 provides in pertinent part:

In any contested case the Commission or the Hearing Officer:

(2) May, on its own motion or the motion of any party, allow amendments, consolidate cases, join parties, sever aspects of the case for separate hearings, permit additional claims or contentions to be asserted, bifurcate or **otherwise order the course of proceedings in order to further the just, efficient and economical disposition of cases consistent with the statutory policies governing the Commission**; and

(3) Shall afford all parties an opportunity to be heard after reasonable notice before exercising these general procedural powers.

When deliberating the *Motion to Dismiss*, the Administrative Judge did not consider the specific issue of whether Mr. Emberling should be personally liable for the attorney fees awarded to TECA and JEA. The Administrative Judge finds that certain issues raised in the *Motion to Dismiss* should not be decided in a vacuum, but should be considered within the context of the remaining issues in this docket. All parties were given an opportunity to file pre-filed testimony and were aware of the issues to be presented at the hearing well in advance of the hearing date.²³ In addition, the Administrative Judge held a Pre-Hearing Conference with the parties on November 21st and was very clear that the issue of joint and several liability would be argued during the hearing on the amount of the reasonable attorney fees.²⁴

The Administrative Judge finds that based on the record in this matter and the foregoing analysis, the Commission has jurisdiction over the *Petition* before it and the related discovery issues


²³ See *Order Establishing Second Amended Hearing Procedural Schedule* (November 9, 2023).

²⁴ Transcript of Pre-Hearing Conference (via telephone), p. 10 (November 23, 2023).

and that the issue concerning sufficiency of notice is controlled by the provisions of Uniform Administrative Procedures Act, rather than the Rules of Civil Procedure. Therefore, the Administrative Judge concludes that the *Emberling Motion to Dismiss* should be denied. Further, although the Administrative Judge has denied the *Emberling Motion to Dismiss*, Mr. Emberling is not precluded from presenting these arguments in response to the intervening parties' presentations concerning joint and several liability during the hearing to establish the amount of reasonable attorney fees awarded to TECA and JEA; and, in fact, did so argue during that hearing.

IT IS THEREFORE ORDERED THAT:

- 1) The *Motion to Dismiss Pursuant to T.R.C.P. 12.02(1)(2)(4)(5) and [TPUC RULE] 1220-01-02-.03(2)(a)(b)(c)(d)* filed by Emberling is **DENIED**.
- 2) Any party aggrieved by the decision of the Administrative Judge in this matter may file a Petition for Appeal with the Tennessee Public Utility Commission within fifteen (15) days from the date of this Order.
- 3) Any party aggrieved by the decision of the Tennessee Public Utility Commission in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.


Monica Smith-Ashford, Administrative Judge