

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**

**ADMINISTRATIVE JUDGE’S ORDER ESTABLISHING AWARD OF REASONABLE
ATTORNEY FEES TO TECA AND JEA**

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This matter came before the Administrative Judge¹ of the Tennessee Public Utility Commission (“Commission”) for a hearing on November 30, 2023. Following the hearing, the Administrative Judge took the matter under advisement. Based on the evidence in the record and a review of applicable law, the Administrative Judge finds that the Jackson Sustainability Cooperative (“JSC” or “Petitioner”) is solely assessed sanctions payable to the Tennessee Electric Cooperative Association (“TECA”) in the amount of \$59,002.50 and to Jackson Energy Authority (“JEA”) in the amount of \$8,493.00. The Administrative Judge declines to sanction Mr. Dennis Emberling or Mr. John Beam, III, individually.

BACKGROUND

On May 24, 2021, JSC filed a *Petition For a Solar Facility For Supplemental Energy* (“*Petition*”). The *Petition* indicated JSC has plans for the construction of a solar facility with a battery-energy storage and shared interconnection (“Solar Facility”) located on Roosevelt Parkway in Jackson, Tennessee.² According to the *Petition*, the facility was intended to have a capacity of 16.5 MW with an accompanying storage facility of 46MWh.³ The *Petition* sought a determination that JSC is a non-utility, exempt from regulation by the Tennessee Public Utility Commission because it has identified itself as a non-profit cooperative under Tenn. Code Ann. § 65-4-101(6)(E).⁴

In the alternative, if JSC is not exempt as an electric cooperative, then JSC sought an exemption because it is not a “public utility” as it intends to distribute supplemental electricity in a manner that is not “affected by and dedicated to public use.” JSC further requested that if it is

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

² *Petition*, p. 1 (May 24, 2021).

³ *Id.* at 3.

⁴ *Id.*

indeed a “public utility,” it be granted a Certificate of Public Convenience and Necessity (“CCN”) authorizing construction.⁵

In pre-filed testimony submitted in support of the *Petition*, Mr. Dennis Emberling identified himself as the President of JSC and described the proposed Solar Facility as consisting of fixed solar panels, inverters, batteries, electrical and control equipment, and underground wiring within 3.5 miles of the facility.⁶ According to Mr. Emberling, JSC is a nonprofit cooperative organized under the Electric G&T Cooperative Act (Tenn. Code Ann. § 48-69-101, *et seq.*). Mr. Emberling identified Northern Reliability, Inc. (“Northern Reliability”) as the primary contractor to build the facility and the company that will also handle all operations and maintenance.⁷

The customers or members JSC sought to serve are being served already by the JEA. The Solar Facility was apparently to have been a source of supplemental power. Under the proposal, members of JSC would have smart meters separate from the meters of the JEA. Members would continue to draw power from JEA when usage is normal or below normal. When demand rises, members of JSC would be able to draw power from the Solar Facility. According to Mr. Emberling, no power would backflow onto JEA’s power grid.⁸ According to Mr. Emberling, the members of JSC would have had little expense and paid a cheaper rate for peak demand usage than the rate paid to JEA.⁹ Mr. Emberling testified that members need the Solar Facility for many reasons, ranging from environmental policy issues to cheaper energy on demand. In addition, Mr. Emberling testified that the Solar Facility can help lower the costs to its customers and reduce peak charges from the Tennessee Valley Authority (“TVA”) to JEA.¹⁰

⁵ *Id.* at 17.

⁶ Dennis Emberling, Pre-Filed Direct Testimony, pp. 2-3 (May 24, 2021).

⁷ *Id.*

⁸ *Id.* at 3.

⁹ *Id.* at 3.

¹⁰ *Id.* at 4-5.

Mr. Emberling is listed as a Director of JSC on a charter filed with the Tennessee Secretary of State on May 14, 2021, shortly before the filing of the *Petition*.¹¹ Mr. Emberling stated that the project is expected to cost \$67 million dollars and all equipment, installation, and construction costs will be financed by Community Development Enterprises-Jackson I (“CDE”).¹² Mr. Emberling identified himself as the President of JSC in his pre-filed testimony and also as the regulatory and service contact of CDE, the entity that was expected to finance the project.¹³ CDE is a joint venture with three venture partners, E A Solar, LLC, Hunt Solar, LLC, and SynEnergy, Inc.¹⁴ According to documents produced in discovery, Mr. Emberling is the CEO of CDE.¹⁵ In an affidavit submitted on June 2, 2022, Mr. Emberling also identified himself as the CEO of EA Solar.¹⁶ CDE’s willingness to finance the project was based on its eligibility for certain tax credits. Under Mr. Emberling’s proposal, JSC would obtain capital and lease equipment from CDE.¹⁷

Following the filing of the *Petition*, on June 25, 2021, TECA, JEA, the Tennessee Municipal Electric Power Association (“TMEPA”), and the TVA filed petitions to intervene. TECA is a trade organization representing twenty-two (22) electric cooperatives and one (1) municipality that are electric power distributors in Tennessee.¹⁸ JEA is an energy authority created by a private act of the Tennessee General Assembly and provides retail electric service throughout the City of Jackson, Tennessee.¹⁹ While the TVA and TMEPA participated in the docket to varying

¹¹ *Id.* at Exhibit 1, p. 3.

¹² *Id.* at 6.

¹³ *Id.* at 1, 8.

¹⁴ *Petitioner’s Responses to Tennessee Electric Cooperative Association’s Interrogatories And Requests for Production of Documents*, p. 27 (September 27, 2021).

¹⁵ *Response of SynEnergy, Inc. to Subpoena of Tennessee Electric Cooperative Association*, SYNCONF000008, (April 5, 2021).

¹⁶ *Response By Jackson Sustainability Cooperative To The Motions to Compel Filed By The Tennessee Electric Cooperative Association*, Affidavit of Dennis Emberling (June 2, 2022).

¹⁷ Dennis Emberling, Pre-Filed Direct Testimony, p. 7 (May 24, 2021).

¹⁸ *Petition to Intervene of the Tennessee Electric Cooperative Association*, p. 1 (June 25, 2021).

¹⁹ *Petition to Intervene of the Jackson Energy Authority*, pp. 1-2 (June 25, 2021).

degrees, TECA and JEA served discovery requests on JSC and thus became involved in the discovery disputes that ultimately resulted in a finding by the Administrative Judge that sanctions should be imposed against JSC.²⁰

Pursuant to the procedural schedule, on September 8, 2021, TECA and JEA submitted their first set of discovery requests. On September 22, 2021, JSC filed responses to discovery requests of the intervening parties. As part of its response, JSC submitted new pre-filed direct testimony of Mr. Emberling providing additional information.²¹ After the responses were filed, JEA and TECA voiced concerns with the extent of the documentation provided. During status conferences with the Administrative Judge, the parties indicated ongoing discovery issues. Yet, the parties indicated a willingness to continue to attempt to resolve the discovery disputes among themselves resulting in a process that suspended the procedural schedule.²²

On January 5, 2022, JSC filed supplemental responses to the discovery. Over the course of several months, stretching from September of 2021 to April of 2022, JSC and the intervening parties discussed and conferred over what some intervenors described as a lack of discovery documents for a project that is projected to cost \$67 million.²³ One specific concern documented by TECA was the production of only a handful of emails for a project of such a size.²⁴

²⁰ 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).

²¹ *Petitioner's Responses to Tennessee Electric Cooperative Association's Interrogatories and Requests for Production of Documents*, pp. JSC-000426-00436, Dennis Emberling, Part II, Pre-Filed Direct Testimony (September 22, 2021).

²² Transcript of Status Conference, (September 30, 2021); Transcript of Status Conference, (October 21, 2021); *Order on September 30 and October 21, 2021 Status Conferences*, (December 23, 2021).

²³ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, pp. 7-13, Ex. 13, Ex. 14, Ex. 15, Ex. 16, Ex. 22, Ex. 23 (May 20, 2022).

²⁴ *Id.* at Ex. 14, p. 2; Ex. 16, pp. 3-4;

TECA eventually sought documents from Northern Reliability, a contractor of the Petitioner, with a subpoena perfected in a court in Vermont.²⁵ Following modifications to the protective order, Northern Reliability turned over a large number of documents. Following review of the production of documents by Northern Reliability, TECA alleged that JSC had not provided all responsive documents, had not conducted an adequate search of records, and had been selective in the documents it has chosen to provide.²⁶ TECA and JEA filed motions to compel requesting relief, including sanctions that included legal fees.

MOTIONS TO COMPEL

On May 20, 2022, the TECA filed its *Tennessee Electric Cooperative Association's Motion to Compel Discovery from Jackson Sustainability Cooperative* (“TECA’s Motion to Compel”), and JEA filed its *Motion to Compel* and accompanying Memorandum of Law as well. TECA’s *Motion to Compel* requested that JSC be compelled to comply with its discovery obligations and produce all documents responsive to TECA’s First and Second Discovery Requests.²⁷ TECA asserted that JSC produced minimal documents related to its project, including only four emails.²⁸ According to TECA, JSC’s counsel repeatedly confirmed that JSC has produced all responsive documents, and no non-privileged documents had been withheld on the basis of an objection.²⁹ However, after receiving the response to the subpoena from Northern Reliability, TECA asserted that Northern Reliability produced over 200 emails from, to, or copying Mr. Dennis Emberling and his associate, Mr. David Shimon. JSC then informed TECA that Mr.

²⁵ *Update on Status of Third-Party Discovery By Tennessee Electric Cooperative Association*, pp. 1-3 (March 18, 2022).

²⁶ *Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative* (“TECA’s Motion to Compel”), pp. 2-3 (May 20, 2022).

²⁷ *Id.* at 1.

²⁸ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, pp. at 2-3 (May 20, 2022).

²⁹ *Id.* at 3.

Emberling had deleted potentially responsive emails. TECA's accompanying memorandum of law in support of the motion to compel included confidential exhibits documenting emails produced by Northern Reliability between Mr. Emberling and others dealing with the Solar Facility that were made *after* the filing of discovery by TECA, yet were not turned over by JSC.³⁰

At the hearing on the motions to compel on June 8, 2021, TECA maintained that although the parties had been talking about discovery since the Fall of the previous year and discussing the need to make sure that discovery was thorough and complete, TECA was only informed about the auto-delete document retention policy after *TECA's Motion to Compel* was filed.³¹ TECA argued that these actions by JSC raised serious concerns about spoliation of evidence.³² In addition, TECA argued that JSC's actions during the discovery process make it impossible for the Commission to have a complete and accurate record in this docket and to obtain the necessary facts to make a decision.³³ Therefore, TECA requested that JSC be compelled by the Administrative Judge to "fully comply with its discovery obligations, perform thorough searches for responsive documents, produce all documents responsive to TECA's discovery requests, and comply with the relief requested in the Motion..."³⁴

Following a hearing, TECA and JEA's respective motions to compel were granted, in part. The Administrative Judge's Order addressed JSC's lack of transparency with respect to discovery efforts.

Early in the discovery process, TECA and JEA expressed concern about the lack of emails produced by JSC. According to TECA, this production consisted of only four emails. However, JSC assured the parties that it had produced all of the

³⁰ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, pp. 18-19; Confidential Exhibit 33 (May 20, 2022).

³¹ Transcript of Proceeding, p. 8 (June 21, 2021).

³² *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, pp. 3-4 (May 20, 2022).

³³ Transcript of Proceedings, p. 9 (June 21, 2022).

³⁴ *Memorandum of Law in Support of Tennessee Electric Cooperative Association's Motion to Compel Discovery From Jackson Sustainability Cooperative*, p. 4 (May 20, 2022).

responsive documents and that no document was not being produced based on an objection by JSC. 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.

In addition to JSC's failure to produce responsive documentation during the progression of this docket, numerous status conferences were held where TECA explained in great detail that there had been many conversations and meetings with JSC regarding discovery and JSC continued to maintain it had produced all responsive documents and did not mention EA Solar's auto delete policy...³⁵

As such, the Administrative Judge found that JSC had not acted in good faith when it failed to disclose the auto-delete policy and concluded that the Petitioner either knew or should have known about the existence of the auto-delete policy and had a duty to disclose the existence of the policy to the parties.³⁶ The Administrative Judge found that the motions to compel of TECA and JEA should be granted, in part.

Based on the record in this docket thus far and the arguments of the parties, the Hearing Officer [Administrative Judge] finds that JSC has failed to comply with its discovery obligations, and further, 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....³⁷

The Administrative Judge ordered JSC, CDE, and its principals and agents to perform a thorough search of its records, provide details of the search performed, and produce all documents responsive to TECA's request. The Administrative Judge further ordered JSC and CDE to answer specific interrogatories about any discarded documents. In addition, the Administrative Judge ordered JSC to pay reasonable attorney fees and expenses associated with the filing of the motions

³⁵ *Initial Order Granting, In Part and Denying, In Part Motions To Compel Filed By Tennessee Electric Cooperative Association And Jackson Energy Authority* ("Administrative Judge's Order on the Motions to Compel"), p. 13 (November 14, 2022).

³⁶ *Id.* at 14.

³⁷ *Id.* at 10-11.

to compel by TECA and JEA, the amount of which would be determined after a hearing. The Administrative Judge denied the requests of JEA for attorney fees for seeking supplemental responses to discovery requests and of TECA seeking attorney's fees associated with obtaining service of process on Northern Reliability.³⁸

JSC sought interlocutory review of the order, among several other orders issued by the Administrative Judge, before a hearing panel of the Commission shortly after JEA and TECA filed supplemental notices of their attorney fees.³⁹ Following the filing of briefs and a hearing, the Commission affirmed the Administrative Judge's decision. In doing so, the Commission found as follows:

With respect to the hearing officer's decision on the merits of the motions to compel, the panel does not find any abuse of discretion. The record here paints a perplexing picture. JSC has indicated to the intervenors in correspondence ranging from October 2021 to the end of April of 2022 that it has not withheld documents based on any objection. Yet the Petitioner never indicated that documents may have been deleted or discarded until April 29, 2022. There was no disclosure that documents were deleted due to an auto-delete policy over the course of months of back and forth between the parties. The auto-delete policy itself was not disclosed until June 2, 2022, over a year after the filing of the *Petition* and nine months after the start of discovery....

.....The omission is striking, to say the least, given the period of months and the back and forth between the parties as they conferred over discovery.⁴⁰

The Commission noted that, contrary to statements made by JSC, neither the Administrative Judge nor the Commission had yet imposed, set, or apportioned a sanction amount for legal fees, as a hearing was needed before such a determination could be made.⁴¹

³⁸ *Id.* at 15-17.

³⁹ *JSC's Motion for Interlocutory Appeal to the Full Public Utility Commission* (December 12, 2022).

⁴⁰ *Order Affirming Hearing Officer's Orders Granting, In Part, Motions to Compel, Granting Interventions, and Setting a Procedural Schedule*, pp. 33-35 (May 8, 2023).

⁴¹ *Id.* at 37.

STATUS CONFERENCE OF JUNE 1, 2023, AND JSC’S BANKRUPTCY FILING

The Commission’s order affirming the Administrative Judge’s decision on sanctions was released on May 8, 2023. A notice of a status conference scheduled for June 1, 2023, was issued on May 26, 2023, to discuss the proceedings to determine a reasonable amount of legal fees and to discuss JSC’s efforts to search for responsive documents and interrogatories pursuant to the Administrative Judge’s Order of November 14, 2022.⁴² On June 1, 2023, the day of the status conference, a notice of Chapter 7 bankruptcy filing by JSC was received by TPUC.⁴³ At the status conference, the Administrative Judge acknowledged that the filing of the bankruptcy stayed further proceedings and that she had received an email earlier in the week advising her of the bankruptcy filing.⁴⁴ JSC Attorney, Mr. Beam, did not participate in the status conference. Mr. Steve Lefkovitz, JSC’s bankruptcy counsel, indicated JSC would not go forward with the docket and was unable to conduct business and that a motion to withdraw or dismiss the petition would be drafted.⁴⁵ In light of JSC’s bankruptcy filing, counsel for TECA expressed that the Administrative Judge’s order should be amended to make Mr. Beam and other individuals involved in JSC liable for the sanctions award of legal fees.⁴⁶

JSC’S BANKRUPTCY PROCEEDING

The filing of a bankruptcy proceeding effectively stayed the proceedings at the Commission. In the bankruptcy proceeding, JSC listed the Commission as its sole creditor in the amount of \$89,000.00, although there was no record or indication of an actual financial obligation owed by JSC to the Commission.⁴⁷ In sworn testimony at the meeting of creditors, Mr. Emberling

⁴² *Notice of Telephone Status Conference* (May 26, 2023).

⁴³ *Notice of Chapter 7 Bankruptcy* (June 1, 2023).

⁴⁴ Transcript of Status Conference, p. 5 (June 1, 2023).

⁴⁵ *Id.* at 5, 12-14.

⁴⁶ *Id.* at 8-10.

⁴⁷ *TECA’s Notice of Filing Transcript of Creditors Meeting in JSC’s Bankruptcy Proceeding and Request for a Status Conference*, Exhibit B, p. 14 of 39 (July 11, 2023).

indicated JSC had no assets, no bank accounts, and no leased office space.⁴⁸ The bankruptcy attorney for JSC was paid by Mr. Emberling out of his own personal funds.⁴⁹ JSC's attorney before the Commission, Mr. Beam, had apparently not been paid at all.⁵⁰

On July 11, 2023, TECA filed the *Notice of Filing of Creditors Meeting Transcript in JSC's Bankruptcy Proceeding and Request for a Status Conference* in which TECA provided a copy of the Final Decree in the bankruptcy proceedings.⁵¹ The Final Decree, dated July 5, 2023, indicated the bankruptcy proceedings were at an end.⁵² TECA requested a status conference to address JSC's intention to withdraw the petition and to finalize the sanction amount of attorney fees.

STATUS CONFERENCE OF AUGUST 11, 2023

Following a notice of a telephone status conference issued on August 3, 2023, a status conference was held to determine a number of matters, including the setting of a procedural schedule for a hearing to establish the amount of legal fees payable to TECA and JEA. Mr. Beam did not participate in the status conference. Mr. Lefkovitz, the bankruptcy counsel for JSC, indicated JSC had not been dissolved yet, and he would be drafting a motion to dismiss the petition with prejudice.⁵³ With respect to the need for a hearing, TECA asserted the time to contest the fee amounts had passed and, thus, waived. JEA joined in with TECA's argument.⁵⁴ Relying on the Commission's order on appeal mandating a hearing on the reasonableness of the fees, the Administrative Judge pushed forward with setting a procedural schedule requiring briefs on September 1st, reply briefs on September 8th, and ending with a hearing on September 12, 2023.⁵⁵

⁴⁸ *Id.* at Exhibit A, pp. 7-10.

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* at 11-12

⁵¹ *Notice of Filing of Creditors Meeting Transcript in JSC's Bankruptcy Proceeding and Request for a Status Conference*, p. 2 (July 5, 2023).

⁵² *Id.* at Exhibit C.

⁵³ Transcript of Status Conference, pp. 13-14 (August 11, 2023).

⁵⁴ *Id.* at 7-9.

⁵⁵ *Id.* at 19-23; *Order Establishing Briefing and Hearing Procedural Schedule* (September 8, 2023).

MOTION TO DISMISS PETITION WITH PREJUDICE

On August 14, 2023, JSC filed the *Applicant's Motion to Dismiss Petition with Prejudice*, which was signed by JSC's bankruptcy attorney, Mr. Steven L. Lefkovitz.⁵⁶ TECA filed a response indicating it did not oppose JSC's motion to the extent the motion was not granted until the claim for reasonable attorney fees was resolved.⁵⁷

STATUS CONFERENCE OF SEPTEMBER 8, 2023

Pursuant to the procedural schedule, both TECA and JEA filed briefs on September 1, 2023. In a letter to the Administrative Judge on September 5, 2023, Mr. Beam indicated that Mr. Lefkovitz, JSC's bankruptcy counsel, had not consulted with Mr. Beam with respect to his conflicts with the procedural schedule. Mr. Beam stated he had a conflict with the hearing date set by the Administrative Judge for September 12, 2023. In addition, Mr. Beam stated that he and Mr. Emberling needed additional time to determine whether they needed independent counsel.⁵⁸

At a specially called telephone status conference on September 8, 2023, the Administrative Judge stated she had received emails from the other parties that they did not object to Mr. Beam's request for an extension of time, as long as the hearing was conducted within thirty (30) days.⁵⁹ The parties agreed to reply briefs being filed on October 2, 2023, with the hearing following on October 17, 2023. Mr. Beam believed the proposed dates would work for Mr. Emberling, although Mr. Beam said he had recommended to Mr. Emberling that he should obtain independent counsel.⁶⁰

⁵⁶ *Applicant's Motion to Dismiss Petition with Prejudice* (August 14, 2023).

⁵⁷ *TECA's Response to JSC's Motion to Dismiss Petition with Prejudice* (August 21, 2023).

⁵⁸ *Letter to Monica Smith-Ashford, Hearing Officer, from John Beam & Equitus Law Firm Requesting an Extension of Time* (September 5, 2023).

⁵⁹ *Transcript of Status Conference*, p. 6 (September 8, 2023).

⁶⁰ *Id.* at 11-12.

STATUS CONFERENCE OF OCTOBER 5, 2023

While Mr. Beam filed a reply brief on October 2, 2023, Mr. Emberling filed a request with the Administrative Judge the same day asking for an extension of time to obtain independent counsel because he only recently learned of the need for independent counsel on September 25, 2023.⁶¹ Mr. Emberling also included a sworn affidavit that stated he was cautious about what documents and emails were deleted and that all documents he deemed relevant were turned over the Intervenor.⁶² Mr. Emberling asserted the auto-delete email policy did not delete any relevant documents and documents were not withheld despite JSC's objections in discovery.⁶³

A status conference was organized shortly thereafter and took place on October 5, 2023, wherein the Administrative Judge granted Mr. Emberling's request for additional time.⁶⁴ During the status conference, the Administrative Judge again amended the procedural schedule, to allow Mr. Emberling and his newly-acquired counsel to file a brief on October 30, 2023, to be followed by a hearing on the reasonableness of fees on November 30, 2023.⁶⁵

POSITION OF TECA

TECA previously filed a fee claim of \$67,843.95 for fees related to the filing of its motion to compel.⁶⁶ In TECA's brief filed on September 1, 2023, TECA contended that JSC's discovery misconduct is well documented. TECA argued that JSC's move to declare bankruptcy is a transparent attempt to avoid paying the sanction.⁶⁷ TECA asserted the legal fees it sought should

⁶¹ *Letter to Monica Smith-Ashford, Hearing Officer from Dennis Emberling Regarding an Extension to Obtain Independent Counsel, Affidavit of Dennis Emberling*, (October 2, 2023).

⁶² *Id.* at Affidavit of Dennis Emberling, p. 4 (October 2, 2023).

⁶³ *Id.*

⁶⁴ *Order Amending Briefing and Hearing Procedural Schedule* (October 27, 2023).

⁶⁵ *Id.*

⁶⁶ *TECA's Memorandum Supporting the Award of Reasonable Attorney Fees from JSC*, pp. 1-2 (November 23, 2022).

⁶⁷ *TECA's Memorandum Supporting Award of Reasonable Attorney Fees*, p. 3 (September 1, 2023).

be jointly and severally liable as to Mr. Emberling and Mr. Beam, as they are responsible for the discovery misconduct.⁶⁸

TECA asserted that the full amount of fees sought is reasonable and further, that JSC had waived its right to contest the amount. JSC did not object to the amount of fees prior to December 12, 2022. TECA observed that JSC seemingly accepted the full sanctions amount when it argued that the Administrative Judge had in fact already sanctioned it for \$90,000.00, and in bankruptcy listed the Commission as a creditor in the amount of \$89,000.00.⁶⁹ As such, TECA argued the reasonableness of the amount had been waived.

According to TECA, Rule 37 of the Tennessee Rules of Civil Procedure provides ample authority to impose individual liability for the legal fees on Mr. Beam and Mr. Emberling. TECA argued that Mr. Beam engaged in conduct that was intended to frustrate TECA's efforts to obtain discovery, including TECA's efforts to obtain discovery from Northern Reliability.⁷⁰ With respect to Mr. Emberling, TECA argued while Mr. Emberling is not technically a party, the Administrative Judge should pierce the corporate veil and hold Mr. Emberling liable.⁷¹ TECA asserted that the record is clear that JSC was an under-funded sham company whose only purpose was to allow Mr. Emberling and his partners to operate the solar project without regulatory oversight.⁷² Based on the record at the Commission and before the bankruptcy court, TECA asserted several of the facts necessary to pierce the corporate veil were present and that imposing liability on Mr. Emberling is necessary to accomplish justice.⁷³

⁶⁸ *Id.* at 5-6.

⁶⁹ *Id.* at 6-8.

⁷⁰ *Id.* at 9-10.

⁷¹ *Id.* at 12.

⁷² *Id.*

⁷³ *Id.* at 12-13.

POSITION OF JEA

Previously, JEA provided documents indicating it sought legal fees of \$12,373.00.⁷⁴ JEA argued that JSC did not timely respond and object to the attorney fees request and thus waived the issue.⁷⁵ With respect to liability for the fees, JEA indicated that the Administrative Judge found JSC, Mr. Emberling, and JSC's counsel responsible for actions that were the basis for the sanctions. JEA asserted there is ample authority authorizing a claim against a company officer or official when that person is responsible for acts that lead to attorney fees awards.

POSITION OF JSC

In a filing signed by JSC's bankruptcy attorney, Mr. Lefkovitz, JSC asserted, in summary, that if JSC was assessed with fees and expenses, the assessment would be non-collectible.⁷⁶ JSC stated it took no position, positive or negative, regarding the amount of fees to be awarded to TECA and JEA because there are no assets for distribution.⁷⁷ JSC stated it is essentially "a dormant, non-functioning corporation."⁷⁸

POSITION OF MR. EMBERLING

In a filing on October 2, 2023, Mr. Emberling submitted a six-page affidavit in which he recounted his involvement spearheading the solar project, his actions during discovery, and a claim that only three (3) documents were not turned over that could not be found.⁷⁹ Mr. Emberling provided his own analysis and stated that all JSC emails had been provided to the Intervenor. Mr. Emberling claimed he became more "cautious about moving anything to trash I thought was

⁷⁴ *JEAs Notice of Filing of its Request for Legal Fees*, Ex. A (November 23, 2023).

⁷⁵ *Brief in Support of Jackson Energy Authority's Claim for Attorneys' Fees*, p. 1 (September 1, 2023).

⁷⁶ *Applicant's Response Argument to Motion to Assess Fees and Expenses*, p. 5 (September 29, 2023).

⁷⁷ Transcript of Hearing, pp. 21-22 (November 30, 2023).

⁷⁸ *Id.* at 22.

⁷⁹ *Letter to Monica Smith-Ashford, Hearing Officer from Dennis Emberling Regarding an Extension to Obtain Independent Counsel, Affidavit of Dennis Emberling*, (October 2, 2023).

important to the PUC case.”⁸⁰ Mr. Emberling went on to state that he “had no obligation to turn over items to them that had no relevance to the petition.”⁸¹

On October 30, 2023, counsel on behalf of Mr. Emberling, submitted a motion to dismiss asserting the Commission had a lack of subject-matter jurisdiction, lacked personal jurisdiction over Mr. Emberling, and that Mr. Emberling had not been properly served with process.⁸² No testimony or brief opposing the reasonableness of the attorney fees was submitted. The parties presented oral arguments on the Emberling motion to dismiss on November 30, 2023, prior to the hearing on the amount of the attorney fee award. After oral arguments, the Administrative Judge denied the Emberling motion to dismiss finding that the Commission has jurisdiction over the JSC petition and the related discovery issues and that the issue concerning sufficiency of notice is controlled by the Uniform Administrative Procedures Act, rather than the Rules of Civil Procedure. The Administrative Judge but did not preclude Emberling from presenting the arguments during the hearing on the attorney fees.

POSITION OF MR. BEAM AND EQUITUS LAW ALLIANCE

On October 2, 2023, Mr. Beam and Equitus Law Alliance, PLLC, submitted a response to the respective motions for sanctions of TECA and JEA and a sworn declaration. A number of arguments were put forth, including assertions that Mr. Beam, acting then as counsel for JSC, fully cooperated in the discovery process and that there was no evidence showing he advised his client to withhold or otherwise delete documents.⁸³ In a sworn declaration, Mr. Beam stated that “[a]fter June 2, 2021 all members of Community Development Enterprises – Jackson – I were requested

⁸⁰ *Id.* at 4.

⁸¹ *Id.*

⁸² *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)* (October 30, 2023).

⁸³ *Response by John Beam and Equitus Law Alliance, PLLC to the Motions for Sanctions Filed by TECA and JEA*, pp. 10-12 (October 2, 2023).

to retain all email communications. Other than privileged communications, all communications of the third-party solar developer were produced to TECA and JEA in discovery.”⁸⁴

Mr. Beam asserted that the thirty-day auto-delete protocol set up in Microsoft Outlook was abandoned “when litigation became apparent.”⁸⁵ Nevertheless, Mr. Beam claimed that regardless of when the auto-delete protocol was suspended, there was no evidence to indicate he was culpable in causing the destruction of emails through third-parties that are not parties to this docket.⁸⁶

Mr. Beam sought to withdraw as counsel for JSC, a request that was subsequently granted due, in part, to JSC being represented in filings before the Commission by Steven Lefkovitz.⁸⁷ On November 23, 2023, Mr. Beam, submitted pre-filed testimony shortly after being granted formal permission to withdraw as counsel for JSC. Mr. Beam’s testimony summarized and recast the development of the *Petition* and the nature of the proceeding. Mr. Beam testified that when the Intervenor sought discovery from Northern Reliability, he believed that TVA, TECA, and JEA were seeking confidential trade secrets from Northern Reliability for their own use.⁸⁸

Mr. Beam testified that the Intervenor used information obtained from Northern Reliability that is not relevant to the *Petition* to “weaponize the discovery process.”⁸⁹ Mr. Beam went on to explain his communications with Northern Reliability, testifying he informed Northern Reliability of his concern that the Intervenor were using a subpoena improperly and sought a phone call with Northern Reliability’s counsel to discuss “protecting Northern Reliability from

⁸⁴ *Declaration of John Beam*, p. 2 (October 2, 2023).

⁸⁵ *Response by John Beam and Equitus Law Alliance, PLLC to the Motions for Sanctions Filed by TECA and JEA*, p. 13 (October 2, 2023).

⁸⁶ *Id.*

⁸⁷ *Order Granting Motion for Counsel to Withdraw*, pp. 1-2 (November 21, 2023).

⁸⁸ John Beam, III, Pre-Filed Direct Testimony of John Beam and Equitus Law Alliance, PLLC, pp. 3-4 (November 20, 2023).

⁸⁹ *Id.* at 4-5.

potential piracy.”⁹⁰ After revisions to the protective order, Mr. Beam testified he encouraged compliance with the subpoena issued by TECA.⁹¹

With respect to discovery with JSC, Mr. Beam testified that there were no delays in responses, no refusals to provide documents, and all documents in his possession that were not privileged were turned over to the Intervenors. Mr. Beam testified he did not hold back or delete any emails given to him by JSC and CDE.⁹² On April 21, 2022, when TECA requested in writing an explanation for why certain documents produced by Northern Reliability were not produced by JSC, Mr. Beam responded with a letter on April 29, 2022, explaining that documents mentioned by TECA pertained to a solar project for Lane College and a prospective contractor, iSUN, for Northern Reliability.⁹³ Mr. Beam emphasized that all emails provided to him by JSC and CDE were produced by Mr. Beam in discovery.⁹⁴

With respect to the reasonableness of the fees sought by TECA and JEA, Mr. Beam opined that TECA had not met its burden of proof as TECA had not submitted its invoices into the record. Mr. Beam testified that any perceived deficiency was not caused by his efforts as JSC’s attorney.⁹⁵ No other party offered pre-filed testimony.

HEARING

The Hearing was held before the Administrative Judge assigned to this docket on November 30, 2023, as noticed on November 17, 2023. Participating in the Hearing were:

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.

⁹⁰ *Id.* at 5.

⁹¹ *Id.* at 6.

⁹² *Id.* at 7.

⁹³ *Id.* at 8-9.

⁹⁴ *Id.* at 10.

⁹⁵ *Id.* at 11.

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.

Mr. Beam provided testimony and was subject to cross-examination. The parties presented oral argument before the Administrative Judge. Following argument, the Administrative Judge took the matter under advisement.

FINDINGS AND CONCLUSIONS

While the purpose of the hearing in this matter was to determine the amount of the legal fees that should be awarded as sanctions and the apportionment thereof, additional facts came to light that should be memorialized for the record. The primary defense raised by JSC after the filing of the motions to compel was a claim that the emails and documents were deleted as the result of an automatic delete function within the document retention policy of E A Solar. E A Solar is the manager of CDE, and JSC relied upon EA Solar for basic functionality. Mr. Emberling, who as previously noted is CEO of both JSC and CDE, is also CEO of E A Solar.⁹⁶

JSC claimed that the document retention policy of E A Solar provides in part that the “e-mail software is configured so that all emails are ‘permanently deleted after 30 days...’”⁹⁷ Rule 37.06 of the Tennessee Rules of Civil Procedure would excuse failing to provide electronically

⁹⁶ *Response by JSC to the Motion to Compel Filed by JEA*, p. 10 (June 2, 2022).

⁹⁷ *Id.*

stored information lost as a result of the routine, good-faith, operation of an electronic information system. When asked by counsel for JEA at the hearing on November 30, 2023, when he learned of the “auto-delete” policy, Mr. Beam testified to the following:

Not until discovery had closed and - - and I questioned Mr. Emberling about why has Gregg Noble produced emails between you guys and we haven’t produced in discovery. And - - and that’s when he explained that, well, if they’re - - if they’re irrelevant, I put them in a trash bin, and my trash bin gets emptied every 30 days.
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According to Mr. Beam’s testimony, the mechanics of the “auto-delete” policy was anything but automatic. It apparently required Mr. Emberling to make a decision, then place the email in the trash that would be deleted after thirty days. Thus, the choice to delete emails and documents was not the function of an automatic or systematic deletion, but rather was a subjective determination entirely in the hands of Mr. Emberling. It should be noted that Mr. Beam’s testimony differs little from a sworn affidavit Mr. Emberling provided that indicates Mr. Emberling only put documents in the trash that he thought “were not worth keeping.”⁹⁹ The same affidavit states Mr. Emberling was “cautious” with preserving emails after the filing of the petition in this matter.¹⁰⁰ Although JSC’s attorney was telling the Intervenors that no documents were withheld on the basis of an objection, such as relevancy, Mr. Emberling apparently believed he could go on deciding what documents to delete because he “had no obligation to turn over items to them that had no relevance to the petition.”¹⁰¹

To be clear, the hearing was not convened for the purpose of relitigating the issue, as the Administrative Judge and the Commission already concluded that emails were deleted *after*

⁹⁸ Transcript of Hearing, p. 69, lines 10-16 (November 30, 2023).

⁹⁹ *Letter to Monica Smith-Ashford, Hearing Officer from Dennis Emberling Regarding an Extension to Obtain Independent Counsel, Affidavit of Dennis Emberling* (October 2, 2023).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

discovery commenced that pertained to the solar project and were relevant.¹⁰² Various examples obtained from Northern Reliability attest to this fact. It is unknown what other documents relevant to the proceeding were lost. Mr. Beam testified that the Intervenors “weaponized” the discovery process to stop a solar energy proposal, a point Mr. Emberling echoes. Yet, the record is clear that while JSC was telling Intervenors it was not withholding any document on the basis of any objections, such as relevancy, Mr. Emberling was simultaneously deleting emails and documents he apparently deemed irrelevant.¹⁰³ JSC’s lack of candor during discovery in this docket is disturbing and unprecedented at the Commission.

With respect to the reasonableness of the legal fees that may be collected as a sanction, the Administrative Judge finds that the right to contest the reasonableness of the fees was not previously waived by JSC. The appeal of the *Administrative Judge’s Order on the Motions to Compel* to the Commission tolled the time for objections to the reasonableness of the fees. Moreover, in affirming the Administrative Judge’s Order imposing sanctions, the Commission explicitly directed a hearing on the reasonableness of the fees as is required under Rule 37 of the Tennessee Rules of Civil Procedure.

DETERMINATION OF REASONABLE ATTORNEY FEES

When determining the amount of reasonable attorney fees, there is a non-exhaustive list of factors that should be considered based on the Tennessee Rules of Professional Conduct (“TRPC”). They are as follows:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

¹⁰² *Order Affirming Hearing Officer’s Orders Granting, In Part, Motions to Compel, Granting Interventions, and Setting a Procedural Schedule*, pp. 33-34 (May 8, 2023).

¹⁰³ *Id.*

- (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.¹⁰⁴

It is not necessary to evaluate all the factors in every situation because all factors may not be relevant to a particular set of facts, however, “[an] attorney's time and labor will always be relevant in cases where the court is asked to determine a reasonable fee.”¹⁰⁵ The Supreme Court in *Wright v. Wright* acknowledged the discretion of the trial court or trier of fact in determining the amount of reasonable attorney fees based on evidence and its experience.¹⁰⁶ In addition, the Court pointed out that “Tennessee has ‘no fixed mathematical rule’ for determining what a reasonable fee is.”

¹⁰⁴ See *Robinson v. City of Clarksville*, 673 S.W.3d 556, 589–90 (Tenn. Ct. App. 2023), *appeal denied* (May 10, 2023) (citing Tenn. R. Sup. Ct. 8, RPC § 1.5).

¹⁰⁵ See *Smith v. All Nations Church of God*, No. W2021-00846-COA-R3-CV, 2022 WL 4492199, at *4 (Tenn. Ct. App. Sept. 28, 2022) (quoting *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 181 (Tenn. 2011)).

¹⁰⁶ *Wright* at 176 (quoting *Killingsworth v. Ted Russell Ford, Inc.*, 104 S.W.3d 530, 534 (Tenn.Ct.App.2002)).

JEA’S REASONABLE ATTORNEY FEES AWARD

In *TECA’s Memo for Fees*, TECA states TRPC Factors 1, 3, 4, 6, and 7 should apply and that the remaining factors are inapplicable to this proceeding.

The Administrative Judge agrees and finds that TRPC Factors 1, 3, 4, 6, and 7 apply to JEA. In the *Affidavit of Larry L. Cash* attached as Exhibit B to JEA’s *Supplemental Notice of Filing for Attorney Fees*, Mr. Cash maintains that:

Considering, among other factors, the time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the services, the fees, customarily charged in the locality for similar services, as well as the experience, reputation, and ability of the lawyers performing the services, the attorneys’ fees detailed in Exhibit A are exceedingly reasonable and necessary for the work performed for JEA by attorneys at Miller & Martin PLLC.

Mr. Cash avers that he represents JEA in this matter and has practiced law since October 1981, and Mark Smith, another Miller & Martin attorney who is primarily responsible for representing JEA, has practiced law since 1994. Further, through a search of the Commission dockets, the Administrative Judge verified a long-standing professional relationship between the law firm employing Mr. Cash, Miller & Martin, and JEA. Dating back to 2003, there are Commission dockets where Mark Smith of Miller & Martin has represented JEA.¹⁰⁷ TECA provides a more detailed analysis of each factor, but the rationale for the reasonableness of the fees apply to JEA as well. Throughout the proceedings, TECA and JEA have worked together as Intervenor with common interests and divided the workload required of this docket. While JEA did not specifically provide a detailed analysis of the TRPC Factors, it is not required to do so. The Administrative Judge concludes that the rationale provided by TECA to justify the reasonableness of its hourly rate and the attorney fees submitted for Factors 1, 3, 4, 6, and 7 apply to JEA as well.

¹⁰⁷ See *In re: Application of Jackson Energy Authority for a Certificate of Convenience and Necessity*, Docket No. 03-00438, *Application for a Certificate to Provide Telecommunications Services as a Carriers’ Carrier* (July 15, 2003).

In addition to the TRPC Factors, the Administrative Judge also considers the ruling made on the *Motions to Compel*. The award of attorney fees was specifically limited to reasonable fees and expenses incurred related to the filing of its Motion to Compel. The Administrative Judge rejected JEA's request for attorney fees related to seeking Supplemental Responses to Discovery Requests from JSC. The Administrative Judge finds the reasonable attorney fees related to the filing of the Motions to Compel would include the following activities, although this list is not exhaustive: review of documents and research performed in preparation for drafting the Motions to Compel, drafting and review of the Motions, conferring with colleagues regarding the Motions, preparation for the status conference regarding oral arguments on the Motions to Compel, preparation for oral arguments, the appearance for oral arguments on the Motions to Compel. Therefore, when evaluating the fees submitted by JEA, the Administrative Judge removed any fees that did not pertain to these types of activities and were related to obtaining discovery. Based on the Administrative Judge's analysis of TRPC Factors 1, 3, 4, 6, and 7 and the ruling made on the Motions to Compel, the Administrative Judge concludes JEA should be awarded reasonable attorney fees in the amount of **\$8,493.00**.

TECA'S REASONABLE ATTORNEY FEES AWARD

In *TECA's Memo for Fees*, TECA provides a detailed analysis of TRPC Factors 1, 3, 4, 6, and 7 to justify the reasonableness of the hourly rates of its attorneys and of the fees submitted.

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.

According to TECA, 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, if approved, will be completely exempt from all

regulatory oversight by the Commission.”¹⁰⁸ TECA argues that some of the issues raised by JSC are fact intensive and require very specific information, such as whether JSC indeed qualifies as an electric cooperative exempt from Commission regulation. In *TECA’s Memo for Fees*, TECA sets forth the many issues it had with trying to obtain responsive discovery from JSC. The Administrative Judge is well aware of the issues throughout the discovery process which is why she found that JSC had committed discovery abuses and awarded sanctions to TECA and JEA. TECA points out that due to 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.”¹⁰⁹

While this issue is indeed complex and a matter of first impression before the Commission, the Commission never reached the merits of the *Petition* because the docket was stymied during the discovery phase. Admittedly, TECA did a lot of research regarding the issues in the *Petition*, but these efforts were not undertaken solely for the purpose of filing the Motions to Compel. The knowledge obtained was developed over the course of the two years that this docket has progressed and perhaps some of this knowledge was used in *TECA’s Motion to Compel*. However, the primary issue in the Motion to Compel were not the complex electric cooperative issues but were the discovery abuses and attempts to obtain discovery from JSC. TECA acknowledges this in *TECA’s Motion to Compel* stating:

Unlike a typical motion to compel, where the judge is asked to determine whether particular objections are valid or to rule upon a narrow dispute over a particular class of documents, the issue here is whether the Petitioner—who has come to the Commission seeking a broad exemption from regulation—may be excused from making basic discovery efforts.¹¹⁰

¹⁰⁸ *TECA’s Memo for Fees*, p. 4 (November 23, 2022).

¹⁰⁹ *Id.* at 5.

¹¹⁰ *TECA’s Motion to Compel*, p. 13 (May 20, 2022).

The Administrative Judge finds that despite TECA somewhat overstating the complexity of the Motion to Compel issues, TECA clearly put in a lot of work to show the discovery abuses and this was no minor undertaking. TECA had to review and analyze many documents in preparation for drafting its Motion to Compel. Therefore, the Administrative Judge concludes that the facts of this docket justify the reasonableness of TECA's fees under TRPC Factor 1.

Factor 3: The fee customarily charged in the locality for similar legal services.

TECA argues that when determining a reasonable hourly rate when awarding attorney fees, it is appropriate to rely on the attorney's customary billing rate as long as the billing rate falls "within the range of reasonableness based for litigators of [counsel's] level of skill and experience in the community."¹¹¹ Further, TECA maintains that the hourly rate of an attorney should only be reduced in rare circumstances.¹¹² TECA states that Bass, Berry & Sims is a well-established law firm with over 300 attorneys and four offices in Tennessee and Washington D.C. All of the attorneys who represented TECA in this matter worked in the Nashville office of Bass, Berry & Sims. According to TECA, it is a longtime client of Bass, Berry & Sims and has been given a preferred rate for legal services, which discounts the attorneys' hourly rate by 20%.¹¹³

The Administrative Judge will not question or reduce the hourly rates submitted by the TECA attorneys. The Administrative Judge finds that the hourly rates are not out of line with the hourly rates charged by attorneys working for firms similar to Bass, Berry & Sims and by attorneys of the experience and caliber of those representing TECA in this matter. In addition, the TECA attorneys made an effort to have the attorneys with the lowest hourly rate do much more work on

¹¹¹ *TECA Fee Memo*, p. 6 (November 23, 2022) (quoting *Dowling v. Litton Loan Servicing LP*, 320 Fed. Appx. 442, 447 (6th Cir. 2009)).

¹¹² *Id.*

¹¹³ *Id.* at 6-7.

the docket. For the foregoing reasons, the Administrative Judge concludes that the hourly rates submitted by TECA to be reasonable.

Factor 4: The Amount Involved and the Results Obtained.

According to TECA, if JSC is granted the relief sought in its *Petition*, it may result in “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.”¹¹⁴ TECA maintains it is uncertain of the potential consequences of the “proliferation of sham cooperatives” but is “deeply concerned that it will diminish the role and reputation of true electric cooperatives, which exist to serve all of the customers in their respective geographic territories and not merely to ‘cherry-pick’ customers as JSC proposes to do.”¹¹⁵ TECA argues that its successful results on virtually all of its arguments in its Motion to Compel justify an award of attorney fees equal to the full amount of attorney fees and expenses incurred by TECA in obtaining those results.¹¹⁶

The Administrative Judge agrees with TECA that the stakes were high for TECA and the other Intervenor regarding the outcome of JSC’s *Petition* and its precedential effect on electric cooperatives and the regulation of electricity by the Commission in the State of Tennessee. In addition, the Administrative Judge also finds that *TECA’s Motion to Compel* was primarily granted and the Administrative Judge only refrained from allowing attorney fees and expenses related to the issuing a subpoena on Northern Reliability in Vermont. The Administrative Judge limited TECA’s award of attorney fees and expenses to the filing of the *Motion to Compel*.

¹¹⁴ *Id.* at 7.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 8.

Factor 6: The nature and length of the professional relationship with the client.

TECA asserts Bass, Berry, & Sims has regularly served as legal counsel to TECA for over twenty-seven years.¹¹⁷ Therefore, TECA maintains the firm has “a good understanding of the client, electric cooperatives, and the regulatory regime governing the generation and distribution of electricity in Tennessee.”¹¹⁸ In addition, TECA argues that any potential savings from hiring a lower cost attorney would have been offset by the time necessary for such attorney to gain expertise about TECA, its members, the electric cooperative industry, and the issues in this docket. The Administrative Judge finds that Bass, Berry & Sims has had a longstanding professional relationship representing TECA and based on this history, TECA received a discounted rate on legal fees. The Administrative Judge concludes this factor supports TECA’s request for its attorney fees.

Factor 7: The experience, reputation, and ability of the lawyer or lawyers performing the services.

TECA argues that Attorneys Phillips, Sinback, and Hogan have a combined fifty-two years of legal experience handling complex litigation. The Administrative Judge certainly does not question the experience and caliber of the legal knowledge exhibited by TECA. It is apparent from the legal analysis contained within the filings and the oral arguments in this docket that the attorneys are very experienced litigators and put a lot of time and effort in this docket. Therefore, the Administrative Judge concludes that this factor also supports TECA’s request for attorney fees.

As previously stated, the attorney fees must comply with the parameters of the ruling on the Motions to Compel. In *TECA’s Motion to Compel*, in addition to other relief, it sought attorney fees and expenses related to serving the subpoena on Northern Reliability. TECA filed a legal

¹¹⁷ *Id.*

¹¹⁸ *Id.*

memorandum and affidavit of Brant Phillips in support of its legal fees and expenses on November 23, 2022, which was supplemented on September 1, 2023. During the Hearing to establish the amount of fees to be paid, the Administrative Judge requested that TECA file a detailed spreadsheet of the legal bills that it sought to be paid pursuant to the Administrative Judge's Order for an in-camera review. The Administrative Judge received TECA's detailed billing for review on January 4, 2024.¹¹⁹ After reviewing TECA's detailed spreadsheet of attorney fees, the Administrative Judge eliminated any fees that dealt with obtaining documents from Northern Reliability. The Administrative Judge allowed fees associated with the review of the documents from Northern Reliability because the document review was necessary to prepare the Motion to Compel. Based on the forgoing analysis, including analysis of the TRPC Factors, the Administrative Judge concludes TECA should be awarded reasonable attorney fees in the amount of **\$59,002.50**.

JOINT AND SEVERAL LIABILITY OF BEAM, EQUITUS LAW ALLIANCE, AND DENNIS EMBERLING

With respect to Mr. Emberling's individual liability, the intervenors are in essence asking the Administrative Judge to pierce the corporate veil. There is a presumption that a corporation is a distinct legal entity, wholly separate and apart from its shareholders, officers, directors, or affiliated corporations.¹²⁰ Conditions under which a corporate entity may be disregarded vary according to the circumstances in the case. In appropriate cases, the separate identity of a corporation may be disregarded, and the individuals owning all its stock and assets may be treated as identical to the corporation.¹²¹ Piercing the corporate veil is appropriate when the corporation is without funds to pay the debt and the lack of funds is due to misconduct on the part of the officers

¹¹⁹ TECA sent the filing by FedEx on December 7, 2023, but it was misplaced in the mail and not recovered and received by the Commission until January 4, 2024.

¹²⁰ *Edmunds v. Delta Partners, LLC, et al*, 403 W.W, 3d 812, 828 (Tenn.Ct.App. 2012) (cert.denied).

¹²¹ *Id.*

and directors. In such circumstances, courts may pierce the corporate veil to impose liability against a controlling shareholder who has used the corporate entity to avoid a legal obligation.¹²² However, courts in Tennessee have been instructed that the doctrine of piecing the corporate veil should be applied with great caution and not precipitately, as there is a presumption of corporate regularity.¹²³

There are certainly facts and elements in the record that could be the basis of piercing the corporate veil. In pre-filed testimony submitted in support of the *Petition*, Mr. Dennis Emberling identified himself as the President of JSC and described the proposed Solar Facility.¹²⁴ Mr. Emberling stated that the project is expected to cost \$67 million dollars and all equipment, installation, and construction costs will be financed by CDE.¹²⁵ In his pre-filed testimony, Mr. Emberling identified himself as both the President of JSC and also as the regulatory and service contact of CDE, the entity expected to finance the project.¹²⁶ CDE is a joint venture with three venture partners, E A Solar, LLC, Hunt Solar, LLC, and SynEnergy, Inc.¹²⁷ According to documents produced in discovery and admitted elsewhere, Mr. Emberling is the CEO of CDE.¹²⁸ In an affidavit submitted on June 2, 2022, Mr. Emberling also identified himself as the CEO of E A Solar.¹²⁹ The entire project was based on JSC obtaining capital and leasing equipment from CDE.¹³⁰

¹²² *Id.*

¹²³ *Id.* at 829.

¹²⁴ Dennis Emberling, Pre-Filed Direct Testimony, pp. 2-3 (May 24, 2021).

¹²⁵ *Id.* at 6.

¹²⁶ *Id.* at 1, 8.

¹²⁷ *Petitioner's Responses to Tennessee Electric Cooperative Association's Interrogatories And Requests for Production of Documents*, p. 27 (September 27, 2021).

¹²⁸ *Response of SynEnergy, Inc. to Subpoena of Tennessee Electric Cooperative Association*, SYNCONF000008 (April 5, 2021)

¹²⁹ *Response By Jackson Sustainability Cooperative To The Motions to Compel Filed By The Tennessee Electric Cooperative Association*, Affidavit of Dennis Emberling (June 2, 2022).

¹³⁰ Dennis Emberling, Pre-Filed Direct Testimony, p. 7 (May 24, 2021).

JSC itself has no members. There is only Mr. Emberling. JSC filed for bankruptcy shortly after the Commission affirmed a series of rulings, among which was a finding that sanctions were appropriate for the legal fees incurred with the filings of motions to compel by TECA and JEA. Although no sanction amount had been set by the Commission, JSC's sole debt reported to the bankruptcy court can only be considered a pre-emptive estimate of what sanction the Administrative Judge might impose. In sworn testimony at the meeting of creditors, Mr. Emberling indicated JSC had no assets, no bank accounts, and no leased office space.¹³¹ The bankruptcy attorney for JSC was paid by Mr. Emberling out of his own personal funds.¹³²

Based on the record, Mr. Emberling has been the primary actor in seeking to make JSC's proposal a reality while wearing the different hats of several corporate entities with a financial interest in the venture. With respect to the destruction or withholding of documents sought in discovery, there is testimony in the record that Mr. Emberling alone was responsible for the actual determination as to whether a document would be deleted rather than provided in discovery.¹³³ All roads in this matter lead to Mr. Emberling.

Despite a well-documented record, the Administrative Judge can find no compelling authority which would grant an administrative agency the legal basis to pierce the corporate veil to impose sanctions on an individual that is not technically a party or deponent. While the General Assembly has been explicit in granting administrative agencies the authority to effect discovery pursuant to the Tennessee Rules of Civil Procedure, it has not explicitly granted the Commission the authority to pierce the corporate veil in the context of this proceeding. This is not to say the Commission's ratemaking and plenary authority over public utilities can be curbed or dodged by

¹³¹ *Id.* at Exhibit A, pp. 7-10.

¹³² *Id.* at 8.

¹³³ Transcript of Hearing, p. 69, lines 10-16 (November 30, 2023).

the shuffling of corporate charters or affiliate and subsidiary transactions or non-regulated affiliates.¹³⁴ However, any administrative agency operating under the contested case procedures of the Uniform Administrative Procedures Act (“U.A.P.A.”) must be mindful of the General Assembly’s 2022 enactment of Tenn. Code Ann. § 4-5-326 which provides:

In interpreting a state statute or rule, a court presiding over the appeal of a judgment in a contested case shall not defer to a state agency's interpretation of the statute or rule and shall interpret the statute or rule de novo. After applying all customary tools of interpretation, the court shall resolve any remaining ambiguity against increased agency authority.

The Intervenor has failed to cite any compelling authority that would support an administrative agency having the authority to pierce the corporate veil for purposes of imposing individual liability for sanctions on a person that is not technically a party to the contested case proceeding.

TECA and JEA have argued, that aside from piercing the corporate veil, Rule 37 of the Tennessee Rules of Civil Procedure would allow the Commission to sanction Mr. Emberling personally for an award of legal fees. Among other cases, both Intervenor cited *Johnson v. Kakvand*¹³⁵, a federal 7th Circuit case affirming an award of attorney fees for discovery misconduct pursuant to Rule 37 of the Federal Rules of Civil Procedure. The 7th Circuit noted that it was not necessary to pierce the corporate veil, but rather that the defendant’s conduct in discovery justified sanctions. In *Kakvand*, the trial court sanctioned the president of a corporation for discovery abuse. While there are similarities here, the fact remains that the corporate president sanctioned in *Kakvand* was a named party and defendant in the proceeding. As such, the Administrative Judge declines to adopt and expand any holding regarding the application of the Federal Rules of Civil

¹³⁴ *Tennessee Public Utility Commission v. Nashville Gas Company*, 551 S.W. 2d 315, 319-320 (Tenn. 1977); *BellSouth Advertising & Publishing v. Tennessee Regulatory Authority*, 79 S.W. 3d 506, 515-517 (Tenn. 2002); *Laurel Hills Condominiums Property Owners’ Association v. Tennessee Regulatory Authority*, 2014 WL 1494126*5 (Tenn.Ct.App.2014) (cert.denied).

¹³⁵ *Johnson v. Kakvand*, 192 F.3d 656 (7th Cir. 1999).

Procedure, but rather looks to the plain language of Rule 37 of the Tennessee Rules of Civil Procedure, which provides:

If the motion is granted, the court shall, after opportunity for hearing, 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, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. (emphasis added).¹³⁶

The Administrative Judge declines at this time to find the scope of Rule 37 would consider Mr. Emberling a “party” or “deponent” for purposes of imposing a sanction and holding Mr. Emberling liable for the award of attorney fees to TECA and JEA.

The Administrative Judge further declines to sanction JSC’s former counsel, Mr. Beam, individually. As discussed earlier herein, Mr. Beam testified to the following when asked when he became aware of the “auto-delete” policy:

Not until discovery had closed and - - and I questioned Mr. Emberling about why has Gregg Noble produced emails between you guys and we haven’t produced in discovery. And - - and that’s when he explained that, well, if they’re - - if they’re irrelevant, I put them in a trash bin, and my trash bin gets emptied every 30 days.¹³⁷

However, it strains the imagination to fully lend credence to this testimony when the record contains multiple complaints made by the Intervenor in writing to Mr. Beam about the lack of emails and documents turned over in discovery for a project purported to be an investment of several million dollars.

Indeed, aspects of the testimony are misleading and self-serving. The use of the phrase “discovery had closed” in the testimony by Mr. Beam would indicate discovery had concluded by a date certain. There is nothing in the record to indicate or suggest discovery was ever resolved or “closed.” Nevertheless, given the number of letters and phone calls the Intervenor documented in

¹³⁶ Tenn. R. Civ. P. 37.01(4).

¹³⁷ Transcript of Hearing, p. 69, lines 10-16 (November 30, 2023).

contacting Mr. Beam on this issue, an attorney would have been expected to consult closely with his or her client before “discovery had closed” to sort out the issue. Ignoring, avoiding, or dodging an obvious issue in discovery until the filing of a motion to compel does not reflect well upon the professionalism of an attorney. On the other hand, the testimony of Mr. Emberling in the bankruptcy proceeding illustrates what Mr. Beam may have understood or expected from a project that more closely resembles a “Potemkin Village” than a tangible \$67 million dollar project. Mr. Beam may have genuinely expected there to be few emails or documents generated at that time.

With respect to Mr. Beam’s explanation regarding his communication with Northern Reliability about his concerns surrounding the potential for piracy on the part of the Intervenor, those communications did not ultimately frustrate the efforts to obtain discovery and cooperation from Northern Reliability. Mr. Beam’s representations, and that of his associate, Mr. David Wood, in arguments before the Commission that emails and documents were simply deleted because of an “automatic delete” policy of a third party were disingenuous at best. However, the automatic delete policy defense was not raised until *after* the filing of the motions to compel and did not contribute to the necessity for the filing of the motions to compel. The evidence in the record suggests Mr. Beam’s conduct played little to no part in the actual destruction of documents or emails that drove the filing of the motions to compel. There are documents in the record indicating attempts by Mr. Beam to respond to concerns of the Intervenor before the motions to compel were filed. Finally, the Administrative Judge concludes it would be inequitable and unjust to hold Mr. Beam individually liable for sanctions when JSC is an empty shell, and Mr. Emberling escapes liability on an individual basis.

The Administrative Judge has realistic expectations that due to JSC’s bankruptcy, JEA and TECA will likely be left empty-handed when attempting to collect the awarded legal fees from

JSC. Nevertheless, the ultimate sanction, dismissal with prejudice, has been self-imposed, and Mr. Emberling's decision to place JSC in bankruptcy should bring this matter to a close. The Administrative Judge intends to grant JSC's *Applicant's Motion to Dismiss Petition with Prejudice* after this order becomes final.

IT IS THEREFORE ORDERED THAT:

1) Jackson Energy Authority is awarded reasonable attorney fees and expenses in the amount of **\$8,493.00**.

2) Tennessee Electric Cooperative is awarded reasonable attorney fees and expenses in the amount of **\$59,002.50**.

3) The Jackson Energy Authority and Tennessee Electric Cooperative Motions to hold John Beam, III, Equitus Law Alliance, PLLC, and Dennis Emberling jointly and severally liable for the reasonable attorney fees and expenses awarded herein is **DENIED**.

4) 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.

5) 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