

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF THE KENTUCKY CABLE)	
TELECOMMUNICATIONS ASSOCIATION FOR)	
A DECLARATORY ORDER THAT THE)	
COMMISSION HAS JURISDICTION TO)	CASE NO.
REGULATE THE POLE ATTACHMENT RATES,)	2012-00544
TERMS, AND CONDITIONS OF)	
COOPERATIVES THAT PURCHASE)	
ELECTRICITY FROM THE TENNESSEE)	
VALLEY AUTHORITY)	

ORDER

On July 18, 2013, the Kentucky Cable Telecommunications Association ("KCTA") filed an application for rehearing of the Commission's June 28, 2013 Order ("June 28 Order") denying KCTA's petition for a Declaratory Order. KCTA argues that there was an insufficient factual record to deny its petition requesting a Declaratory Order that the Commission does have jurisdiction to regulate the pole attachment rates, terms, and conditions of the five electric cooperatives in Kentucky that purchase electricity from the Tennessee Valley Authority ("TVA"). Those five electric cooperatives are Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyrite Rural Electric Cooperative Corporation, Tri-County Electric Membership Corporation, Warren Rural Electric Cooperative Corporation, and West Kentucky Rural Electric Cooperative Corporation (collectively "TVA Cooperatives").

In addition to requesting rehearing, KCTA requests that an evidentiary hearing be scheduled to "explore and ultimately answer the fundamental factual question . . . whether the [TVA] regulates pole attachments and pole attachment rates" of the TVA

Cooperatives.¹ KCTA argues that the conclusion in the June 28 Order that the Commission's jurisdiction is preempted by the TVA is not supported by substantial evidence² due to the Commission's reliance on the unsworn and unverified comments in two TVA letters describing TVA's review of pole attachment rates. Further, KCTA claims that the TVA letters provide no "evidence that TVA does in fact regulate pole rates."³ KCTA states that an evidentiary hearing is needed to determine, at a minimum, whether TVA has a pole-rate formula and if the TVA Cooperatives have to follow it, the process and methodology of pole attachment rates, and other aspects of the relationship between communication attachers and the TVA Cooperatives, including the procedure for filing complaints.⁴

On July 24, 2013, the TVA Cooperatives filed their response to the Application for Rehearing asserting that there were only issues of law presented to the Commission and that the Commission properly concluded that it was preempted by federal law from asserting jurisdiction over the pole attachment rates of the TVA Cooperatives. The TVA Cooperatives argue that there are no issues of fact to be determined, and that the only issue that was to be determined was "whether or not the TVA Act and the Supremacy Clause, U.S. Const. Art. IV, Sec. 2; cl. 2, operate to preempt state regulation of the TVA Cooperative's pole attachment rates."⁵ The TVA Cooperatives claim that no

¹ KCTA's Application for Rehearing filed July 18, 2013. ("Application for Rehearing").

² *Id.* at 2-3.

³ *Id.*

⁴ *Id.* at 5.

⁵ TVA Cooperatives' Response to Application for Rehearing filed July 25, 2013 at 5. ("Response").

“documentary or testimonial evidence” is necessary to resolve the issue of the Commission’s jurisdiction.⁶

On July 30, 2013 KCTA filed a reply, asserting that the Commission does have jurisdiction over pole attachment rates and acknowledging that TVA does have preemptive authority over retail electric rates. However, KCTA frames the issues to be determined here as whether TVA has, or does exercise, preemptive authority over pole attachment rates.

Based on the application for rehearing and being otherwise sufficiently advised, the Commission finds that the question of whether we are preempted from exercising jurisdiction over the TVA Cooperatives’ pole attachment rates is a mixed question of fact and law. To the extent that our June 28 Order relied upon two letters from TVA, which KCTA did not have an opportunity to challenge, our decision was not supported by substantial evidence. Therefore, we will grant rehearing on the issue of whether TVA has, or does exercise, jurisdiction over the pole attachment rates of the TVA Cooperatives.

Although the Commission must ensure that its decision in this case is based on legal precedent and substantial evidence, we reject KCTA’s assertion that TVA’s jurisdiction over pole attachment rates can be determined only by the testimony at an evidentiary hearing of a TVA representative and the TVA Cooperatives. While such testimony at a hearing would be needed if the TVA letters are to be the sole basis for determining whether TVA has, or does exercise, jurisdiction over pole attachment rates, there may well be other ways to show the extent of TVA’s jurisdiction. Further, we reject KCTA’s assertion that it is relevant and necessary for the Commission to

⁶ *Id.*

determine whether TVA regulates pole attachment rates using the same or a similar rate methodology as we do, and whether TVA has a procedure for KCTA to file a complaint or otherwise challenge the TVA Cooperatives' pole attachment rates. The question before us is whether or not TVA has or exercises any jurisdiction, be it through the establishment of a ratemaking formula, review, or simply oversight responsibility in connection with ratemaking, over the pole attachment rates of the TVA cooperatives.

Finally, Commission Staff will schedule an informal conference within the coming weeks to allow the parties to discuss a procedural schedule for processing this rehearing.

IT IS THEREFORE ORDERED that KCTA's application for rehearing is granted.

By the Commission

ENTERED AUG 06 2013 KENTUCKY PUBLIC SERVICE COMMISSION

ATTEST:


Executive Director

Case No. 2012-00544

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