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 REGULATE THE POLE ATTACHMENT RATES, TERMS, AND CONDITIONS OF COOPERATIVES THAT PURCHASE ELECTRICITY FROM THE TENNESSEE VALLEY AUTHORITY	))))))))	**Case No. 2012-00544**

THE TVA COOPERATIVES' RESPONSE
TO THE JANUARY 17 ORDER

Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyrile Rural Electric Cooperative Corporation, Tri-County Electric Membership Corporation, Warren Rural Electric Cooperative Corporation, and West Kentucky Rural Electric Cooperative Corporation (collectively, the "TVA Cooperatives"), by counsel, and in response to the January 17, 2013 Order (the "Order") of the Public Service Commission of the Commonwealth of Kentucky (the "Commission") in this matter, hereby jointly submit this Response. In short, the TVA Cooperatives respectfully request that the Commission enter an Order affirming that it lacks the jurisdiction to regulate the pole attachment rates of cooperatives that purchase electricity from the Tennessee Valley Authority.

I. PROCEDURAL BACKGROUND

The legal matters at the heart of this case have a nearly eighty-year history, beginning with the passage of the Tennessee Valley Authority Act (the "TVA Act") in 1933. 16 U.S.C. § 831 *et seq.* The TVA Act was passed at the height of the Great Depression to remedy a wide

range of environmental, economic, and technological issues, including the delivery of low-cost electricity and the management of natural resources. *From the New Deal to the New Century*, TVA, http://www.tva.com/abouttva/history.htm (retrieved February 6, 2013). At the outset, the TVA "announced [its] intention to regulate local intrastate rates and service by a so called 'yardstick' method through federally subsidized competition which will supplant state regulation as inadequate and unsatisfactory." *TVA v. Tennessee Electric Power Co.*, 90 F.2d 885, 890 (6th Cir. 1937) (emphasis added). In this way, the TVA could ensure that the economically depressed areas of the country that it was created to serve had low-cost access to the energy needed for economic development and the improvement of the quality of life of the area's residents.

The complete authority of the TVA over the rates and services of TVA Cooperatives has been recognized for eighty years since the TVA came into existence. *See TVA, et al. v. Energy Regulatory Comm'n of Kentucky*, No. 79-0009-P, slip op. (W.D. Ky. Sept. 25, 1979) (attached as Exhibit 1)[1]. The TVA interprets the TVA Act in this same manner. *See* Letters from Cynthia L. Herron, Director, TVA Retail Regulatory Affairs, to the TVA Cooperatives (Jan. 24, 2013) (attached as Exhibits 2 to 6). The Commission has taken this stance as well. *See The Application of Hickman-Fulton Counties Rural Electric Cooperative Corporation for an Order Authorizing Said Corporation to Borrow One Hundred Eighty-Nine Thousand Dollars ($189,000) From the National Rural Utilities Cooperative Finance Corporation for the Purpose of Construction, Improvement and Operation of Electric Distribution and Service Facilities in Hickman, Fulton, Graves and Carlisle Counties, Kentucky*, Order, Ky. P.S.C. Case No. 8858 (June 27, 1983) (attached as Exhibit 7) ("In January 1983, the Commission received correspondence from [the] TVA stating that in its opinion the principle enunciated in the 1979

[1] The Energy Regulatory Commission of Kentucky (ERC) is the predecessor agency to the Commission.

federal court decision would apply to service as well as rates. The Commission agreed with this interpretation and has returned all tariffs to the TVA-supplied cooperatives"); Letter from William M. Sawyer, General Counsel, Public Service Commission to Senator William L. Quinlan, Chairman, Kentucky Joint Interim Committee on Energy (March 2, 1983) (attached as Exhibit 8) ("[T]he PSC received correspondence from TVA stating that it was TVA's belief that the principle enunciated in [*TVA, et al. v. Energy Regulatory Comm'n of Kentucky*] would apply to service as well as rates. . . . [I]t is our conclusion that TVA is right on this point and that federal rather than state law governs the service as well as the rates of all TVA-supplied utilities"); Letter from Don Mills, Executive Director, Public Service Commission to Albert P. Marks, Counsel to Cumberland Electric Membership Corp. (Aug. 27, 1993) (attached as Exhibit 9) (opining that "no aspect of a TVA distribution cooperative's operations [are] subject to [the Commission's] jurisdiction").

On December 3, 2012, the Kentucky Cable Telecommunications Association ("KCTA")[2] filed with the Commission a petition (the "Petition") for a declaratory order that would reverse this eighty year history by extending the Commission's jurisdiction to the regulation of pole attachment rates and services of cooperatives that purchase and resell electricity from the TVA. *Petition of the Kentucky Cable Telecommunications Association for a Declaratory Order That the Commission Has Jurisdiction to Regulate the Pole Attachment Rates, Terms, and Conditions of Cooperatives That Purchase Electricity from the Tennessee Valley Authority*, Petition, Ky.

[2] KCTA members include Access Cable TV, Armstrong Cable Services, Big Sandy Broadband, C & W Cable, Comcast, Harlan Community TV, Inter Mountain Cable, Irvine Community TV, Reimer Communications, Lycom Communications, Mediacom, Suddenlink, Time Warner Cable, and TVS Cable. *The Kentucky Cable Telecommunications Association Response to the Commission's January 17, 2013 Order Requiring a Listing of the Cable Companies On whose Behalf the KCTA Petition Was Filed*, Response, P.S.C. Case No. 2012-00544 (Jan. 24, 2013). Of those members, Access Cable TV, Time Warner Cable, Comcast, and Mediacom have attachment to poles of the TVA Cooperatives. *Id.*

P.S.C. Case No. 2012-00544 (Dec. 3, 2012). Notwithstanding established Commission policy and federal case law regarding state non-regulation of the rates and services of TVA-supplied electric utilities, KCTA claims that the Commission has both the authority and duty to regulate the TVA Cooperatives' provision of pole attachment rates and services. The Commission subsequently entered the Order, seeking a response from the TVA Cooperatives.

As the TVA Cooperatives agree, "KCTA bears a considerable burden to prove its claim that the Commission does have jurisdiction to regulate pole attachments of TVA Cooperatives." Order at 2. KCTA does not meet this burden.

II. DISCUSSION & ANALYSIS

A. The Commission Lacks Authority to Regulate the Rates and Services of Electric Cooperatives That Purchase Electricity from the TVA.

"Since [1981], no one has asserted, as KCTA does now, that the Commission has jurisdiction to regulate the pole attachments of the TVA Cooperatives." Order at 2. Indeed, KCTA's argument is a novel one. KCTA argues that nothing in Commission or federal policy and precedent precludes Commission jurisdiction over the pole attachment rates charged by the TVA Cooperatives. Petition at ¶ 17. As the Commission notes, however, "KCTA's petition includes no support for its allegations that . . . Commission regulation of pole attachment rates is not preempted by the TVA's rate jurisdiction." Order at 2-3.

It is established that Commission regulation of the TVA Cooperatives' rates and services is preempted by federal law. *TVA, et al. v. Energy Regulatory Comm'n of Kentucky* at 5. It is also established that pole attachment revenues are a direct component of the retail rate-setting function performed exclusively by the TVA for the TVA Cooperatives. (*See* Letters from

Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.) Therefore, the Commission does not have jurisdiction to regulate pole attachment rates and services of the TVA Cooperatives.

The seminal case on the issue of Commission's authority to regulate the rates and services of the TVA Cooperatives is *TVA, et al. v. Energy Regulatory Comm'n of Kentucky*. The United States District Court for the Western District of Kentucky held there that "direct conflict exists between an exercise of federal authority granted [to the] TVA by Congress and an exercise of state authority granted [to the Commission] by the General Assembly of Kentucky." *Id.* at 15. The Commission has interpreted this opinion to mean that "Commission regulation of the TVA Cooperatives' retail electricity rates was preempted because it directly conflicted with TVA regulation of those same rates." Order at 2. In its January 24, 2013 letters to the TVA Cooperatives, the TVA likewise agrees that it is "the exclusive retail rate regulator for the distributors of TVA power." (*See* Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.)

This preemption extends not only to "rates," but also to "services."[3] It is the interpretation of both the Commission and the TVA that "federal rather than state law governs the service as well as the rates of all TVA-supplied utilities." (*See* Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6; Letter from William M. Sawyer to Senator William L. Quinlan, Exh. 8.) Moreover, the Commission and Kentucky courts have held that "the rates charged for pole attachments are 'rates' within the meaning of KRS 278.040, and that the pole attachment itself is a 'service' within the meaning of the statute." *Kentucky CATV*

[3] Under KRS 278.010(13), "service" includes "any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility, but does not include Voice over Internet Protocol (VoIP) service."

Association v. Volz et al. 675 S.W.2d 393, 396 (Ky. Ct. App. 1983). Consequently, federal preemption precludes the PSC from regulating the TVA Cooperatives' pole attachments, which are but a particular subspecies of the broader "rates and services" regulated exclusively by the TVA. *See TVA, et al. v. Energy Regulatory Comm'n of Kentucky, supra.*

KCTA argues that TVA regulation only precludes Commission regulation to the extent the two directly conflict. Petition at ¶ 18. This is a misstatement of well-established principles of law and the District Court's opinion in *TVA, et al. v. Energy Regulatory Comm'n of Kentucky.* The District Court in *TVA* states merely that "[w]hen compliance with the legitimate directions of a state government is impossible without violating the legitimate directions of the federal government, Article IV §2 of the United States Constitution, the Supremacy Clause, demands that the exercise of federal authority supersede the exercise of state authority." *TVA, et al. v. Energy Regulatory Comm'n of Kentucky* at 5 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963); *McDermott v. Wisconsin*, 228 U.S. 115). KCTA's extension of that holding into an otherwise unsupported claim that preemption occurs only where there is a direct conflict completely misconstrues the scope of that case, as well as the now eighty-year history underlying the TVA's exclusive jurisdiction over the rates and services of its member cooperatives.

Under the Supremacy Clause, U.S. CONST. art. IV, cl. 2., any state law that conflicts with federal law is pre-empted. *E.g. Gibbons v. Ogden*, 22 U.S. 1 (1824). Conflict arises where it would be impossible to comply with both the state and federal regulations, or when the state law imposes an obstacle to the achievement of Congress's discernible objectives. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). In addition, even in the absence of a direct conflict between state and federal law, a conflict exists if the state law is an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). Congress has clearly stated that it is an objective of the TVA Act that "power shall be sold at rates as low as are feasible," 16 U.S.C. § 831n-4(f). Here, Commission regulation would directly infringe on the TVA's ongoing efforts to ensure that the TVA Cooperatives "recover [the] full cost associated with the pole attachment" in connection with the performance of its duties as "the exclusive retail rate regulator for the distributors of TVA power." (*See* Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.) The cost-based rates the TVA Cooperatives collect in connection with the pole attachment services they provide directly impact their end-users' retail rates which are set by the TVA. Therefore, Commission regulation is pre-empted.

B. KCTA Incorrectly Argues That the TVA Does Not Regulate the Pole Attachment Rates of Its Member Cooperatives.

KCTA argues not only that the Commission has the authority to regulate the TVA Cooperatives' pole attachment rates, but also that the Commission should regulate these rates because the TVA allegedly does not. Petition at ¶ 21. The Order rightly recognizes that "KCTA's petition includes no support for its allegations that the TVA does not regulate the pole attachment rates of the TVA Cooperatives." Order at 2. That omission, alone, is fatal to the KCTA, as the party bearing the burden of proof. The KCTA's claim is incorrect, in any event. Accordingly, KCTA's argument fails as a matter of both law and fact.

Once again, it bears reiteration that it is a principal objective of the TVA Act that "power shall be sold at rates as low as are feasible." 16 U.S.C. § 831n-4(f). To achieve this Congress granted the TVA – consistent with its status as the exclusive regulator of member cooperative rates and services – broad powers over retail rates and conditions of service. These powers

include the express authority to "include in any contract for the sale of power such terms and conditions, including resale rate schedules, and [to] provide for such rules and regulations as in its judgment may be necessary or desirable" to effectuate the intent of the TVA Act. 16 U.S.C. § 831i.

In response to a request from the TVA Cooperatives, the TVA provided guidance as to the scope of its regulatory authority over the Cooperatives. (*See* Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.) The TVA's position is that it "is the exclusive retail rate regulator for the distributors of TVA power, including the five Kentucky cooperatives." *Id.* In the course of regulating the retail rates of the TVA Cooperatives, "TVA requires that a distributor recover its full cost associated with the pole attachment and not place any unfair burdens on the electric ratepayers by ensuring full cost recovery." *Id.* Clearly, the TVA considers its member cooperatives' pole attachment rates and services to play an important role in the context of the ultimate retail rate paid by its member cooperatives end-users. (*See* Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6) ("TVA becomes concerned when any electric asset gets used for other purposes. . . . [U]se [of] property and personnel jointly for the electric systems and other operations [is] subject to agreement between [the Cooperatives] and [the] TVA as to appropriate cost allocations"). Not only would Commission involvement in this process create unnecessary confusion, contention, and expense, it would clearly infringe the TVA's recognized role as "the exclusive retail rate regulator for the distributors of TVA power." (*See* Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.)

Therefore, KCTA's petition that the Commission must regulate the TVA Cooperatives' pole attachment rates and services should be denied.

C. Even if the TVA Did Not Regulate Its Member Cooperatives' Pole Attachment Rates and Services, It Cannot Be Said That the TVA Has Abdicated Its Authority to Do So to the States.

Even assuming, solely for the sake of argument, that the TVA did not directly regulate pole attachment rates and services of its member cooperatives, that does not confer upon the Commonwealth a right to do so through the Commission. The United States Court of Appeals for the D.C. Circuit, recognizing the complexity of the economic relationship between electricity supplier and customer, has found that "it is no more possible [for FERC] to set forth all of the practices affecting rates and services than it is to set forth all of the terms and conditions of a contract, leaving nothing whatever to be implied or to be governed by an unspecified standard of reasonableness." *City of Cleveland, Ohio v. FERC*, 773 F.2d 1368, 1370 (D.C. Cir. 1985) (emphasis original). In that case, which arose in the context of Federal Power Act,[4] the Court affirmed federal jurisdiction over rate and service issues even though the Federal Energy Regulatory Commission was "willing to leave as many practices unspecified as is ordinarily the case." *City of Cleveland, Ohio* at 1371 (emphasis added).

The same principles apply here. The TVA has a broad regulatory scheme in place and plenary authority over the rates and services of TVA-supplied utilities. *See TVA, et al. v. Energy Regulatory Comm'n of Kentucky.* Even if we assume for the sake of argument that the TVA does not regulate pole attachment rates, it does not follow that it has abdicated the authority to do so. As the *City of Cleveland* court counsels, the absence of specific TVA practices regarding pole attachment rates and services does not – as the KCTA contends – mean that jurisdiction lies elsewhere. Even so, there is no basis for the KCTA's argument because the TVA Cooperatives'

[4] 16 U.S.C. §§ 791a-828c.

pole attachment rates and services are direct inputs to the broader rate-setting function overseen exclusively by the TVA.

D. The KCTA Attempts to "Wag the Dog" When It Seeks Regulation of the TVA Cooperatives for the Benefit of Its Unregulated Cable Providers.

The Commission's charge to regulate the rates and services of certain utilities derives from the underlying statutory and policy goal of ensuring fair, just, and reasonable rates for the customers of those utilities. *See In the Matter of the Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space* at 10. "Under KRS 278.030 and KRS 278.040, [the] Commission has the authority to consider the interests of the subscribers of cable television services, as well as the interest of the consumers of the utility services, in the exercise of its jurisdiction over utility rates and services." *In the Matter of the Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space* at 11. Thus, when the Commission considers the interest of cable subscribers when regulating utilities, it does so only because it already regulates the other rates and services of the utility. In essence, cable television providers and their subscribers ride the coattails of the utility customers for whose benefit the Commission has jurisdiction.

Consequently, the KCTA's reliance on *In the Matter of the Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space* is misplaced. The electric utilities in that case were not TVA members. The end-user customers of the utilities were, in fact, intended to receive the benefit of Commission regulation of rates and services. Here, the end-user customers of the TVA Cooperatives are protected by the TVA's regulation of rates and services, so there is no underlying "hook" on which the Commission can hang the supplemental jurisdiction the KCTA claims should be exercised over the TVA Cooperatives' pole attachment

rates and services. Consequently, there is no basis for regulation of the TVA Cooperatives' pole attachment rates.

III. CONCLUSION

Historically, and under settled principles of law, the Commission does not have jurisdiction over the TVA Cooperatives' rates and services. Any Commission regulation is preempted under federal law and is unnecessary because the TVA regulates the TVA Cooperatives' rates and services. The Order the KCTA requests would extend the scope of the Commission's regulatory beyond its proper and traditional purpose and would upset eighty years of established law and policy.

In conclusion, the TVA Cooperatives respectfully request that the Commission enter an Order affirming that it lacks the jurisdiction to regulate the pole attachment rates of cooperatives that purchase electricity from the Tennessee Valley Authority.

Respectfully submitted,

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