

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

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

**THE TVA COOPERATIVES' RESPONSE  
TO KCTA'S MOTION TO COMPEL**

The TVA Cooperatives,<sup>1</sup> by counsel, hereby respond to Kentucky Cable Telecommunications Association's ("KCTA") Motion to Compel the TVA Cooperatives to Produce Documents Withheld on the Basis of . . . Privilege and Documents Responsive to KCTA's Supplemental Request for Information ("Motion to Compel") filed with the Public Service Commission of Kentucky (the "Commission") on Thursday, January 2, 2014.

The Commission should deny the Motion to Compel. The TVA Cooperatives cannot produce a privilege log where KCTA has requested no documents or tangible things which could be catalogued by such a privilege log. And, the additional discovery that KCTA seeks to compel is overly broad and unduly burdensome, and is not reasonably calculated to lead to the discovery of relevant and admissible evidence given the single jurisdictional issue which the Commission has identified as the subject of this matter.

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<sup>1</sup> 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.

## ARGUMENT & ANALYSIS

### **I. THE TVA COOPERATIVES ARE NOT REQUIRED TO PRODUCE A PRIVILEGE LOG.**

In its First Request for Information, KCTA submitted the following Requests to the TVA Cooperatives:

- 1-2 If [you contend that the TVA regulates your pole rates in any way], please explain fully, making reference to all facts known to you supporting that answer.
  
- 1-3 Provide the legal and factual basis for the statement on page 7 of the TVA Cooperatives' Response to the January 17 Order, filed with the Commission on February 15, 2013, that states: "The cost-based rates the TVA Cooperatives collect in connection with the pole attachment services they provide directly impact the end-users' retail rates which are set by the TVA."
  
- 1-5 [If you contend that regulation of your pole attachment rates according to the cost-based rate methodology used by the Commission would conflict with the TVA's regulation of your electric rates], please explain fully, making reference to all facts known to you supporting that answer.
  
- 1-8 [If you contend that the TVA has statutory jurisdiction to regulate pole attachment rates of its member cooperatives,] please explain fully, giving all statutory reference and case citations in support of your answer.

The TVA Cooperatives objected to these requests to the extent that responsive information was protected either by the attorney-client or attorney work product privileges, or both. KCTA seeks a privilege log of documents and tangible things the TVA Cooperatives have supposedly so withheld. Simply put, however, no documents or other tangible things are responsive to KCTA's requests, and therefore no privilege log is required or even possible to produce, other than a blank piece of paper.

Specifically, KCTA in its requests did not seek any documents or tangible things as to which a privilege log could be compiled. In KCTA 1-2 and KCTA 1-5, supra, KCTA seeks explanations of prior data request responses "making reference to all facts known to [the TVA

Cooperatives] supporting that answer.” Similarly, KCTA seeks the “legal and factual basis” for a statement in KCTA 1-3. In none of these requests does KCTA seek documents, communications, or things. The TVA Cooperatives provided narrative responses to these requests and otherwise objected, invoking the attorney work product privilege to protect their attorneys’ research, mental impressions, and theories of the case. Such matters fall squarely within well-recognized privileges and are never the proper subject of discovery. (*See, e.g., United States v. One Tract of Real Property*, 95 F.3d 422, 427 (6<sup>th</sup> Cir. 1996); *Meenach v. General Motors Corp.*, 891 S.W.2d 398, (Ky. 1995) (“Factual information appropriately discoverable from a party . . . must be differentiated from mental impressions and advice protected by the attorney-client privilege. . . .”))

Even more dubious is KCTA’s request for a privilege log regarding the TVA Cooperatives’ response to KCTA 1-8, *supra*. Here, KCTA sought an explanation of a prior data request response “giving all statutory reference and case citations in support of [the TVA Cooperatives’] answer.” Once again, KCTA did not request documents or tangible things, so no privilege log is possible. Furthermore, it is legally unfounded for KCTA to request the TVA Cooperatives to provide KCTA with their legal research as part of the discovery process. (*See, e.g., in Re: Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002) (“[A] party may not obtain the ‘opinion’ work product of his adversary; i.e., ‘any material reflecting the attorney’s mental impressions, opinions, conclusions, judgments, or legal theories.’”))

The TVA Cooperatives properly objected on grounds of attorney-client and attorney work product privileges. And, KCTA has not requested documents or tangible things that can be

the subject of a privilege log. So, KCTA's request for a privilege log is frivolous and should be denied.

**II. THE DISCOVERY KCTA SEEKS IS OVERLY BROAD, UNDULY BURDENSOME, AND IS NOT REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF RELEVANT AND ADMISSIBLE EVIDENCE.**

In its August 6, 2013, order on rehearing, the Commission identified the limited issue in this case: "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." (Order on Rehearing at \*4 (emphasis added).) Moreover, the Commission "reject[ed] KCTA's assertion that it is relevant and necessary for the Commission to determine whether TVA regulates pole attachment rates using the same or a similar rate methodology as [the Commission]... ." (Order on Rehearing at \*3-4.)

KCTA seeks to compel production of the following: **(a)** all pole attachment agreements, joint use agreements, and pole license agreements between the TVA Cooperatives and all pole users; **(b)** pole rates charged to ILECs and cable entities for the past ten years; **(c)** invoices for pole attachment fees sent to all pole attachers for each of the past three years; **(d)** total pole attachment revenue received from licensee attachers for each of the years 2008 to present; **(e)** "surplus revenues" as defined in paragraph 6(b) of the TVA Contract for the past five years; and **(f)** the identity of any representative of the TVA that will testify for the TVA Cooperatives. (*See* Motion to Compel at 9-15.)

These requests are overly broad and unduly burdensome and are not reasonably calculated to lead to the discovery of relevant and admissible evidence. As noted above, this case concerns solely a question of jurisdiction. (*See also* the title of KCTA's petition (" . . .

Declaratory Order that the Commission Has Jurisdiction . . . .”) This is not a pole attachment ratemaking proceeding, however much KCTA or the cable industry would like to turn it into one. It will require much time and money to physically locate and catalog the sheer volume of documents requested by KCTA. Requiring the TVA Cooperatives to review, extract, sort, and verify the requested data will divert personnel from their usual, ordinary, and important business activities, and will further increase the TVA Cooperatives’ legal expenses in pursuit of a task that is not germane to this proceeding in any event. The burden on the TVA Cooperatives to marshal the requested discovery is unjustifiable in this situation given the amount of documentation requested by KCTA and the fact that this matter involves a single jurisdictional issue which the Commission has correctly and precisely identified. (*See infra.*)

Moreover, KCTA’s requests are not reasonably calculated to lead to the discovery of relevant and admissible evidence. To reiterate, the Commission ruled that the issue in this case 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.” (Order on Rehearing at \*4.) The various invoices, agreements, and financial data requested by KCTA will not have any tendency at all to make this determination more probable or less probable than without the requested documents and data. (*See Ky. R. Evid. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).*)

Finally, the TVA Cooperatives point out that in Items 3 and 4 of their First Data Requests to KCTA, the TVA Cooperatives sought the names of all fact and expert witnesses KCTA intended to call. KCTA replied that it would provide the names of its witnesses “in accordance

with the Commission's scheduling order." To date, KCTA has not identified its witnesses. KCTA cannot, in good faith, therefore argue that it is not bound to reveal its witnesses under the current scheduling order, but that the TVA Cooperatives are so now required. In any event, KCTA has not yet retained or identified any such witnesses, and so there are no such witnesses for the TVA Cooperatives to identify at this time.

For the foregoing reasons, KCTA's motion should be denied.

### **CONCLUSION**

This issue in this case is "whether TVA has, or does exercise, jurisdiction over the pole attachment rates of the TVA Cooperatives." (August 6 Order at \*3.) In an effort to displace the "considerable burden" it bears on this question of law, KCTA has complicated this proceeding. (*Id.*) KCTA has done so by repeatedly and knowingly mischaracterizing the TVA Cooperatives' position as one purely of conflict pre-emption that allegedly requires the TVA Cooperatives to take on the undue burden of extracting and producing detailed financial records and data that are not reasonably calculated to lead to the discovery of admissible evidence. (*E.g.*, Motion to Compel at 3 ("The Cooperatives have made conflict preemption an issue in this case, and KCTA is entitled to discovery to rebut it."))

The documents and data requested by KCTA are wholly unnecessary to resolve the single jurisdictional question of law that KCTA itself presented upon filing its petition. The detailed agreements, invoices, and financial data KCTA seeks would be relevant, perhaps, only in a rate-setting proceeding. Whatever the case, this discovery is not reasonably calculated to lead to the discovery of admissible evidence in this purely jurisdictional proceeding, and it would be unduly burdensome to require the TVA Cooperatives to provide the requested documents and data. KCTA is not entitled to a burdensome and time-consuming fishing expedition at great expense to

the TVA Cooperatives in order to satisfy its curiosity regarding matters irrelevant to the single jurisdictional question before the Commission.

**WHEREFORE**, the TVA Cooperatives respectfully request that the Commission enter an order denying KCTA's Motion to Compel in its entirety.

Respectfully submitted,

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