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 IN OPPOSITION TO KCTA'S MOTION FOR ISSUANCE OF A SUBPEONA *DUCES TECUM*

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, hereby respond as follows to Kentucky Cable Telecommunications Association's ("KCTA") Motion for Issuance of Subpoena *Duces Tecum* ("Motion for Subpoena"). KCTA's Motion for Subpoena was filed with the Public Service Commission of Kentucky (the "Commission") on Wednesday, January 15, 2014. The Commission should deny the Motion for Subpoena because the discovery that KCTA seeks is not relevant to this proceeding, and the Commission lacks jurisdiction over the TVPPA.

I. THE DISCOVERY THAT KCTA SEEKS TO COMPEL IS IRRELEVANT TO THIS PROCEEDING.

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.) 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's Motion for Subpoena is just the latest salvo in its strategy to delay prompt resolution of this matter, harass the TVA Cooperatives, and increase costs by engaging in a pattern of discovery tactics that seek information that is not reasonably calculated to lead to the discovery of admissible evidence regarding the limited jurisdictional issue in this matter.

Despite the limited scope of this matter, KCTA now moves to depose the TVPPA and compel production of documents regarding a broad and extensive range of matters including "the TVA Cooperatives' pole attachment rates under the Commission's cost-based pole attachment rate methodology as set forth in the September 17, 1982 order by the Commission in Administrative Case No. 251," "the TVA Cooperatives' pole attachment rates under the Federal Communication Commission's pole attachment methodology used to determine the maximum just and reasonable rate under 47 U.S.C. § 224(d)," and TVPPA's communications with the TVA Cooperatives. (Motion for Subpoena at Exhibit A, 8.) KCTA has propounded discovery on these topics repeatedly, and the TVA Cooperatives have objected numerous times. (*See*, *e.g.*, TVA Cooperatives' Response to KCTA's [November 20] Motion to Compel, Nov. 27, 2013; TVA Cooperatives' Response to KCTA's [January 2] Motion to Compel, Jan. 9, 2014.)

As the Commission previously ruled, 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.) A calculation of the TVA Cooperatives' pole rates under either the Administrative Case 251 or the 47 U.S.C. § 224(d) methodologies will have no tendency to make that determination more probable or less probable than it would be without the calculation. (*See* Ky. R. Evid. 401.) Likewise, a review of TVPPA's communications with the TVA Cooperatives will offer nothing that demonstrates affirmatively or negatively the TVA's statutory jurisdiction under the TVA Act over the pole attachment rates of the TVA Cooperatives. (*See id.*)

The Commission originally ruled on June 28, 2013 that the field of regulated TVA rates and services—pole attachments being services—is preempted because the TVA has a "comprehensive, top to bottom regulatory scheme" that occupies the entire field. (June 28 Order at *8.) This scheme is "so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it." *Id.*; *see English v. Gen. Elec. Co.*, 496 U.S. 72, 79. The Commission's original conclusion regarding field pre-emption still holds true and requires no evidence of any kind to confirm or deny. This is especially true given that the Commission already "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's proposed discovery will offer nothing to assist the parties or factfinder in resolving the ultimate issues in this proceeding, and will unnecessarily drive up the TVA Cooperatives' legal costs. KCTA simply does not need the documents, communications and

calculations it requests to answer, affirmatively or negatively, the purely legal question of "whether TVA has, or does exercise, jurisdiction over the pole attachment rates of the TVA Cooperatives." (Order on Rehearing at *3.)

Consequently, KCTA's motion should be denied.

II. THE COMMISSION DOES NOT HAVE JURISDICTION TO ISSUE A SUBPOENA AGAINST TVPPA.

The Commission should also deny KCTA's Motion for Subpoena because the Commission lacks the statutory authority to issue the process sought by KCTA. The Commission's subpoena power is set out in KRS 278.320, which provides in relevant part that the Commission "may issue subpoenas, subpoenas duces tecum, and all necessary process in proceedings brought before or initiated by the [C]ommission, and such process shall extend to all parts of the state." (Emphasis added.) Pursuant to the statute, the Commission's subpoena power extends only to the borders of the Commonwealth.

For this reason, KCTA's requested subpoena is defective on its face. KCTA requests issuance of its proposed subpoena *duces tecum* to "the Tennessee Valley Public Power Association ("TVPPA"), 1206 Broad Street, Chattanooga, Tennessee 37402." (Motion for Subpoena at 1.) TVPPA is a non-profit, domestic, mutual benefit corporation registered with the Tennessee Secretary of State. (*See* Exhibit 1, Tennessee Valley Public Power Authority, Inc. Filing Information.) KCTA plainly admits, based on the language in its subpoena, that TVPPA resides outside of Kentucky. Because the Commission has no jurisdiction over TVPPA and KCTA requests service of process unauthorized by KRS 278.320, the subpoena is defective, and KCTA's motion should be denied.[1]

[1] Additionally, it does not appear that TVPPA is registered with the Kentucky Secretary of State, and therefore has no registered agent to receive process in the Commonwealth.

KCTA likewise cannot rely on the Uniform Interstate Depositions and Discovery Act (the "UIDDA"), codified by both Kentucky and Tennessee, (KRS 421.360, Tenn. Code Ann. § 24-9-201 *et seq.*), which provides a mechanism for parties to issue subpoenas to out-of-state persons. The UIDDA defines the term "subpoena" as "a document, however denominated, issued under authority of a court of record requiring a person to" attend a deposition or produce documents. (KRS 421.360(2) (emphasis added).) While Kentucky has not directly addressed this issue, the interpretation of the UIDDA by other courts carries special weight. (*See* KRS 421.360(7) ("In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.").) The Court of Appeals of Colorado, which has enacted the UIDDA,[2] held that the Act "applies only to 'discovery' in pending judicial actions; it does not apply to regulatory agency pre-litigation investigations." (*State ex rel. Suthers v. Tulips Investments, LLC*, No. 11CA2367, 2012 WL 5871442 (Col. Ct. App. Nov. 21, 2012).)

Additionally, although there is no authority in Kentucky or the Sixth Circuit that expressly says that a regulatory agency such as the Commission is not a "court of record," there is ample support for the distinction. (*See, e.g., Ellis v. Logan Co.*, 543 F. Supp. 586, 589 (W.D. Ky. 1982) (discussing precedent that "authorizes the Kentucky Commission on Human Rights, not a court of record," to award damages) (emphasis added); *Richardson's Brentwood Homes v. Town of Collierville, Mun. Planning Comm'n*, W2005-02172-COA-R3CV, 2006 WL 1343205 (Tenn. Ct. App. May 17, 2006) (recognizing that "[d]ecisions of the Planning Commission are final administrative decisions, therefore, any appeal of their decision would be made to a court of record") (emphasis added); *State ex rel. Com'r of Transp. v. Med. Bird*

[2] *See* Colo. Rev. Stat. §§ 13-90.5-101 to -107.

Black Bear White Eagle, 63 S.W.3d 734, 769 (Tenn. Ct. App. 2001) (stating that there is "a palpable difference between the [Commission of Indian Affairs] conducting administrative hearings on its own and the [commission's] intervening in judicial proceedings in a court of record . . . [t]he two are completely unrelated"); http://psc.ky.gov/agencies/psc/general/pscinfo.htm (stating that a Commission order is "final and binding unless overturned in a civil court of law") (emphasis added).) There is also no indication in KRS Chapter 278 that the Commission is a "court of record," while that express language is used to describe other entities created by statute. (*See* KRS 23A.010(3) ("The Circuit Court is a court of record and of continuous session."); KRS 24A.010(3) ("The District Court is a court of record."); KRS 67.100(1) ("The fiscal court is a court of record.").) Because the Commission is not "a court of record" as courts in Kentucky and Tennessee have interpreted the term and is not designated as one by statute, a Commission subpoena is not eligible for domestication and service across states lines under the UIDDA.

KCTA's motion unlawfully seeks issuance of a subpoena against an entity over which the Commission has no jurisdiction and through process unauthorized by Kentucky law. For these reasons, KCTA's Motion for Subpoena should be denied.

III. CONCLUSION

This issue in this case is "whether TVA has, or does exercise, jurisdiction over the pole attachment rates of the TVA Cooperatives." (Order on Rehearing at *3.) In an effort to displace the "considerable burden" it bears on this question of law, KCTA continues to complicate and overburden this proceeding by requesting discovery that is not reasonably calculated to lead to the discovery of admissible evidence in the context of this purely

jurisdictional matter. Moreover, it attempts to do so here in a manner that is not permitted under Kentucky law.

Consequently, the TVA Cooperatives respectfully request that the Commission enter an order denying KCTA's Motion for Issuance of a Subpoena *Duces Tecum*.

Respectfully submitted,

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