

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

THE TVA COOPERATIVES’ MOTION FOR A PROTECTIVE ORDER

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, the “TVA Cooperatives”), by counsel, hereby move the Kentucky Public Service Commission (the “Commission”) for entry of a Protective Order in this matter that: (i) cancels the depositions noticed by the Kentucky Cable Telecommunications (“KCTA”) on January 15, 2014; or in the alternative, (ii) limits the areas of discovery permitted in the depositions. The TVA Cooperatives request entry of such an order to prevent KCTA from seeking overly broad and unduly burdensome deposition testimony that is not relevant to this proceeding or otherwise likely to lead to admissible evidence, as the noticed depositions are simply an outgrowth of the objectionable discovery tactics KCTA has pursued to date. Additionally, the TVA Cooperatives move for entry of a Protective Order staying any depositions until the Commission has ruled on KCTA’s November 20, 2013 Motion to

Compel and KCTA's January 2, 2014 Motion to Compel, as there is significant overlap between the discovery at issue in those motions and the matters and topics identified in KCTA's deposition notices. The Commission should grant the Motion in order to focus additional discovery, if any, on the single jurisdictional question identified by the Commission in this case.

I. BACKGROUND.

In December 2012, KCTA filed a petition for a declaratory order to reverse decades of precedent and ignore the federal mandate for the Tennessee Valley Authority ("TVA") to regulate the rates and services of cooperatives that purchase and resell electricity from the TVA by extending the Commission's jurisdiction to the regulation of pole attachment rates of those same cooperatives. On June 28, 2013, after reviewing communications from the TVA and analyzing pleadings filed by the parties, the Commission recognized that it did not have jurisdiction over the pole attachment rates of the TVA and denied KCTA's petition. On August 6, 2013, the Commission granted KCTA's Application for Rehearing of the Commission's June 28, 2013 Order denying KCTA's petition for a Declaratory Order. The Commission issued a scheduling order for discovery on October 10, 2013.

On October 24, 2013, KCTA issued multiple Requests for Information to the five TVA Cooperatives, which included requests for data well beyond the scope of the jurisdictional question posed in this case. The TVA Cooperatives responded to KCTA's requests on November 14, 2013, with all responsive, relevant, and non-privileged information. KCTA issued supplemental Requests for Information to the TVA Cooperatives on December 2, 2013, which persisted in requests for data beyond the scope of the single

jurisdictional question at issue. The TVA Cooperatives responded to KCTA's supplemental requests on December 23, 2013, with all responsive, relevant, and non-privileged data.

KCTA moved to compel further responses to its data requests. On November 20, 2013, KCTA moved to compel the TVA Cooperatives' production of 25 categories of RUS Account cost data in order to test whether the TVA requires full cost recovery of pole attachments and determine the TVA Cooperatives' hypothetical pole attachment rates under the formula approved by the Commission in Administrative Case No. 251. Then, on January 2, 2014, KCTA moved to compel the TVA Cooperatives' production of additional documents, including (a) non-existent privileged documents, (b) all pole attachment agreements, joint use agreements, and pole license agreements between the TVA Cooperatives and all pole users; (c) pole rates charged to ILECs and cable entities for the past ten years; (d) invoices for pole attachment fees sent to all pole attachers for the past three years; (e) total pole attachment revenue received from license attachers for each of the years 2008 to the present; (f) "surplus revenues" as defined in paragraph 6(b) of the TVA Contract for the past five years; and (g) the identity of any representative of the TVA that will testify for the TVA Cooperatives. The TVA Cooperatives timely responded in opposition to both motions to compel, KCTA filed its replies, and both motions are ripe for the Commission's consideration.

On January 15, 2014, pursuant to the Scheduling Order established in this case, KCTA issued notices of deposition to the five TVA Cooperatives as well as a motion for issuance of a subpoena *duces tecum* and notice of deposition to the Tennessee Valley Public Power Association ("TVPPA"). The TVA Cooperatives opposed the motion for a subpoena and deposition notice to the TVPPA on the grounds that KCTA seeks discovery that is not relevant to this proceeding and the Commission lacks jurisdiction over the TVPPA. The

depositions of the five TVA Cooperatives are tentatively scheduled for the last week of February.

II. LEGAL AUTHORITY.

The Commission's rules authorize entry of protective orders to limit discovery in order to prevent abuse of the discovery process. KRS § 278.340 authorizes the Commission to grant a party to a proceeding the right to take a deposition. "Depositions in commission proceedings shall be taken in accordance with the Rules of Civil Procedure." KRS § 278.340. The Kentucky Rules of Civil Procedure, in turn, grant the trial court full authority to issue a protective order to prevent the abuse of discovery. See CR 26.03(1); Hoffman v. Dow Chemical Co., 413 S.W.2d 332 (1967). A protective order is proper where a party requires protection from annoyance, embarrassment, oppression, or undue expense or burden, and may require "that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters." CR 26.03. The scope of examination permitted in a deposition is limited to matters, not privileged, which are relevant to the subject matter involved in the pending action. CR 26.02. It is the duty of the court to keep the inquiry within reasonable bounds and to restrict questions to those having "substantial relevancy" to the pending matter. Carpenter v. Wells, 358 S.W.2d 524, 526 (Ky. App. 1962) (internal quotation omitted).

As the TVA Cooperatives will demonstrate, the matters and topics included in KCTA's notices of deposition do not meet these standards, and requiring representatives of the TVA Cooperatives to unduly expend the time and resources to prepare for and defend these depositions would be overly burdensome in light of the fact that the evidence KCTA seeks to elucidate lacks relevance and will not aid the Commission in resolving the single jurisdictional question that is at the center of this dispute.

III. THE COMMISSION SHOULD CANCEL THE DEPOSITIONS OR LIMIT DEPOSITION TESTIMONY TO THE NARROW JURISDICTIONAL QUESTION PRESENTED.

Since the inception of discovery, KCTA has persisted in seeking wholly irrelevant and unduly burdensome discovery, including years of contracts and agreements, invoices, cost and financial data, and other documents appropriate for a ratemaking case, not a case presenting a single jurisdictional question. Based on the overwhelming and unreasonable discovery KCTA has sought in this case, as well as the expansive list of matters and topics KCTA identified in its deposition notices, the TVA Cooperatives anticipate that KCTA will continue its pattern and seek testimony beyond the scope of the sole legal question at issue when deposing the five TVA Cooperatives. The TVA Cooperatives request that the Commission enter a protective order (i) cancelling the depositions or, in the alternative (ii) limiting the questioning by KCTA to documents produced, and denying any inquiry as to actual ratemaking, costs, or profits.

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 multiple Requests for Information beyond the scope of this narrow question and its Motion for Subpoena to an entity over which the Commission has no jurisdiction all serve to delay prompt resolution of this matter, harass the TVA Cooperatives

and TVPPA, and mount legal costs by pursuing discovery that seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Based upon the lists of topics and matters included in the notices of deposition, the TVA Cooperatives have no reason to believe the deposition testimony sought will be any less vexatious, irrelevant, or unduly burdensome.

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 (emphasis added).) The Commission rejected KCTA’s “assertion that it is relevant and necessary for the Commission to determine whether TVA regulates pole attachment rates using the same or similar rate methodology” as the Commission, and “whether TVA has a procedure for KCTA to file a complaint or otherwise challenge the TVA Cooperatives’ pole attachment rates.” (Order on Rehearing at *4.) The additional questions of fact raised by KCTA regarding how the TVA exercises that jurisdiction are unnecessary to answer. Thus, KCTA has no need for any deposition testimony regarding how the TVA Cooperatives set their rates, the TVA’s procedure for regulating rates, or the TVA Cooperatives’ recoupment of costs. The actual amounts of pole attachment rates or the methodology by which those rates are calculated have no bearing on the jurisdictional question of who maintains regulatory authority over pole attachment rates of cooperatives that purchase and resell electricity from the TVA.

Inquiry into the actual calculation of the TVA Cooperatives’ pole rates will have no bearing on whether the Commission has any jurisdiction. Questioning regarding any methodology used in the calculation of rates, or regarding any specific invoices, agreements,

or cost or financial data, is not relevant to “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.) Such questioning will not have any tendency to make this determination more probable or less probable than without the anticipated testimony. (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.”).) Likewise, the proposed questioning does not meet the standard of “substantial relevance” set forth in Carpenter v. Wells (*see supra*), and the Commission has a duty to protect the TVA Cooperatives by keeping the inquiry within reasonable bounds. Any effort by KCTA to seek deposition testimony on the requested matters and topics will unduly complicate these proceedings, cause undue burden and expense on the TVA Cooperatives, and prevent an expeditious resolution of the single jurisdictional issue presented in this case. Accordingly, the TVA Cooperatives seek a protective order cancelling the noticed depositions or, in the alternative, limiting deposition questions to inquiries regarding documents produced.

Finally, there is significant overlap between the discovery KCTA sought to compel in its November 20, 2013 and January 2, 2014 Motions to Compel and the matters and topics KCTA identified in the notices. The TVA Cooperatives timely filed responses in opposition to those motions on November 27, 2013 and January 9, 2014, respectively. So that the scope of permissible discovery is clear to all the parties, the TVA Cooperatives also request that the Commission stay any depositions (if depositions are in fact proper) until the Commission has reached a ruling on these discovery motions. Clarifying the bounds of permissible discovery

will simplify the discovery process going forward and should abrogate the need for additional motion practice and dueling pleadings regarding the proper scope of discovery.

IV. CONCLUSION.

The 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 has unduly complicated and overburdened 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. For all of the foregoing reasons, the TVA Cooperatives respectfully request that the Commission enter a protective order cancelling the depositions or limiting deposition questioning to ones of jurisdictional relevance.

Respectfully submitted,

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