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' REPLY IN SUPPORT OF ITS MOTION FOR A PROTECTIVE 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, hereby file their Reply in support of their Motion for a Protective Order ("Motion").

The TVA Cooperatives seek a protective order from the Commission to prevent the Kentucky Cable Telecommunications Association ("KCTA") from continuing its pursuit of discovery beyond the scope of rehearing granted by the Commission on the single question of jurisdiction. The Commission explicitly held that the only issue for adjudication 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." (August 6, 2013 Order on Rehearing at *4.) As briefed in detail in response to multiple motions filed by the KCTA, the KCTA seeks

discovery that is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of relevant and admissible evidence. The TVA Cooperatives reluctantly filed a motion for a protective order that largely duplicates prior briefings in order to prevent the KCTA from seeking the same discovery in depositions that is the subject of several motions pending before the Commission.

I. The TVA Cooperatives' Motion for a Protective Order Is Timely and Poses No Risk of Prejudice to the KCTA.

The TVA Cooperatives' Motion is but an extension of the same issue previously addressed in response to multiple motions filed by the KCTA that are currently pending before the Commission: namely, whether the KCTA's discovery requests exceed the bounds of relevancy under the procedural rules for the single jurisdictional question which the Commission identified as the subject of this matter. The TVA Cooperatives raise no new objections in their Motion, and they filed the Motion before the KCTA planned its travel for the depositions. The Motion is timely and poses no risk of prejudice to the KCTA.

The KCTA goes to great lengths to distort the Commission's October 10, 2013 Order ("Procedural Order") to claim the TVA Cooperatives' motion is untimely. The Procedural Order states in full that "[a]ny objections or motions relating to <u>discovery or procedural dates</u> shall be filed within four business day's notice or the filing party shall explain, in writing, why such notice was not possible." (Order at 3, emphasis added.) The TVA Cooperatives did not object to the "discovery or procedural dates" set forth in the Procedural Order. In its Opposition, however, the KCTA conveniently omits the full language of ordering paragraph 6 in order to manipulate the Commission's language into the cramped assertion that an objection to the subject-matter of its deposition notices must be made within four days. As

the KCTA is fully aware, the TVA Cooperatives have no objection to the discovery contemplated by the Procedural Order. If, however, the KCTA wants to read the Order with its carefully selected omissions to construe a specific time requirement for filing any objection related to the subject-matter of certain discovery, then by its own logic, the Commission should likewise deny the KCTA's motion to compel the production of a privilege log, as KCTA's motion was filed on January 2, 2014, nearly two months after receipt of the TVA Cooperatives' responses to the KCTA's requests for information invoking the privilege.

Nevertheless, the Procedural Order should not be read in such a draconian manner, particularly when the basis for the Motion is identical to the objections the TVA Cooperatives have made throughout this proceeding in response to repeated written discovery requests from the KCTA on the same issues. The KCTA ignores the TVA Cooperatives' explanation in their Motion that the request for a protective order duplicates the discovery issues currently pending before the Commission, and if the KCTA inexplicably believed that the TVA Cooperatives did not object to deposition questioning on the same subjects to which they objected in response to the same written questions, then it was unreasonable for it to have done so.

The TVA Cooperatives had hoped to avoid additional motion practice regarding the same discovery issues that are now under review, but – given the impending dates for depositions – they ultimately filed their Motion in order to protect their rights and preempt the inevitable discovery disputes that would arise in light of the subjects identified in the KCTA's notices. A ruling on the pending discovery motions should clarify the appropriate scope, if any, for deposition testimony. As it stands, the TVA Cooperatives simply seek to prevent the KCTA from abusing the discovery process by seeking, via deposition, the very same

discovery currently under review by the Commission. In addition, even the postponement of any depositions cannot prejudice the KCTA because no future procedural deadlines exist in this matter.

Moreover, KCTA is incorrect to allege that "it has relied on the schedule the parties established in good faith and has made plans to conduct these depositions accordingly," and that "counsel for the Cooperatives declined even to commit to produce his witnesses on the deposition dates in the event that the Commission has not ruled on their Motion for a Protective Order by then." (Response at 4.) Both statements misrepresent communications between the parties' counsel. On February 10, KCTA's counsel asked counsel for the TVA Cooperatives if he planned to produce witnesses for the depositions "unless and until the Commission rules on [the] motion for a protective order. We need to know whether to proceed with travel plans." (Email Chain between Amanda Lanham and Edward T. Depp, 2/10/2014, attached as Exhibit 1, emphasis added.) Contrary to KCTA's assertions in its Opposition, counsel for the TVA Cooperatives did not refuse to produce witnesses for deposition. In fact, he explained he was "hopeful" the Commission would rule on the motion for protective order before then, but if not, "we will make the decision. I can't advise you on your travel plans, but I assume your arrangements are refundable or changeable in the event of a change regarding the depositions." (*Id.*)

This exchange confirms that the KCTA apparently had not finalized travel arrangements, and, even if travel plans were underway, no travel had yet begun. Even if the KCTA did generally plan to conduct depositions in accordance with the procedural schedule, the KCTA cannot claim prejudice because of "plans" that had not materialized or that

otherwise could easily be adjusted to accommodate the Commission's consideration of several pending motions pertaining to a common issue.

The KCTA further misrepresents communications between KCTA counsel and counsel for the TVA Cooperatives regarding the scheduling of the requested depositions. KCTA proposed four days of depositions of the five cooperatives at the end of February. Counsel for the TVA Cooperatives replied, "I think this will be fine, but I have not heard back from the clients, yet. If you want to go ahead and do your notices for them on those dates/times, we can address any tweaking that may be necessary on the back end." (Email Chain between Edward T. Depp and Amanda Lanham, 1/15/2014, attached as Exhibit 2.) Moreover, KCTA counsel acknowledged the response by agreeing, "That sounds like a reasonable plan." (*See id*.) Consequently, it is clear that the KCTA knew that counsel for the TVA Cooperatives needed to confirm the proposed dates with his clients. Ultimately, four of the five cooperatives were able to accommodate the requested date, and only one needed to move the proposed date to another in the same week in order to attend a previously scheduled board meeting. It is entirely false for KCTA to now claim that "the Cooperatives' counsel agreed to KCTA's proposal" and later "advised that the agreed-on dates would not work for at least one of the Cooperatives, after all." (Response at 3.)

Counsel for the TVA Cooperatives has been accommodating to the requested deposition schedule and shown a willingness to proceed with depositions, if only on the topics relevant to the jurisdictional issue presented in this case. The Motion is timely pursuant to the Procedural Order and, in light of the pending discovery motions on the same issues as well as KCTA's ability to adjust its travel as necessary for any depositions, poses no threat of prejudice to the KCTA.

II. The TVA Cooperatives Appropriately Seek to Limit Discovery to the Only Jurisdictional Question Before the Commission.

The KCTA also continues to wrongfully accuse the TVA Cooperatives of "hav[ing] acted in an obstructive manner throughout discovery" and again claims that their efforts to focus discovery on the issue at hand equate to "stonewalling." (Response at 4-5.) The TVA Cooperatives are entitled to prevent the KCTA from conducting a fishing expedition – through document requests or deposition questioning – by limiting discovery to the only issue before the Commission. Though discovery may be a liberal process, CR 26.02 nonetheless limits discovery to matters that are relevant. (*See* CR 26.02.) "Discovery, like all matters of procedure, has ultimate and necessary boundaries." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (internal citations and quotations omitted); *see also Proctor & Gamble Distributing Co. v. Vasseur*, 275 S.W.2d 941, 944 (Ky. 1955). In this action, the KCTA wants to pursue discovery without restriction, including seeking information dating back to the 1930s, such as agreements, cost details, and other financial data that offer no insight into "whether or not TVA has or exercises any jurisdiction . . . over the pole attachment rates of the TVA cooperatives." (Order on Rehearing at 4.) Though the KCTA believes otherwise, the question of whether the TVA has jurisdiction to regulate pole attachment rates does not equate with how the TVA regulates pole attachment rates. The KCTA's overly broad discovery efforts are thus beyond the limits of even liberal discovery permitted by procedural rules, which necessitates entry of a protective order. *See Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007) (noting that a court "may limit discovery due to irrelevance and burdensomeness").

The KCTA further mischaracterizes discovery to date in claiming the TVA Cooperatives have "stonewalled" the process. The TVA Cooperatives have responded in a timely manner to multiple sets of information requests and expeditiously produced significant amounts of documentation. Counsel for the TVA Cooperatives has worked diligently to schedule depositions of all five cooperatives on the dates requested by the KCTA, despite the inevitable issues associated with trying to balance deposition dates/times with the 24/7 demands of safely and reliably managing an electric distribution cooperative during this difficult winter. Despite this, only one cooperative ultimately required a rescheduled date, and that deposition was rescheduled for the same week in which the other depositions are taking place. These facts illustrate a willingness to cooperate in an effort to bring this litigation to a conclusion – quite the opposite of "stonewalling" all discovery efforts as the KCTA describes. Entry of a protective order as requested in the TVA Cooperatives' Motion would merely ensure that the depositions, if any, focus on the jurisdictional question presented and nothing more.

III. The TVA Cooperatives Have Shown Good Cause for Entry of a Protective Order.

Finally, the TVA Cooperatives have shown good cause for the Commission to enter a protective order regarding deposition testimony. The KCTA is systematically pursuing discovery intended to overwhelm and harass the TVA Cooperatives. The TVA Cooperatives have repeatedly explained that the KCTA seeks irrelevant and unduly burdensome discovery, including decades of contracts and agreements, invoices, cost and financial data, and other documents more appropriate for a ratemaking case, not one presenting a single jurisdictional question. Rather than heap additional argument before the Commission by repeating *ad*

infinitum the details of the same issues raised now in multiple briefs over three pending motions, the TVA Cooperatives summarily explained that "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 the center of this dispute." (Motion at 4.) The request for a protective order is a direct outgrowth of the overly burdensome discovery requests pending before the Commission and sets forth specifically the injury to result if the KCTA's depositions move forward without regard to the pending motions. Thus the TVA Cooperatives presented good cause for the Commission to grant its Motion.

Contrary to the claims in the KCTA's Opposition, the TVA Cooperatives also clearly explained the terms of the protective order they seek from the Commission. As stated in their Motion, it has become apparent that the KCTA intends to pursue (in deposition) the very same discovery to which the TVA Cooperatives have objected throughout this proceeding; for that reason, the TVA Cooperatives requested that the depositions be cancelled. If, however, the Commission were not inclined to cancel the depositions, the TVA Cooperatives seek to prevent deposition testimony "regarding any methodology used in the calculation of rates, or regarding any specific invoices, agreements, or cost or financial data." (Motion at 6-7.) The Motion explicitly requested a protective order "limiting deposition questions to inquire of documents produced," as opposed to permitting questions on the irrelevant topics for which the TVA Cooperatives refused to produce irrelevant discovery, and "denying any inquiry as to actual ratemaking, costs, or profits." (Motion at 5.) As repeatedly explained to the Commission in prior briefs regarding these discovery requests, any effort by KCTA to seek

deposition testimony on these topics will unduly complicate these proceedings, overly burden the TVA Cooperatives by requiring research into eighty years of agreements and cost data, cause serious financial injury to the cooperatives in time and expense needed to meet these expansive discovery demands and to prepare witnesses adequately for testimony, and prevent an expeditious resolution to this matter. Moreover, permitting the kind of boundless discovery that the KCTA seeks in this action would overburden the record and require the Commission to engage in an exhaustive review of irrelevant evidence in order to answer the single jurisdictional question posed.

As a final matter and to emphasize the undue burden that KCTA seeks to impose, it is important for the Commission to note that the KCTA noticed its motions as the equivalent of 30.02(6) depositions, which require the deponent to be knowledgeable about the subject-matter(s) identified in the notice. Depending upon whether the Commission grants or denies KCTA's pending discovery motions, it may – as a contingent matter – be appropriate for the Commission to cancel and stay the 30.0(6) depositions, as requested, to a date reasonably subsequent to the date any further data request responses may be due in order to permit adequate time for data collection, review, and production, followed by adequate time to educate the designated 30.02(6) witnesses. Cancelling and staying the depositions to accommodate discovery efforts will avoid the possibility of KCTA seeking "repeat" depositions, pose no prejudice to the KCTA, and result in no disruption of any established schedule before the Commission.[1] As their actions to date reflect, the TVA Cooperatives will work cooperatively to reschedule any such deposition dates, if required.

[1] There are no future procedural dates scheduled at this time.

For the reasons noted above, the Commission should grant the TVA Cooperatives' Motion for a Protective Order.

Respectfully submitted,

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