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 KCTA'S MOTION TO COMPEL

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 to Compel the TVA Cooperatives to Produce Cost Data in Response to KCTA's First Request for Information ("Motion to Compel"). KCTA's Motion to Compel was filed with the Public Service Commission of Kentucky (the "Commission") on Wednesday, November 20, 2013. The Commission should deny the Motion to Compel because the discovery KCTA seeks is not reasonably calculated to lead to the discovery of relevant and admissible evidence, and the request is overly broad and unduly burdensome.

I. ITEM 20 OF KCTA'S FIRST REQUESTS FOR INFORMATION IS NOT REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF RELEVANT 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.) 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 argues that it is entitled to compel production of and to review 25 categories of detailed RUS Account cost data in order to test whether the TVA requires full cost recovery of pole attachments. Motion to Compel at *3. Although it is apparent from the data requested that the KCTA seeks to determine what the TVA Cooperatives' pole attachment rates would be pursuant to the methodology set forth in Administrative Case No. 251, the parenthetical requests in subparts "x" and "y" of that request make that conclusion explicit.[1]

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.). Determining TVA Cooperative pole rates under the Administrative Case 251 methodology has no tendency to make that determination

[1] Those parenthetical requests seek information regarding two- and three-party poles "as described in Administrative Order 251." (KCTA First Request for Information No. 20(x)-(y).) In a phone call with counsel on the evening prior to the filing of this motion, KCTA's Washington D.C. counsel also indicated that it desired the data in order to perform a rate calculation consistent with the methodology described in Administrative Case No. 251.

more probable or less probable than it would be without the requested data. *See* Ky. R. Evid. 401.

The TVA Cooperatives have already produced a significant amount of data for KCTA. As that data indicates, the majority of their pole attachment rates are set pursuant to the terms of a voluntarily negotiated agreement with AT&T, not the Commission's ratesetting methodology from Administrative Case No. 251. (*See, e.g.*, Hickman-Fulton RECC's Response to KCTA DR 1-6.) Whatever the methodology, however, the terms by which all of the TVA Cooperatives permit pole attachments are subject to the TVA's broad review powers pursuant to the Act and as more specifically described in the "Schedule of Terms and Conditions" contained in each of the TVA Cooperatives' wholesale power contracts, which were provided to KCTA:

> In the interest of efficiency and economy, Cooperative may use property and personnel jointly for the electric system and other operations, subject to agreement between Cooperative and TVA as to appropriate allocations, based on direction of effort, relative use, or similar standards, of any and all joint investments, salaries and other expenses, funds, or use of property or facilities.

See, e.g., Attachment to Pennyrile RECC's Response to KCTA DR 1-17, p. 13 (emphasis added).

Whether the TVA's review practices comport with the KCTA's or Commission's views regarding an appropriate rate methodology is irrelevant for purposes of the jurisdictional question at issue in this matter. It is sufficient as a matter of law that the TVA has those powers pursuant to the TVA Act, as well as its agreements with the TVA Cooperatives.[2] In addition to the legal views expressed in the letters from Ms. Herron, the TVA Act and the wholesale power contracts confirm the Commission's original ruling on June 28, 2013 where it found that the field

[2] "The question before us is whether or not the 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 [C]ooperatives." (Order on Rehearing at 4 (emphasis added).)

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. *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*, Order, Ky. P.S.C. Case No. 2012-00544, *8 (June 28, 2013) (the "June 28 Order). 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—especially the detailed cost data sought by KCTA—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 [the Commission]." (Order on Rehearing at 3-4.) The KCTA does not need the detailed RUS Account cost data 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." *Id.* at 3.

Consequently, KCTA's motion should be denied.

II. ITEM 20 OF KCTA'S FIRST REQUESTS FOR INFORMATION IS OVERLY BROAD AND UNDULY BURDENSOME.

Item 20 of the KCTA's first requests for information is also overly broad, and requiring production of the requested data would subject the TVA Cooperatives to undue burden. 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 ratemaking proceeding, however much KCTA or the cable industry would like to turn it into one. Requiring the TVA Cooperatives to review, extract, sort, and verify the requested data will divert personnel from their ordinary activities, and it will further increase the TVA Cooperatives' legal expenses in pursuit of a task that is not germane to this proceeding in any event.

Consequently, KCTA's Motion to Compel should be denied.

III. KCTA MISCHARACTERIZES THE TVA COOPERATIVES' POSITION AS INVOLVING A QUESTION OF FACT.

It bears noting that this motion to compel stems largely from KCTA's insistently inaccurate framing of the TVA Cooperatives' position in this matter as one solely of conflict preemption that the TVA Cooperatives allegedly believe require factual proof. That is a gross mischaracterization of the TVA Cooperatives' position. Although the TVA Act, and the wholesale power contracts with the TVA Cooperatives (as well as the letters from Ms. Herron) support a finding of conflict preemption, the TVA Cooperatives' filings have been clear that field preemption compels the same result as was reached in the Commission's original, June 28, 2013, order. (*See* Response to Application for Rehearing at 7 ("No amount of factual proof would change the conclusion that the TVA Act preempted the field of Commission jurisdiction over the TVA Cooperatives, whose rates and services are regulated by the TVA").) Nothing about the detailed cost data sought by the KCTA's Motion to Compel is even arguably probative regarding the question of field preemption. The language of the TVA Act, the wholesale power contracts, and the letters from Ms. Herron compel the same result for the question of conflict preemption.

"Whether a federal law preempts a state law or precludes another federal law is a question of law." *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 429 (6th Cir. 2009) (emphasis added); s*ee also Nye v. CSX Transp., Inc.*, 437 F.3d 556, 563 (6th Cir. 2006), *Ramsey v. Formica Corp.*, 398 F.3d 421, 424 (6th Cir. 2005). This has been and continues to be the TVA Cooperatives' position. (*See* Response to Application for Rehearing at 3-4.) Relying on precedent and Commission practice, the Commission originally resolved the KCTA's legal question by ruling that "Congress has occupied the field of regulating the TVA Cooperatives." June 28 Order at *6. *See also TVA v. Tennessee Electric Power Co.*, 90 F.2d 885, 890 (6th Cir. 1936) (holding that the TVA intended to "supplant state regulation"). KCTA now argues that the TVA Cooperatives' position requires certain findings of fact. That assertion remains in error.

Federal law is clear. The duty of the TVA is to supply electrical power at the lowest possible cost. 16 U.S.C. 831n-4(f) ("power shall be sold at rates as low as are feasible"); *see also TVA v. Energy Regulatory Comm'n of KY*, Memorandum Op., *2 (Sept. 27, 1979). The TVA is also empowered to make "determinations to promote the wider and better use of electric power for agricultural and domestic use." 16 U.S.C. 831i. In order to meet the stated objectives, the TVA "regulate[s] 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). The TVA is therefore "authorized 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 for carrying out the purposes of this Act." 16 U.S.C. § 831i (emphasis added).

There is simply no regulatory space in which a state authority can exercise jurisdiction over pole attachments, as that matter falls within the scope of the TVA's exclusive oversight regarding rates and services of its member distributors. This position accords with the express language of the TVA Act, the express language of the wholesale power contracts, the express language of the 6th Circuit Court of Appeals (*see TVA v. Tennessee Electric Power Co.*, *supra*), as well as the TVA's own legal interpretation of its statutory authority. *See* Jan. 24, 2013 Ltrs. fr. C. Herron, Exhibits 2-6 to the TVA Cooperatives' Response to the January 17 Order (TVA "is the exclusive retail rate regulator for the distributors of TVA power, including the five Kentucky cooperatives"); *see also* May 16, 2013 Ltr. fr. C. Herron (filed in case record on June 18, 2013) ("TVA also regulates the use of electric system assets of the distributors of TVA power"). The Commission properly relied on these letters in the June 28 Order to the extent that they provided the TVA's interpretation of the TVA Act, which interpretation was a mere corroboration of existing federal and state law, not a statement of fact. *See Nickels v. Grand Trunk W. R.R.*, 560 F.3d at 429 (6th Cir. 2009) ("Whether a federal law preempts a state law or precludes another federal law is a question of law").

Despite its original allegation that this case presents a question of law, KCTA now argues that there is a material question of fact as to whether the TVA engages in some positive, direct action to regulate the pole attachment rates of the TVA Cooperatives. This is incorrect for two reasons. First, there is no question that the TVA does regulate the pole attachments of the TVA Cooperatives. The "Schedule of Terms and Conditions" in the TVA wholesale power contract shows it:

> "In the interest of efficiency and economy, Cooperative may use property and personnel jointly for the electric system and other operations, subject to agreement between Cooperative and TVA as to appropriate allocations, based on

> direction of effort, relative use, or similar standards, of any and all joint investments, salaries and other expenses, funds, or use of property or facilities."

E.g. Attachment for Pennyrile RECC's Response to KCTA DR 1-17, p. 13 (emphasis added).

Second, any supposed question of fact is immaterial. Even if the TVA did not address the use of electric utility property (including poles) in its power contracts—an assertion disproven by the contract itself—that fact would nevertheless remain unreviewable. "Congress has retained oversight of TVA's rates and its contracts with respect thereto." *Mobil Oil Corp. v. TVA*, 387 F.Supp. 498, 507 (N.D. Ala. 1974); *also see Carborundum Co. v. TVA*, 521 F.Supp. 590, 593 (referring to the "well established legal principal that the setting of power rates under the Tennessee Valley Authority Act is not subject to judicial review."). The Commission cannot usurp Congress's retained "oversight of TVA's rates and its contracts with respect thereto," *Mobil Oil Corp. v. TVA*, 387 F.Supp. at 507, even to ensure that TVA is enforcing the terms of its wholesale power contracts. *Matthews v. Town of Greeneville,* 1991 U.S. App. LEXIS 9453 (6th Cir. 1991) (holding that TVA's failure to enforce certain terms in a wholesale power contract with a municipality is unreviewable).

Accordingly, the principles of field pre-emption operate to prohibit state regulation of the TVA Cooperatives' pole attachment rates. In the June 28 Order, the Commission properly exercised administrative restraint in acting upon KCTA's petition by employing the doctrine of field pre-emption and choosing not to reach the separate and unnecessary legal question of conflict pre-emption. June 28 Order at *8 ("Because we find that Congress has occupied the field of regulating the TVA Cooperatives, we do not have to reach the question as to whether

conflict pre-emption would prevent use from exercising jurisdiction over the pole attachments of TVA cooperatives").

Even though it relied on field preemption for its initial ruling in this case, the Commission also stated its belief that conflict preemption prevents Commission jurisdiction, as well. *See id.* The wholesale power contracts and the letters from Ms. Herron may provide documented examples of TVA jurisdiction, but they are not necessary to resolve the pure question of law answered by the broad reservation of power in the TVA Act, as well as the many cases indicating that Congress retained oversight of the TVA and its contracts with its distributor members. *See Mobil Oil Corp. v. TVA, supra*; *Carborundum Co. v. TVA, supra; Matthews v. Town of Greeneville*, *supra.* Pursuant to either a field pre-emption or conflict pre-emption analysis, KCTA has no need to review the requested RUS Account cost data for the TVA Cooperatives.

Therefore, the KCTA's Motion to Compel should be denied.

IV. 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 by mischaracterizing the TVA Cooperatives' position as one purely of conflict pre-emption that now allegedly requires the TVA Cooperatives to take on the undue burden of extracting and producing detailed cost data that is not even reasonably calculated to lead to the discovery of admissible evidence in the context of this purely jurisdictional matter.

The data requested by KCTA in Item 20 of its First Requests for Information is wholly unnecessary to resolve the jurisdictional question of law that KCTA itself presented upon filing its petition. The detailed RUS Account cost data KCTA seeks would be relevant, perhaps, only in a rate-setting proceeding. Whatever the case, it is not reasonably calculated to lead to the discovery of admissible evidence in this proceeding, and it would be unduly burdensome to require the TVA Cooperatives to provide the requested data.

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

Respectfully submitted,

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