**BEFORE THE**

**KENTUCKY PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| **In The Matter of:** | | |
| **The Petition of the Kentucky Cable** | **)** | |
| **Telecommunications Association for a** | **)** | **Case No. 2012-00544** |
| **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** | **)** | |

## Reply of the Kentucky Cable Telecommunications Association

The Kentucky Cable Telecommunications Association ("KCTA") submits this Reply to the TVA Cooperatives' ("the TVA Coops" or "the Coops") Response to the Commission's January 17, 2013 Order and the KCTA's Petition for a Declaratory Order that the Commission has regulatory jurisdiction over the TVA Coops' pole attachment rates, terms and conditions.

This is an easy case. The parties rely on the same PSC and court decisions regarding the scope of the TVA's preemption of Commission's jurisdiction. There is no doubt that the TVA regulates the retail electric rates of the TVA Coops. But there is also no doubt that the TVA does ***not*** regulate the TVA Coops' pole attachment agreements or rates. Even assuming that the letters the TVA Coops obtained from Ms. Cynthia Herron, the TVA's "Director, Retail

Regulatory Affairs," represent the TVA's position,1/ the letters do not remotely suggest that the TVA either directly regulates the Coops' pole attachment rates or contracts, or that the TVA has otherwise preempted the Kentucky Commission's regulation of these rates or contracts. Indeed, the letters are more notable for what they do not say, than for what they do say. According to Ms. Herron's letters, TVA's only interest regarding the Coops' pole attachment rates is that the Coops "recover [their] full cost associated with the pole attachment and not place any unfair burdens on the electric ratepayers by ensuring full cost recovery." Her statement is neither an assertion of preemptive jurisdiction by the TVA or an objection to this Commission regulating the Coops' pole attachment rates, so long as the electric ratepayers "do not subsidize the costs of these rentals."

## I. Since The Commission "Unquestionabl[y]" Has Jurisdiction Over Coop Pole Attachment Rates, This Case Presents Solely An Issue of Possible Federal Preemption.

This straight-forward case raises an issue of federal preemption, and nothing more. Indeed, the sole issue presented by this case is whether the TVA has preempted the pole attachment jurisdiction that is otherwise held by this Commission. It is not subject to reasonable dispute that, unless the TVA has preempted the Commission's pole attachment jurisdiction in this instance, the Commission clearly has such jurisdiction over the TVA Coops' pole attachment agreements and rates. As the Commission noted in its seminal decision regarding its pole attachment jurisdiction, under KRS 278.040 the Commission has "exclusive jurisdiction over the rates and services" of utilities, including cooperative utilities, in Kentucky. *In re. Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space,* Case no. 8040 (Ky

1/ Without any denigration of Ms. Herron's position at TVA, we note that she is neither on the Board of Directors nor is she listed on TVA's website as an "Executive" of the TVA. *See* http://www.tva.com/abouttva/leadership.htm, last visited on February 22, 2013.

PSC, Aug. 21, 1981) at 5 (emphasis by PSC). The rates and services subject to that jurisdiction include the rates, terms and conditions of pole attachments. *Id.* at 9. Those determinations were affirmed by the Kentucky Court of Appeals in *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393 (Ky Ct. App. 1983). The Court of Appeals thereby confirmed that "the Commission does have statutory jurisdiction [over pole attachment rates, terms and conditions, and] that its failure to exercise such jurisdiction during the previous 25 to 30 years does not bar it from accepting jurisdiction at this time[ ]." *Id.* at 396. The Court of Appeals also confirmed that the Commission's jurisdiction is "exclusive**."** *Id.* "We can only conclude," stated the court, "that the statutory scheme confers broad jurisdiction over the use of the 'facilities' of *all* utilities." *Id.* (emphasis added). When the Commission re-examined the scope of its pole attachment jurisdiction in the 2005 case of *Ballard Rural Telephone Coop. Corp. v. Jackson Purchase Energy Corp.*, 2005 WL 858940 (Ky PSC Mar. 23, 2005), it noted: "[W]e find it *unquestionable* that we have jurisdiction over pole attachments." *Id.* at *3.2/

The sole question presented to the Commission by KCTA's Petition, therefore, is whether the PSC's "*unquestionable*" jurisdiction over the pole attachment rates, terms and conditions of the cooperatives that receive their power from the TVA has been preempted by any concurrent jurisdiction exercised by the TVA. The TVA Coops' suggestion in their Response that there is an unbroken 80-year history of recognition by this Commission that the TVA has "complete authority . . . over the rates and services of TVA Cooperatives" is not correct. To the contrary, it was not until a federal court held in 1979 that this Commission's jurisdiction over the Coops' retail electric rates was preempted by a direct conflict with the concurrent jurisdiction actually

2/ The TVA Coop's argument about "wagging the dog" is opaque, and KCTA doesn't understand it. To the extent that they are arguing that the Commission needs some other jurisdictional "hook" beyond that provided for in KRS 278.040 as interpreted by the Commission and the courts, the argument is simply wrong.

exercised by the TVA that the Commission ceded jurisdiction to the TVA over matters actually regulated by the TVA. *See TVA v. Energy Reg. Comm'n of Ky*, Civ. Action no. 79-0009-P (W.D. Ky. Sept. 25, 1979). Since that court decision, it is true that the Commission has recognized that the TVA also actually regulates certain "services" of the TVA Coops, including their borrowing from the REA. *See In re. Hickman Fulton Counties Rural Elec. Coop. Corp.*, Ky PSC no. 8858 (June 27, 1983.3/ But until now, the Commission has never been asked to address whether its jurisdiction over pole attachments is similarly preempted.

## II. The Sole Preemption Issue Is Whether This Commission's Exercise Of Its Jurisdiction Would Conflict With Jurisdiction Of The TVA.

The Commission's exercise of its statutory jurisdiction over the TVA Coops' pole attachment rates, terms and conditions would not violate any of the preemption standards set forth in the case law. Federal preemption doctrine is a product of the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2. In a preemption analysis, the court "first ascertain[s] the construction of" the state and federal statutes and then "determin[es] the constitutional question whether they are in conflict." *In re Schafer*, 689 F.3d 601, 613 (6th Cir. 2012) (*citing Perez v. Campbell*, 402 U.S. 637, 644 (1971)).

The Sixth Circuit has recently explained that "[w]hen considering federal preemption of state law," courts must begin "with the traditional presumption . . . that Congress did not intend to displace state law . . . unless that was the clear and manifest purpose of Congress." *Black v. Dixie Consumer Prods. LLC*, No. 10–5498, 2013 WL 645954 at *6 (6th Cir Feb. 22, 2013) (quoting *Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1161 (6th Cir. 1993)). This "presumption against preemption" is strongest where "Congress has legislated in a field which the States have traditionally occupied," as courts must "start with the assumption that the historic police powers of the States were not

3/ Borrowings by the TVA Coops are specifically excluded from PSC jurisdiction under KRS 278.300(10). *See West Ky Rural Elect. Coop. Corp. v. Energy Reg. Comm'n*, No. 80-CI-1747 (Franklin Cir. Ct. Nov. 12, 1982).

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotations omitted) (holding further that the presumption against preemption applies even where the federal regulatory scheme has existed for more than a century because it "accounts for the historic presence of state law"). That is the case here, as the Supreme Court has recognized that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (citing *Munn v. Illinois*, 94 U.S. 113 (1877)).

The parties agree that the only preemption principle raised by this case is whether there is present any "conflict preemption." 4/ As such, the Commission's jurisdiction over the TVA Coops' pole attachments need only be considered under a conflict preemption framework. Courts assess conflict preemption in two ways. *First*, courts "consider whether the laws in question conflict such that it is *impossible* for a party to comply with both laws simultaneously." *Id.* at 614 (emphasis added); *Wimbush v. Wyeth*, 619 F.3d 632, 643 (6th Cir. 2010) (describing impossibility preemption as a "demanding defense"). *Second*, courts consider whether "the enforcement of the state law would hinder or frustrate the full purposes and objectives of the federal law." *In re Schafer*, 689 F.3d at 614. "Conflict preemption analysis should be narrow and precise, to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Wimbush*, 619 F.3d at 643 (internal quotations omitted) (explaining, "where possible, a court should try to reconcile federal law and state law"). A state scheme is not preempted "[s]imply because [it] . . . parallels federal [law]." *Id.* Nor is a state law preempted where it furthers, rather than frustrates, federal policy. *See Wyeth*, 555 U.S. at 565.

---

4/ Courts have identified three ways in which a state statute may conflict with federal law: express preemption, field preemption, and conflict preemption. *In re Schafer*, 689 F.3d. at 613-14. Express preemption exists where the intent of Congress to preempt state law is explicit. *Id.* Field preemption exists "where Congress's regulation in a field is so pervasive or the federal interest is so dominant that an intent can be inferred for federal law to occupy the field exclusively." *Id.* at 614. The TVA Coops' preemption argument makes clear that it considers only conflict preemption to be relevant here. Response at 6-7. This is consistent with *TVA v. Energy Reg. Comm'n of Kentucky*, Civil Action No. 79-0009-P (W.D. Ky. Sept. 25, 1979), which considered only whether a direct conflict existed between the Commission's exercise of regulatory authority and federal law. *See id.* ("This Court finds direct conflict exists between an exercise of federal authority . . . and an exercise of state authority.").

## III. There Is No Conflict Preemption Here

Exercise by the Commission of its jurisdiction over the TVA Coops' pole attachment rates, terms and conditions is not in conflict with any TVA jurisdiction. It would not be impossible for the Coops to comply with both state and federal regulations. And exercise by the Commission of its "unquestionable" jurisdiction here would not impose an obstacle to the achievement of Congress's objectives. The only concerns of the TVA, as expressed by Ms. Herron, are that the TVA Coops' pole rates "ensure full . . . recovery" of the costs of pole attachments and do not "subsidize" cable operators and their customers. Nowhere does Ms. Herron suggest that the TVA controls or regulates the TVA Coops' pole rates, or exercises any authority over their pole attachment contracts. Nor does her letter indicate that the TVA would object to PSC regulation of abusive rates, terms and conditions, so long as the PSC's regulation ensures "full cost recovery" and avoids a "subsidy."

These concerns are easily met by the Commission's exercise of jurisdiction through application of the Commission's long-standing pole attachment rate formula – a formula that recovers the utility's fully allocated costs. *See In re. Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments,* Admin. Case. No. 251, Sept. 17, 1982 (attached as Ex. 1). The Commission establishes pole attachment rates which are "fair, just and reasonable." *Id.* at 3. Its fully allocated rate methodology takes the embedded cost of an average pole of the utility, multiplies it by an annual carrying charge that includes the utility's costs of depreciation, operating and maintenance expenses, general and administrative costs and a reasonable rate of return, and then multiplies that product by the percentage of usable space on the pole used for pole attachments. *See id*. at 8, Under this rate methodology, cable operators "pay their equitable share of all the utility's costs in providing services." *Id.* at 11.

There is no doubt that the Commission's exercise of its pole attachment jurisdiction over the past thirty years does not provide a "subsidy" to cable operators or provide less than "full recovery" to the pole owners. The similar pole attachment rate methodology used by the Federal Communications Commission ("FCC") has been reviewed time again by the federal courts and found to be reasonable and not to constitute a subsidy. 5/ The United States Supreme Court has noted that, "Appellees have not contended, nor could it be reasonably argued, that [an FCC-approved pole attachment] rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory." *FCC v. Florida Power Corp.*, 480, U.S. 245, 254 (1987); *see also Alabama Power Co.*, 311 F.3d at 1370-1371 (absent proof to the contrary, the "Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation").

Although the FCC's pole attachment rate methodology has thus been affirmed in the courts as fully compensatory, the PSC's pole attachment rate methodology, while similar to the FCC's, provides even greater protection to the utility and its ratepayers. In adopting its rate formula, this Commission declined to follow the FCC method in all respects, believing that "it does not provide for the allocation of the utility's full cost of providing such service among all its classifications of customers. This Commission cannot accept a formula which allocates costs so unevenly." *In re. Adoption of a Standard Methodology*, at 8. The Commission thus adopted a rate methodology that even more carefully than the FCC's method assures full recovery to the utility of all fully allocated costs.

---

5/ Both the Kentucky Commission and the FCC multiply the net historical cost of an average pole used for pole attachments by a carrying charge made up of the costs of depreciation, operations, taxes, maintenance and a rate of return to derive an average annual cost of owning and maintaining a pole. Both agencies then multiply this product by the amount of usable space on the pole occupied by the attachment. *Compare In re. Amendment of Comm'n's Rules and Policies Governing Pole Attachments*, 16 F.C.C.R. 12103, App. D-2 (2001) *and In re. Adoption of a Standard Methodology*, Admin. Case 251.

Furthermore, it is evident that the TVA itself has no particular concerns about the Commission's exercise of its jurisdiction here. That lack of concern is reflected not only in the wording of Ms. Herron's letter, but also in the TVA's choice to be heard in this proceeding only through identical letters from the TVA's Director, Retail Affairs to the individual TVA Coops. The TVA knows how to express itself when it believes this Commission is infringing on its prerogatives. For example, when the TVA believed that the Commission was overstepping its bounds by exercising jurisdiction over TVA Coop borrowings from the REA, the TVA wrote directly to the Commission "stating that in its opinion the principle enunciated in the 1979 federal court decision would apply to services as well as rates," specifically to the REA borrowings at issue. *See In re. Application of Hickman-Fulton Counties Rural Elec. Coop. Corp.*, Ky PSC Case No. 8858, June 27, 1983. No such correspondence from the TVA to the Commission regarding the Commission's jurisdiction over pole rates has been received in this case. In fact, not only has the TVA chosen not to intervene or to correspond directly to the Commission here, Ms. Herron's letter fails to even *address* the Commission's jurisdiction. In short, the TVA has not expressed any objection to the Commission's asserting its jurisdiction to assure that the pole rates of the TVA Coops are not unjust or unreasonable according to the Commission's traditional pole attachment rate analysis.

In particular, Ms. Herron's letters do not suggest that this Commission's actions to ensure that the TVA Coops do not gouge cable operators with unjustified pole attachment fees would interfere with the TVA's regulation of the TVA Coops' rates for retail electric service. The TVA Coops' statement in their Response that "[c]learly, the TVA considers its member cooperatives' pole attachment rates and services to play an important role in the context of the ultimate retail rate paid by its members cooperatives end-users" is wholly without basis. So long as this

Commission ensures that the TVA Coops' pole attachment rates do not prevent the Coops from recovering of the full costs of their pole attachment service, the TVA's concerns are satisfied. Indeed, the PSC's exercise of its jurisdiction here through application of its rate formula would *assure* that the TVA Coops recover their full costs of providing pole attachment service and do not subsidize cable operators – performing a function that the TVA is not itself performing.

## IV. The Commission Should – Indeed, Must – Exercise Its Pole Attachment Jurisdiction Over the TVA Coops.

As noted in KCTA's Petition, the TVA Coops' pole rates are far in excess of any regulated pole attachment rates in this state. *See* Petition ¶6. Whether the TVA Coops will assert any cost justification for pole attachment rates that are more than three times those of other coops in Kentucky remains to be seen, but there is no reason to expect that there is. In any case, no harm can come from this Commission's ensuring that the TVA Coops are not simply exercising their power as a monopoly provider of an essential facility.6/

In terms of how the Commission might exercise its jurisdiction to ensure that the TVA Coops' pole attachment rates, terms and conditions are just and reasonable, the Commission has several choices. It could require the filing of pole attachment tariffs, as required of other cooperatives in Kentucky. Or the Commission could exercise its jurisdiction simply by allowing the parties to negotiate, and if the parties cannot reach agreement, the Commission could "conduct an investigation and establish rates that are fair, just and reasonable," as the Commission determined to do with joint pole users. *See Ballard Rural Telephone Coop., Inc. v. Jackson Purchase Energy Corp.*, 2005 WL 858940 (Ky PSC, March 23, 2005). In any case, in its assertion of jurisdiction, the Commission should clearly state a commitment that its regulation of

6/ *See Nat'l Cable & Telecom. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002); *American Elec. Power Corp. v. FCC*, No. 11-1146, D.C. Cir. Slip Op., Feb. 26, 2013, at 8.

pole rates of the TVA Coops will ensure that the rates will neither provide a subsidy to cable operators or deprive the Coops of recovery of the full costs of their pole attachment service.

However the Commission decides to exercise its jurisdiction over the TVA Coops' pole attachment rates, terms and conditions, we respectfully suggest that it is statutorily obligated to assert jurisdiction here. The Commission has clearly and correctly noted that it has "unquestionable" jurisdiction over pole attachments, *see id.,* at *4, at least in the absence of a preemptive conflict with the exercise of the TVA's federal jurisdiction. Since there is no conflict with the TVA's jurisdiction in this case, *see TVA v. Energy Reg. Comm'n of Ky,* Civ. Action no. 79-0009-P (W.D. Ky. Sept. 25, 1979), or any basis to conclude that the Commission's exercise of its jurisdiction would interfere with the TVA's contractual control of the TVA Coops' retail electric rates, the Commission must exercise that jurisdiction here.

In its January 17, 2013 Order in this matter, the Commission noted that it "has not exercised jurisdiction over TVA Cooperatives since 1979 when the United States District Court for the Western District of Kentucky found that Commission regulation of the TVA Cooperatives' retail electric rates was preempted because it directly conflicted with TVA regulation of the same rates." Order at 2. The Commission also stated that in light of that decision, "KCTA bears a considerable burden to prove its claim that the Commission does have jurisdiction to regulate pole attachments of TVA Cooperatives." As stated in its Petition, KCTA has been unable to unearth any instances in which the TVA has regulated pole attachments in any way. KCTA cannot be expected to do more in proving a negative. The TVA Coops, who would have reason to know, do not allege that such regulation actually exists. And the letter from Ms. Herron at TVA provides no such indication. The Commission has more than sufficient basis, therefore, for determining that its regulation of the TVA Coops' pole rates would neither

directly conflict with any exercise by the TVA of its own jurisdiction, or in any way prevent the TVA Coops from meeting the regulatory demands of both the TVA and the Commission.

## V. Conclusion

Because this Commission plainly has jurisdiction over the TVA Coops' pole rates, terms and conditions; because the TVA does not exercise conflicting jurisdiction; and because the TVA Coops' pole rates are far out of line with regulated rates of other cooperatives, we respectfully request the Commission to exercise its jurisdiction.

Respectfully Submitted,

/s/ Laurence J. Zielke
Laurence J. Zielke
Janice M. Theriot
**Zielke Law Firm, PLLC**
1250 Meidinger Tower
462 South 4th Street
Louisville, KY 40202
(502) 589-4600

Gardner F. Gillespie (admitted pro hac vice)
**Hogan Lovells US LLP**
555 13th St NW
Washington, DC 20004
(202) 637-5600