

**COMMONWEALTH OF KENTUCKY
BEFORE THE 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)	

**KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION’S SECOND
STATUS REPORT AND REQUEST FOR ACTION**

The Kentucky Cable Telecommunications Association (“KCTA”) submits this Second Status Report and Request for Action to update the Commission on recent developments in the above-captioned matter, and to ask the Commission to rule on pending motions to facilitate this proceeding. As described below, the Commission’s failure to exercise its statutory jurisdiction over the pole attachment rates of TVA Cooperatives in the Commonwealth is causing TWC severe financial harm that may not be rectifiable.

INTRODUCTION

KCTA filed its petition in this proceeding in December 2012, seeking a declaratory order affirming that the Commission’s exclusive and “unquestionable” jurisdiction to regulate the pole attachment rates, terms, and conditions extends to the pole attachment rates charged by the TVA Cooperatives. In its August 6, 2013 Order, the Commission ruled that this matter presents “a mixed question of fact and law” and ordered the parties to go forward to determine “whether or not TVA has or exercises any jurisdiction” The Commission set a procedural schedule for discovery, including notices of depositions on October 10, 2013. Since that time, the TVA Cooperatives systematically have denied KCTA its right to discovery of relevant information in

this matter, consistently presenting the argument – in direct contradiction to the Commission’s August Order – that this proceeding is a “pure question of law.”

BACKGROUND¹

The ongoing dispute regarding the scope of relevant discovery in this case has resulted in two motions to compel,² a contested motion for the issuance of a subpoena *duces tecum* to the Tennessee Valley Public Power Association (“TVPPA”),³ a motion for a protective order, and two Requests for Action (of which this filing is the second). Because it had not yet acted on the other pending discovery motions, the Commission stayed KCTA’s depositions on February 19, 2014. The issues raised by the pending discovery motions have been fully briefed by the parties and are ready for the Commission to decide. KCTA urges action on these motions so that it can demonstrate the “unquestionable” jurisdiction of the Commission and move forward. The failure of the Commission to allow this proceeding to move toward completion not only prevents it from exercising its statutory jurisdiction, but it is causing harm that may be irreparable to KCTA members.

Pending resolution of this proceeding, one of KCTA’s largest members, Time Warner Cable (“TWC”), initially deferred paying the exorbitant – not to mention unreasonable – pole attachment fees charged by the TVA Cooperatives. The pole attachment rates being charged by

¹ As KCTA’s First Status Report and Request for Action, attached as Exh. A, provides an in-depth summary of the relevant events, this Second Request for Action provides a more concise summary of the proceeding’s background. *See* Exh. A, at 3-6.

² KCTA incorporates by reference its Motion to Compel the TVA Cooperatives to Produce Documents Withheld on the Basis of Attorney-Client Privilege and Documents Responsive to KCTA’s Supplemental Request for Information, filed on January 2, 2014, and its Reply in Support of Its Second Motion to Compel, filed on January 16, 2014.

³ KCTA incorporates by reference its Motion for Issuance of Subpoena *Duces Tecum*, filed on January 15, 2014, and its Reply In Support of Its Motion, filed on January 29, 2014.

the Cooperatives (in the range of \$15-\$30) are multiples of the rates that are charged by utilities regulated by the Commission (in the range of \$4-\$12). TWC's deferral of payment of the invoices was not an issue until March 2014, when the Cooperatives began an apparently concerted effort to take advantage of the fact that this proceeding has stalled by demanding payment of their unilaterally imposed rates.

On April 1, 2014, after KCTA filed a Request for Action on the pending motions, *see* Exh. A, and without any way to calculate the appropriate rate under the Commission's methodology, TWC made an interim payment of \$7.50 per attachment to the Cooperatives. The payments were made under protest, and subject to true up, whether up or down, based on the resolution of the pending matter and any subsequent proceedings. Additionally, TWC made clear that acceptance of the interim payment would not waive the Cooperatives' rights, if any, to a higher amount.

In response to TWC's interim payment, at least two of the Cooperatives continue to attempt to take advantage of the fact that this proceeding has stalled by demanding payment of their unilaterally imposed rates. One of the Cooperatives – Warren Rural Electrical Cooperative Corporation (“Warren”) – is also demanding an unconscionable “late fee” on amounts paid and amounts not yet owed, as well as denying TWC any new attachments or transfers until all amounts are paid. The other Cooperative – West Kentucky Rural Electrical Cooperative Corporation (“West Kentucky”) – has apparently convinced the City of Murray to attempt to interfere with the sale of TWC to Comcast and the further transfer of control of TWC's cable systems in Kentucky to Charter Communications, unless TWC pays all of the amount that the Cooperative has demanded in pole attachment fees.

In light of Warren's efforts to take advantage of the stalled proceedings, TWC has had no choice but to pay the amounts that the Cooperative has demanded. In light of Warren's position, if TWC continued to withhold payment of the disputed amounts, it would be unable to operate its business, including the expansion of its cable plant to serve new and existing customers. Despite the clear lack of any relationship between the pole rates paid to West Kentucky and Comcast's and Charter's qualifications to operate a cable system in Murray, it is not yet clear how the City's overreaching to help West Kentucky recover unjustified revenues will be resolved. Nor is it clear whether other TVA Cooperatives will follow Warren's lead and refuse to allow TWC to make new attachments unless the disputed fees are immediately paid. What is already clear, however, and illustrated by the actions of both Warren and West Kentucky, is that the Commission's failure to exercise its jurisdiction over TVA Cooperatives' pole rates – including its failure even to allow this proceeding to go forward to fully develop the facts – is creating substantial harm to TWC. Notably, there may be no way for TWC to recover the exorbitant amounts paid, even if the Commission subsequently exercises its exclusive and “unquestionable” jurisdiction to prevent unreasonable pole attachment rates.

Based on the above, and specifically the substantial harm faced by TWC, KCTA asks the Commission to rule on the outstanding discovery-related motions so that the parties can move toward quick resolution of this matter. Once the Commission rules on its motions, KCTA will require only a brief period of time to complete discovery. At that time, the matter may be suitable for a summary decision on the merits, or, if necessary, resolution after a short hearing.

RECENT DEVELOPMENTS

Since the April 1, 2014 Request for Action, several notable events relevant to this proceeding have occurred:

1. On or about May 1, 2014, TWC sent the TVA Cooperatives an interim payment in the amount of \$7.50 per attachment. As noted in the previous Request for Action, TWC made these payments under protest, and subject to true up, whether up or down, pending the Commission's ruling regarding its jurisdiction over the Cooperatives' pole attachment rates, terms, and conditions and any related proceedings. Further, TWC advised the Cooperatives that acceptance of the interim payment would not prejudice the legal position of the Cooperatives.

Despite the uncertainty regarding the status of the pending motions, as well as the uncertainty regarding the amounts that should properly be due, TWC willingly paid substantial amounts to the Cooperatives. As discussed below, however, some of the Cooperatives refuse to acknowledge TWC's efforts to provide interim payments and, instead, continue to use the delay in this proceeding as an opportunity to demand payment of exorbitant, and unilaterally imposed, rates.

2. On August 29, 2014, Warren sent a second "Pole Attachment Rentals Past Due Notice." See Warren Letter, attached as Exh. B. Included with the letter was an invoice for TWC's pole attachment fees for the period July 1, 2013 through December 31, 2014, totaling over \$290,000 at pole attachment rates of either \$25.26 or \$25.57. Approximately \$11,000 of the amount owed represents late fees, assessed at 6%, for various time periods. Although Warren did subtract TWC's "Partial Payment" of \$67,605 (*i.e.*, the interim payment of \$7.50 per attachment) from the total amount sought, it assessed its "late fee" on the full amount of the interim payment that Warren has had in its possession since May of 2014. In other words, Warren demanded that TWC pay interest both on amounts it may not owe and on amounts it already has paid. Further, Warren's "late fees" appear to cover amounts for the period between now and the end of 2014; TWC's failure to pay in advance has thus subjected it to prospective

late fees. Warren left TWC with no alternative but to pay its demands in full, by notifying TWC that **“no new attachments, transfers or power supply connections will be permitted until all fees are paid.”**

To summarize, Warren indicated it would (a) accept no less than the exorbitant rates of \$25.26 or \$25.57 per attachment, (b) charge late fees on the total amount sought without regard to any interim or partial payments already made, (c) charge unconscionable “late fees” on amounts owed in the future, and (d) deny TWC the right to any new attachments, transfers, or power supply connections until the total amount sought, plus late fees, is paid. As a result, TWC had no choice but to pay Warren the amount it demanded in full, and TWC did so on October 2, 2014. *See* Letter re Pole Attachment Payment to Warren RECC, attached as Exh. C.

3. On September 3, 2014, the City of Murray informed TWC that it would not approve TWC’s request for transfer of control to Comcast Cable unless TWC paid West Kentucky the pole attachment fees it was demanding – \$25.27 – in full. *See* Murray Letter, attached as Exh. D. The letter sent by the City’s counsel dictates that TWC “pay pole attachment fees owed to West Kentucky Rural Electric Cooperative [‘West Kentucky’] for those poles [used by TWC] within the City of Murray” at the rate of \$25.27 per attachment.

KCTA consistently has acknowledged that TWC owes West Kentucky compensation for the use of its poles, and TWC provided West Kentucky an interim payment of \$7.50 per attachment. Because the Cooperatives have steadfastly refused to provide cost data to KCTA, however, it has no way to calculate what the rates would be under the Commission’s pole rate methodology. If TWC refuses to pay the exorbitant amount demanded, TWC runs the risk that Murray will deny the transfer of control of the cable system to Comcast, which would certainly

result in costly litigation, at the least. TWC – and West Kentucky (and Murray, for that matter) – are entitled to a decision by the Commission on this long-pending issue.

It is KCTA’s position in this matter that the Commission is required under its enabling statute to exercise the jurisdiction given to it by the legislature. *See Ky. PSC v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 380-381 (Ky. 2010) (reading the PSC’s enabling statute broadly such that it “require[s] that the PSC act to ensure that rates are ‘fair, just and reasonable’”). The Commission’s jurisdiction over utility pole attachment rates is “exclusive,” *Kentucky CATV Ass’n v. Volz*, 675 S.W.2d 393, 396 (Ky Ct. App. 1983), and it is “unquestionable.” *Ballard Rural Telephone Coop. Corp. v. Jackson Purchase Energy Corp.*, 2005 WL 858940, *3 (Ky PSC Mar. 23, 2005). It includes “broad jurisdiction over the use of the ‘facilities’ of *all* utilities.” *Ballard* at *3. Only if the TVA has effectively preempted the Commission’s authority may it be decline to exercise its otherwise “broad” and “exclusive” and “unquestionable” jurisdiction. The exercise of federal preemption is “not lightly to be presumed,” *Michigan Bell Telephone Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 358 (6th Cir. 2003). To the contrary, it is presumed, in the absence of evidence to the contrary, that the federal government has not preempted in a given area. *Id.* That is the question at hand, and it is the issue that KCTA is attempting to prove through discovery in this proceeding.

REQUEST FOR ACTION

TWC made preliminary payments to each of the Cooperatives in an effort to show its continued willingness to fairly compensate the Cooperatives for use of their poles. In response, two of the Cooperatives demanded payment of unilaterally imposed rates within days of each other. Further, these demands were presented in questionable, if not unconscionable, ways. As

noted in KCTA's previous Request for Action, the Cooperatives' demands appear to be a concerted effort to take advantage of the fact that this matter has stalled before the Commission.

Accordingly, KCTA asks the Commission to exercise its "broad," "exclusive" and "unquestionable" jurisdiction over pole attachments to determine whether the presumption against federal preemption has been effectively rebutted by facts proving that TVA is actually exercising a conflicting jurisdiction. The facts uncovered by KCTA to date do not demonstrate that the PSC's jurisdiction has been preempted. But we request the Commission to allow discovery to go forward so that the facts underlying the Cooperatives' argument regarding preemption can be established once and for all. The Commission's failure to act on the discovery motions is prejudicing KCTA's members, as described above.

CONCLUSION

For the reasons stated above, KCTA asks the Commission to rule on all pending discovery as soon as possible and to exercise its broad, exclusive and unquestionable jurisdiction so that this matter can proceed.

Respectfully submitted,

/s/ Laurence J. Zielke

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**ATTORNEYS FOR THE KENTUCKY CABLE
TELECOMMUNICATIONS ASSOCIATION**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Kentucky Cable Telecommunications Association's Status Update and Request for Action has been served on all parties of record via hand delivery, facsimile, or electronically this 6th day of October, 2014.

/s/ Laurence J. Zielke

Laurence J. Zielke