

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

<b>The Petition of the Kentucky Cable</b>	)	
<b>Telecommunication Association for a</b>	)	<b>Case No. 2012-00544</b>
<b>Declaratory Order that the Commission</b>	)	
<b>Has Jurisdiction to Regulate the Pole</b>	)	
<b>Attachment Rates, Terms, and Conditions</b>	)	
<b>of Cooperatives That Purchase Electricity</b>	)	
<b>from the Tennessee Valley Authority</b>	)	

**KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION’S MOTION TO  
COMPEL THE TVA COOPERATIVES TO PRODUCE COST DATA IN RESPONSE TO  
KCTA’S FIRST REQUEST FOR INFORMATION**

Pursuant to Rule 37.01 of the Kentucky Rules of Civil Procedure, the Kentucky Cable Telecommunications Association (“KCTA”), through counsel, hereby moves the Kentucky Public Service Commission (“Commission”) to compel Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyryle Rural Electric Cooperative Cooperation, Tri-County Electric Membership Corporation, Warren Rural Electric Cooperative Corporation, and West Kentucky Rural Electric Cooperative Corporation (collectively the “TVA Cooperatives” or “Cooperatives”) to respond to KCTA’s First Request for Information Number 20.

**INTRODUCTION**

This straightforward case raises only one issue – whether the Commission’s exclusive and unquestioned jurisdiction over pole attachment rates in Kentucky conflicts with the federal law granting the Tennessee Valley Authority (“TVA”) jurisdiction to regulate the retail rates for electricity the Cooperatives sell to consumers.

KCTA does not dispute that the TVA regulates the retail electric rates of the Cooperatives that purchase electricity from the TVA. But the TVA’s authority to regulate the

Cooperative's retail electric rates does *not* extend to the regulation of the Cooperatives' pole attachments. Thus, there is no conflict between federal and state law and no federal preemption.

To support its argument that the Commission's jurisdiction is preempted by TVA's authority to regulate their electric rates, the TVA Cooperatives rely primarily on their theory that Commission regulation of the Cooperatives' pole rates would interfere with the TVA's requirement that the Cooperatives ensure full cost recovery to prevent consumers from subsidizing attaching entities. Given the TVA Cooperatives' reliance on this argument, KCTA is entitled to cost data for each Cooperative to demonstrate that the rates charged by the Cooperatives far exceed their costs.

### **BACKGROUND**

KCTA filed this petition in December 2012, seeking a declaratory order affirming the Commission's exclusive and unquestioned jurisdiction to regulate pole attachment rates, terms, and conditions of the TVA Cooperatives. In its Response, the TVA Cooperatives argue that federal law preempts the Commission's regulation of the TVA Cooperatives' pole attachment rates. But the TVA Cooperatives' Response contains no assertions that the TVA controls or regulates the Cooperatives' pole rates, or otherwise exercises any authority over the Cooperatives' pole attachment contracts. Rather, the Cooperatives rely on identical letters from Cynthia Herron, the TVA's Director of Regulatory Affairs, to each of the TVA Cooperatives,<sup>1</sup> that state, "Commission regulation would directly infringe on the TVA's ongoing efforts to ensure that the TVA Cooperatives 'recover [the] full cost associated with the pole attachment' in connection with [the TVA's] duties as 'the exclusive retail rate regulator for the distributors of

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<sup>1</sup> Correspondence from the TVA is in the record. However, despite its assertions of an interest in this matter, the TVA itself failed to intervene by the deadline, and is not a party to this case.

TVA power.”<sup>2</sup> Ms. Herron took a similar position in a later response to an inquiry directly from the Commission, in which she said, “TVA requires each distributor to charge a pole attachment fee that ensures full cost recovery so that no unfair burdens are placed on the electric ratepayers.”<sup>3</sup>

These expressions of concern regarding cost recovery are the Cooperatives’ primary basis for their assertion that the TVA regulates their pole rates. The Cooperatives argue that their rates are cost-based. KCTA is entitled to test that assertion. Furthermore, neither the Cooperatives nor Ms. Herron have demonstrated that application of the Commission’s rate methodology would result in pole attachment rates that are lower than their actual costs. As long as the Cooperatives’ pole rates ensure full cost recovery and no subsidization of the attaching entities by consumers, therefore, there would be no conflict between federal and state law and thus, no federal preemption.

Given the TVA’s concerns regarding full cost recovery, in its first Request for Information to the TVA Cooperatives, KCTA included the following Request:

Provide the following information for each of the years 2010, 2011 and 2012. Use either the data for the entire year or the information as of the yearend, as appropriate. If you do not keep any data requested according to the RUS accounting system contained in 7 C.F.R. Ch. 17, provide the equivalent number.<sup>4</sup>

- i. Gross investment in RUS Account 364;
- ii. The number of poles in RUS Account 364;
- iii. Gross investment in 35 foot poles in RUS Account 364;
- iv. The number of 35 foot poles in RUS Account 364;

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<sup>2</sup> TVA Cooperatives’ Resp., at 7 (quoting Jan. 24, 2013 Letters from C. Herron to TVA Cooperatives).

<sup>3</sup> May 16, 2013 Letter from Ms. Herron to the Commission (filed on June 18, 2013).

<sup>4</sup> Documents provided by the Cooperatives indicate that the TVA requires them to keep their books of account according to FERC accounting. The FERC Accounts are identical in number and nomenclature to the RUS Accounts.

- v. Gross investment in 40 foot poles in RUS Account 364;
- vi. The number of 40 foot poles in RUS Account 364;
- vii. Gross investment in 45 foot poles in RUS Account 364;
- viii. The number of 45 foot poles in RUS Account 364;
- ix. Accumulated depreciation reserve related to the total investment in RUS Account 364;
- x. Gross investment in any grounds included in RUS Account 364;
- xi. Gross investment in RUS Account 365;
- xii. Accumulated depreciation related to RUS Account 365;
- xiii. Gross investment in RUS Account 369;
- xiv. Accumulated depreciation related to RUS Account 369;
- xv. Gross investment in total utility plant;
- xvi. Accumulated depreciation related to total utility plant;
- xvii. Gross investment in Distribution Plant;
- xviii. Accumulated depreciation related to Distribution Plant;
- xix. Annual depreciation rate for RUS Account 364;
- xx. Expenses in RUS Account 593;
- xxi. Any tax expenses (please describe and detail);
- xxii. Expenses in RUS Accounts 920-931 (General and Admin.)
- xxiii. Cost of money
- xxiv. The number of poles with attachments owned only by the pole owner and a cable company (two-party poles as described in Administrative Order 251);
- xxv. The number of poles with attachments owned by the pole owner, a cable company, and another entity (three-party poles as described in Administrative Order 251).

On November 14, each of the TVA Cooperatives objected to this Request as “overly broad and unduly burdensome” and “not reasonably calculated to lead to the discovery of relevant and admissible evidence.”

In light of the fact that the TVA Cooperatives and the TVA have stated that the Commission’s regulation of their pole attachment rates would frustrate, and potentially conflict with, the TVA’s requirement that the TVA Cooperatives charge fees that would ensure full cost recovery, the TVA Cooperatives’ cost data is relevant to this proceeding. Counsel for KCTA have conferred with counsel for the Cooperatives, but the latter have refused to agree to provide this data. The Commission should compel their production.

## ARGUMENT

### **I. The TVA Cooperatives' Cost Data Is Relevant Because They Will Show that the Commission's Methodology for Calculating Pole Attachment Rates Ensures Full Cost Recovery.**

Kentucky Rule of Civil Procedure 26.02(1) provides that “[p]arties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action.” CR 26.02(1). It is not necessary that the information sought be admissible as competent evidence for trial. *Id.*; *see also Ewing v. May*, 705 S.W.2d 910, 912 (Ky. 1986). “Even though it might be otherwise incompetent and inadmissible, information may be elicited if it appears reasonably calculated to lead to the discovery of admissible evidence.” *Ewing*, 705 S.W.2d at 912; *see also* 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.”))

The cost data KCTA seeks in its Request for Information Number 20 bear directly on the issue in this action. The TVA Cooperatives' objection that the Request is “not reasonably calculated to lead to the discovery of admissible evidence” lacks merit. Because the Cooperatives have said that the TVA's requirement that the Cooperatives recover all costs associated with its poles would be frustrated by Commission regulation of the attachment rates, data reflecting the TVA Cooperatives' costs are directly at issue in this proceeding. This information is necessary to rebut the Cooperatives' argument that Commission regulation would interfere or conflict with the Cooperatives' mandate to recover all their costs and prevent consumer subsidization of attaching entities.

KCTA is entitled to the Cooperatives' cost data to demonstrate that the Commission's methodology permits full cost recovery. The Commission's fully allocated rate methodology

takes the embedded cost of an average pole of the Cooperative, 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 for pole attachments. *See In re Adoption of Standard Methodology for Establishing Rates for CATV Pole Attachments*, Admin. Case No. 251, Sept. 17, 1982. KCTA's Request for Information seeks the information needed to apply this formula.

Since the TVA's concern regarding subsidization is the Cooperatives' primary argument to support its position that the Commission's jurisdiction is preempted, the Cooperatives' cost data bears squarely on the single issue in this case and it should be produced.

## **II. The TVA Cooperatives' Objections to Producing the Cost Data Based on Overbreadth and Undue Burden Are Baseless.**

The Cooperatives also argue that production of the cost data KCTA seeks in its Request for Information Number 20 is "overly broad and unduly burdensome." These objections also lack merit. The information KCTA requests is routinely maintained by the Cooperatives according to the TVA's requirement that they maintain their bookkeeping according to FERC accounting, and is easily accessible. KCTA asks only for the information it needs to apply the Commission's formula, and nothing more. The Cooperatives' objections are simply an attempt to hinder and obstruct discovery of the facts in this case. The Commission should compel production of the Cooperatives cost data.

## **CONCLUSION**

For the reasons stated above, KCTA asks the Commission to compel the TVA Cooperatives to produce their cost data in response to KCTA Request for Information Number 20.

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 Motion to Compel the TVA Cooperatives to Produce Cost Data has been served on all parties of record via hand delivery, facsimile, or electronically this 20th day of November, 2013.

/s/Laurence J. Zielke

Laurence J. Zielke