

**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
REPLY IN SUPPORT OF ITS SECOND MOTION TO COMPEL**

The Kentucky Cable Telecommunications Association (“KCTA”) submits this Reply to the TVA Cooperatives’ (“the TVA Coops” or “the Coops” or “the Cooperatives”) Response to KCTA’s Motion to Compel the Cooperatives to produce documents withheld on the basis of the attorney client privilege and documents responsive to KCTA’s Supplemental Requests for Information.

First, with regard to the privilege log, the Cooperatives mistakenly argue that KCTA’s Requests did not seek documents. This argument is based on a selective and inaccurate reading of KCTA’s requests.

Second, with regard to the documents and information KCTA seeks in its Supplemental Requests for Information, the Cooperatives have refused to produce a significant number of relevant documents to KCTA on the basis that the issue in this case involves a pure question of law that requires no fact discovery. In its August 6, 2013 Order granting KCTA’s application for rehearing, the Commission found “that the question of whether [the Commission is] preempted from exercising jurisdiction over the TVA Cooperatives’ pole attachment rates *is a mixed question of fact and law.*” Case No. 2012-00544, Aug. 6, 2013 Order, at *3 (emphasis added).

The Cooperatives' Response to KCTA's second motion to compel, as with all their other filings in this proceeding, ignores the Commission's explicit rejection of the Cooperatives' persistent but incorrect refrain that this proceeding involves a pure question of law. The Commission ordered discovery in this case, and KCTA is entitled to it.

ARGUMENT

I. KCTA Is Entitled to a Privilege Log for the Documents the TVA Cooperatives Withheld on the Basis of Attorney-Client Privilege and Work-Product Doctrine.

KCTA has repeatedly asked the TVA Cooperatives to articulate the basis for their claims of attorney-client privilege and attorney work-product protection over the documents they withheld in response to KCTA's First Requests for Information. The TVA Cooperatives first told KCTA they were not required to provide a privilege log for the "numerous" documents they withheld. But now they claim that KCTA's Requests 1-2, 1-3, 1-5, and 1-8 did not seek "documents or tangible things." The Cooperatives' reading of KCTA's Requests is too narrow.

KCTA's requests asked the Cooperatives to explain the basis of their preemption argument by explaining (1) how the TVA regulates their pole rates (*see* KCTA Request 1-2), (2) the basis for how the Cooperatives' pole attachment rates directly impact end-users' electric rates (*see* KCTA Request 1-3), (3) how the Commission's methodology would conflict with the TVA's regulation of the Cooperatives' electric rates (*see* KCTA Request 1-5), and (4) the basis of their contention that the TVA has statutory jurisdiction over their pole attachment rates (*see* KCTA Request 1-8). Instruction 11 of KCTA's requests asked the Cooperatives to "produce all documents on which you relied or to which you referred in responding to these Requests." *See* KCTA's First Requests for Information to TVA Cooperatives Instruction 11 (Oct. 24, 2013). Thus, KCTA's Requests 1-2, 1-3, 1-5, and 1-8, like all of its requests, seek the production of documents.

KCTA is not asking the Cooperatives to provide a privilege log to justify the withholding of counsel's mental impressions. Rather, KCTA is asking the Cooperatives to articulate the basis of their claims of privilege over *documents* responsive to Requests 1-2, 1-3, 1-5, and 1-8 – documents that may finally shed light on the basis for their conflict preemption argument. The Cooperatives have repeatedly declined to point to any specific language in any document to support their contention that the TVA regulates their pole attachment rates. Instead, when asked to explain how the TVA's regulation over the Cooperatives' electric retail rates preempts the Commission's jurisdiction over all pole attachment rates, the Cooperatives have referred to the TVA's "general revenue requirement" and have cited to the handful of documents they have produced, none of which explain how the pole attachment rates affect electric retail rates or otherwise support their argument that the TVA regulates their pole attachment rates.

KCTA deserves an opportunity to thoroughly examine the basis of the TVA Cooperatives' claims of privilege over the documents responsive to KCTA's Requests 1-2, 1-3, 1-5, and 1-8.

II. KCTA Is Entitled to Documents Responsive to Its Supplemental Requests for Information.

A. KCTA's Requests Are Relevant.

The TVA Cooperatives have a confined view of what is relevant to this case. The pole attachment agreements, pole rates, invoices, revenue received from licensee attachers, and surplus revenues directly bear on the single issue in this proceeding. These documents are relevant because they will show the extent to which, if any, the TVA regulates the Cooperatives' pole attachment rates and whether application of the Commission's pole rate methodology would interfere with TVA's regulation of consumer electric rates.

As KCTA explained in its motion to compel, to the extent the pole agreements, pole rates, and invoices show that the Cooperatives charge various entities different rates for pole attachments, and that the TVA has never even considered, much less approved the varying rates, the Cooperatives cannot demonstrate that that TVA has exercised any oversight responsibility in connection with the Cooperatives' pole rates. Nor can the Cooperatives demonstrate that their pole rates are material with regard to the TVA's unquestioned responsibility to regulate the Cooperatives' electric rates. With regard to the Cooperatives' surplus revenues and revenues received from licensee attachers, this information is relevant to rebut an argument that the Cooperatives have put forward in this case – that Commission regulation of their pole attachment rates would result in a subsidy that the Cooperatives would ultimately have to recover through higher electric rates. KCTA is entitled to information about the Cooperatives' "surplus revenues," as defined in the Coops' contracts with TVA, to show that the Cooperatives are operating with substantial margins, and that application of the Commission's cost-based methodology to the Cooperatives' pole attachment rates would not trigger an increase in electric rates. Similarly, because the revenue the Cooperatives receive from attachments made by "joint user" telephone companies would not necessarily be affected by the Commission's exercise of its jurisdiction over the Cooperatives' pole attachment rates to licensee cable operators, KCTA is entitled to know the revenue the Cooperatives received from licensee attachers to determine the impact of Commission regulation of the Cooperatives' pole rates.

B. KCTA's Requests Are Neither Overbroad Nor Unduly Burdensome.

The Cooperatives also argue that KCTA's requests are overbroad and unduly burdensome because "[r]equiring the TVA Cooperatives to review, extract, sort and verify the requested data will divert personnel from their usual, ordinary, and important business activities"

and will increase legal expenses. The same could be said for discovery in every litigation, and the Cooperatives have failed to offer any evidence to show how KCTA's requests are either overbroad or *unduly* burdensome. *See e.g., Groupwell Int'l (HK) Ltd. v. Gourmet Express, LLC*, 277 F.R.D. 348, 360 (W.D. Ky. 2011) ("A responding party must show specifically how each discovery request is burdensome and oppressive by submitting affidavits or offering evidence revealing the nature of the burden. The mere statement by a party that an interrogatory or request for production is overly broad, burdensome, oppressive and irrelevant is not adequate to voice a successful objection.") (citation omitted).¹ Inconvenience and expense are not enough to establish an undue burden. *Groupwell Int'l (HK) Ltd.*, 277 F.R.D at 360 ("Good cause for refusing discovery is not established solely by showing that discovery may involve inconvenience and expense."); *see also Baine v. Gen. Motors Corp.*, 141 F.R.D. 328, 330 (M.D. Ala. 1991) ("The mere fact that producing documents would be burdensome and expensive and would interfere with the party's normal operations is not inherently a reason to refuse an otherwise legitimate discovery request.").

A more accurate description of the Cooperatives' objection is that, again, the Cooperatives view this information as irrelevant based on their narrow theory of this case. There is nothing about KCTA's requests that is oppressive or harassing, and the requests are narrow and limited as to time and scope. The Cooperatives have failed to meet their burden to explain why KCTA's requests are overbroad or why production of the documents and information KCTA seeks would be *unduly* burdensome.

¹ *See Southern Financial Life Ins. Co. v. Combs*, ___ S.W.3d ___, 2013 WL 6145234, *5 n.29 (Ky. Nov. 21, 2013) (stating that federal court decisions interpreting the Federal Rules of Civil Procedure are persuasive authority when interpreting Kentucky Rules of Civil Procedure that were adopted verbatim from their federal counterparts).

III. KCTA Is Entitled to Know the Identity of Any TVA Representatives Who May Testify on the Cooperatives' Behalf Before It Finalizes Its Witness List.

The Commission's Scheduling Order, filed on October 10, 2013, states that "Notices of Depositions shall be filed no later than January 15, 2014." Given this deadline, KCTA's Supplemental Request sought the identity of any representatives from TVA who may testify on behalf of the Cooperatives. The Cooperatives refused to provide this information. In its Response to KCTA's motion to compel, the Cooperatives state that because KCTA has not identified its witnesses, the Cooperatives are relieved of their obligation to do so.

The Cooperatives' argument neglects to acknowledge that, in this case, all of the relevant facts lie with the Cooperatives. Indeed, the Cooperatives' theory for preemption is based on their contention that the TVA regulates their pole attachment rates. Thus, KCTA is entitled to depose any witnesses from TVA upon whom the Cooperatives may rely.

CONCLUSION

For the foregoing reasons, the Commission should compel the TVA Cooperatives to produce documents responsive to KCTA's First Requests for Information Numbers 1-2, 1-3, 1-5, and 1-8 that were wrongly withheld on the basis of attorney-client privilege and attorney work-product doctrine, as well as documents and information responsive to KCTA's Supplemental Requests for Information as described above.

Respectfully submitted,

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**ATTORNEYS FOR THE KENTUCKY CABLE
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Kentucky Cable Telecommunications Association's Reply in Support of Its Second Motion to Compel has been served on all parties of record via hand delivery, facsimile, or electronically this 16th day of January, 2014.

/s/ Laurence J. Zielke
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