

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

In the Matter of:

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| 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 MOTION FOR ISSUANCE OF A *SUBPOENA DUCES TECUM* TO
THE TENNESSEE VALLEY PUBLIC POWER ASSOCIATION**

The Kentucky Cable Telecommunications Association (“KCTA”) submits this reply to the TVA Cooperatives’ response to KCTA’s Motion for an Issuance of a Subpoena *Duces Tecum* to the Tennessee Valley Public Power Association (“TVPPA”).

INTRODUCTION

Pursuant to Kentucky Revised Statute 278.320, 807 KAR 5:0001 Section 4(6), and Kentucky Rule of Civil Procedure 30.02(6), on January 15, 2014, KCTA moved the Commission to issue a subpoena *duces tecum* to compel deposition testimony of a corporate representative from TVPPA and to compel the production of certain documents. In what is now beginning to sound like a broken record, the TVA Cooperatives oppose the motion, arguing that the discovery KCTA seeks is not relevant to this proceeding and that TVPPA is beyond the subpoena power of the Commission.

First, the Cooperatives continue to obstruct KCTA’s efforts to obtain discovery that is clearly relevant to this proceeding. Based on the limited information the Cooperatives have provided to date, KCTA has learned that the TVPPA (without input of the TVA) negotiates all – or almost all – of the Cooperatives’ pole attachment agreements. In addition, the discovery so

far indicates that the TVA Coops have little if any contact with TVA regarding pole attachment rates. A deposition of the TVPPA will establish the extent to which, if any, that organization, on behalf of the Coops, coordinates with the TVA on the subject. Because the Cooperatives have argued that the TVA regulates their pole attachment rates, KCTA is entitled to discovery from TVPPA to ascertain the level of the TVA's involvement, if any, in setting the Cooperatives' pole attachment rates, terms, and conditions.

Second, the Commission has jurisdiction to issue a subpoena *duces tecum* to the TVPPA through either the Uniform Interstate Depositions and Discovery Act, adopted in Kentucky as K.R.S. § 421.360, or Kentucky Rule of Civil Procedure 28.02.

ARGUMENT

I. The Discovery KCTA Seeks from TVPPA Is Unquestionably Relevant to this Proceeding.

The TVA Cooperatives continue to operate under a constrained theory of what is relevant to this case. Specifically, the Cooperatives argue that KCTA is not entitled to any discovery at all, since they believe this proceeding is a pure question of law. The Cooperatives even cite the Commission's June 28, 2013 Order, in which the Commission initially agreed with the Cooperatives that TVA regulation of the Cooperatives preempts the Commission's unquestioned and exclusive jurisdiction to regulate pole attachment rates, as if that Order was not overruled by the Commission's August 6, 2013 Order granting KCTA's application for rehearing. *See* TVA Coops' Resp., at 3. In the later Order, 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.*" *See* Case No. 2012-00544, Aug. 6, 2013 Order, at *3 (emphasis added). Accordingly, in its October 10, 2013 Procedural Order, the

Commission set a schedule for discovery in this matter, an Order which the TVA Cooperatives have done everything in their power to undermine. Case No. 2012-00544, Oct. 10, 2013 Order.

To support their theory of preemption, the TVA Cooperatives have argued that the TVA regulates the Cooperatives' pole attachment rates. Throughout discovery, therefore, KCTA has sought to understand the basis of that argument. As a result of the very limited documents the Cooperatives have produced, KCTA has learned that the TVPPA negotiates the pole attachment agreements on behalf of the Cooperatives. Accordingly, KCTA seeks to depose a representative from TVPPA, and to review a limited number of TVPPA documents, to understand the TVA's role – or lack thereof – in overseeing or setting the Cooperatives' pole attachment rates. KCTA also seeks to understand the extent to which, if any, TVPPA coordinates with the TVA on pole attachment rates on behalf of the Cooperatives.

Because the TVA's oversight of the Cooperatives' pole attachment rates is an issue in this proceeding, KCTA is entitled to a subpoena *duces tecum* compelling deposition testimony and the production of documents from the TVPPA to determine whether the TVA has any involvement in those negotiations.

II. The Commission Has Jurisdiction to Issue a Subpoena *Duces Tecum* to the TVPPA.

The Commission has jurisdiction to issue a subpoena to TVPPA, an out-of-state third party, under the Uniform Interstate Depositions and Discovery Act (“UIDDA”). Kentucky and Tennessee enacted the UIDDA in 2008. *See* K.R.S. § 421.360, Tenn Code. §§ 24-9-201, *et seq.* The purpose of the UIDDA is to “set[] forth an efficient and inexpensive procedure for litigants to depose out of state individuals and for the production of discoverable materials that may be located out of state.” *See* Uniform Law Comm’n Interstate Depositions and Discovery Act

Summary (*available at* <http://www.uniformlaws.org/ActSummary.aspx?title=Interstate%20Depositions%20and%20Discovery%20Act>).

Under the UIDDA, counsel for KCTA would send the subpoena *duces tecum*, once issued by the Commission, to the Clerk of Court in Hamilton County, Tennessee, where the TVPPA is located. *See* Tenn Code. § 24-9-203(b). The Clerk of Court in Tennessee would then issue a subpoena for service, and that subpoena would incorporate the terms used in the Commission’s subpoena. *See* Tenn Code. § 24-9-203(b). The subpoena would be served, and the deposition taken, in accordance with the Tennessee Rules of Civil Procedure. *See* Tenn. Code. §§ 24-9-204, 205.

The UIDDA, as adopted by both Kentucky and Tennessee, defines a “foreign subpoena” as “a subpoena issued under authority of a court of record of a foreign jurisdiction.” K.R.S. § 421.360(2)(b); Tenn. Code § 24-9-202(2). The TVA Cooperatives argue that the UIDDA does not apply to the Commission because regulatory agencies are not “courts of record.” In support of this argument, the Cooperatives cite *State ex rel. Suthers v. Tulips Investments, LLC*, No. 11-CA-2367, 2012 WL 5871442 (Colo. Ct. App. Nov. 12, 2012), which held that regulatory agencies are not “courts of record” under Colorado law and thus the UIDDA does not apply. But the Cooperatives neglected to explain that the Colorado Supreme Court has granted a petition for writ of certiorari to review this *precise issue* in this case. *See Tulips Investments, LLC v. State ex rel. Suthers*, No. 12SC996, 2013 WL 5984534 (Colo. Nov. 12, 2013). Since this Colorado decision is one of only three cases interpreting the UIDDA, and the only one addressing the UIDDA’s application to administrative agencies, it is disingenuous for the TVA Cooperatives to argue that the weight of authority supports their tenuous position.

The TVA Cooperatives also cite cases showing that various regulatory agencies – none of which are public utility commissions – are not considered “courts of record” under various state laws. Tellingly, the TVA Cooperatives failed to note that several state public utility commissions are in fact considered “courts of record,” at least for the purposes of subpoena power and depositions. *See, e.g.*, Cal. Pub. Util. Code § 312 (“The commission and each commissioner may issue writs of summons, subpoenas, warrants of attachment, warrants of commitment, and all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record.”); *North Carolina Pub. Util. Comm’n v. Atlantic Coast Line R. Co.*, 29 S.E.2d 912, 915 (N.C. 1944) (“The Utilities Commission is by statute (G.S. § 62–11) constituted a court of record with the powers of a court of general jurisdiction as to all matters properly before it.”); W. Va. Pub. Serv. Comm’n Rules of Practice and Procedure, Rule 13.5 (“[De]position[s] shall be taken in the manner prescribed by the laws of West Virginia for taking deposition in civil cases in courts of record.”); 30 V.S.A. § 9 (“[The Vermont Public Services Board] shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction.”).¹

Alternatively, even before Kentucky adopted the UIDDA, the Kentucky Rules of Civil Procedure provided a method for obtaining depositions of out-of-state witnesses. *See* CR 28.02 (“Depositions may be taken out of this state before a commissioner appointed by the governor of the state where taken; or before any person empowered by a commission directed to him by . . . order of the court; or before a judge of a court, a justice of the peace, mayor of a city, or notary

¹ In another matter, the Cooperatives’ counsel asked this Commission to issue a subpoena *duces tecum* to compel the production of documents to an out-of-state third party. *See* Motion for Issuance of a Subpoena *Duces Tecum*, Case No. 2011-00199 (July 25, 2011) (moving the Commission to issue a subpoena *duces tecum* to an entity located in Texas).

public; or before such persons and under such other circumstances as shall be authorized by the law of this state or the place where the deposition is taken.”); *see also Geary v. Schroering*, 979 S.W.2d 134, 136 (Ky. App. Ct. 1998) (“The Civil Rules also provide for depositions to be taken out of state. In cases where witnesses do not reside in Kentucky, subpoenas are issued via letters rogatory in order to take the depositions of those witnesses.”) (citing CR 28.02 and *A Practical Guide To Interstate Deposition Subpoenas*, Ky. Bench & Bar 8, Vol. 58, No. 2, (Spring 1994)).

In short, the Commission has the jurisdiction to issue a subpoena to an out-of-state third party, under either the UIDDA or the Kentucky Rules of Civil Procedure.

CONCLUSION

For the reasons stated above, KCTA asks the Commission to issue a subpoena *duces tecum* to the TVPPA to compel deposition testimony by a corporate representative and to compel the production of documents regarding topics outlined in KCTA’s motion.

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 Motion for Issuance of a *Subpoena Duces Tecum* to the Tennessee Valley Public Power Association has been served on all parties of record via hand delivery, facsimile, or electronically this 29th day of January, 2014.

/s/ Laurence J. Zielke
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