COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION'S OPPOSITION TO THE TVA COOPERATIVES' MOTION FOR A PROTECTIVE ORDER

The Kentucky Cable Telecommunications Association ("KCTA") submits this Opposition to the TVA Cooperatives' Motion for a Protective Order.

INTRODUCTION

Pursuant to the Commission's October 10, 2013 Procedural Order, on January 15, 2014, KCTA filed Notices of Depositions for each of the five TVA Cooperatives that are Respondents in this matter. Because KCTA noticed the depositions of the Cooperatives pursuant to Kentucky Rule of Civil Procedure 30.02(6), KCTA attached an exhibit to the Notices that identified the specific topics it intended to cover during the depositions. As requested by the Commission, the depositions and the dates were coordinated with counsel for the Cooperatives. The depositions are now scheduled for the week of February 24, 2014. Nevertheless, more than three weeks after the notices of deposition were filed an in yet another example of their wholesale refusal to cooperate in discovery, the Cooperatives have moved to quash the depositions in their entirety or strip them of any substance – by limiting them merely to questions about documents produced. Meanwhile, the Cooperatives will not commit to producing their witnesses for the depositions unless and until the Commission rules on their motion.

Although KCTA consulted with counsel for the Cooperatives regarding the dates for the depositions prior to sending out the deposition notices, after the notices were filed, counsel for the Cooperatives advised that their clients would not actually be available on the agreed-on dates. KCTA counsel has engaged in email exchanges and telephone calls over the past several weeks in an effort to accommodate the Cooperatives' schedule. But, on February 6, 2014, without consulting KCTA, the Cooperatives filed a Motion for Protective Order, asking the Commission to cancel the depositions or, in the alternative, to limit the "areas of discovery" in the depositions to "inquiries regarding documents produced." Additionally, the Cooperatives asked the Commission to issue a protective order staying the depositions until the Commission has ruled on KCTA's pending motions to compel.

First, the Cooperatives' motion is untimely. The Commission's October 10, 2013 Order states that parties "shall file any objections or motions relating to discovery . . . within four business days' notice . . . ." KCTA filed its Notices of Deposition, attaching a detailed list of topics to be examined, on January 15, 2014. Accordingly, the Cooperatives were required to file any objections to the depositions no later than January 22. Instead, the Cooperatives waited over three weeks to file their motion objecting to the depositions. Because the depositions are scheduled to take place two weeks from now and plans are already underway, the relief the Cooperatives seek would prejudice KCTA.

Second, the Cooperatives' motion is the latest salvo in the Cooperatives' ongoing campaign to stonewall KCTA's efforts to obtain discovery that is relevant to this proceeding.

Third, the Cooperatives have failed to establish good cause for why the Commission should issue a protective order.

Accordingly, the Commission should deny the Cooperatives' motion.

ARGUMENT

I. The Cooperatives' Motion Is Untimely.

The Commission entered an Order on October 10, 2013, setting forth a procedural schedule for this case. The Appendix to the Order states: "Notices of Deposition shall be filed no later than January 15, 2014." Additionally, paragraph six of the Order states: "Any objections or motions relating to discovery or procedural dates shall be filed within four business days' notice or the filing party shall explain, in writing, why such notice was not possible."

In anticipation of the January 15 deadline to file the Notices of Deposition, counsel for KCTA called counsel for the Cooperatives on January 13, seeking agreement on proposed dates for the depositions. The morning of January 15, the Cooperatives' counsel agreed to KCTA's proposal. Later that day, in accordance with the October 10, 2013 Order, KCTA filed its Notices of Deposition for each of the TVA Cooperatives. *See, e.g.*, KCTA's Notice of Dep. Upon Oral Examination to Tri-County Elec. Membership Corp. (filed Jan. 15, 2014). Because KCTA noticed depositions of the Cooperatives under Kentucky Rule of Civil Procedure 30.02(6), KCTA attached an exhibit that identified the topics it intends to discuss during the depositions. *See id.* Exh. A.

On January 24, counsel for KCTA contacted counsel for the TVA Cooperatives to discuss locations for the depositions. Counsel for the Cooperatives then advised that the agreed-on dates would not work for at least one of the Cooperatives, after all. Between January 27 and February 7 – the day after the Cooperatives filed this motion – counsel for both parties repeatedly discussed the schedule for the depositions as well as general logistics in an effort to reach consensus on the dates and locations of the depositions. But without notice to or

consultation with KCTA, on February 6 the Cooperatives moved for a protective order to cancel the depositions, to narrow the topics KCTA can discuss during the depositions, or to postpone the depositions pending resolution of KCTA's pending motions to compel "because there is significant overlap between the discovery KCTA [has sought] to compel" and the topics identified in the Notices. The Cooperatives' argument, as it has been throughout discovery, is that KCTA seeks information that is not relevant to this proceeding.

The Cooperatives had notice of the topics KCTA will address in its depositions as of January 15, 2014. Under the October 10, 2013 Procedural Order, the Cooperatives had four business days to object to the depositions. Accordingly, the Cooperatives were required to file any motion objecting to the discovery *no later than January 22, 2014* – four business days after KCTA filed its notices. Instead, the Cooperatives waited over three weeks to file their motion for a protective order. And the TVA Cooperatives have failed to offer any explanation, in writing or otherwise, to explain why it was not possible to file their objections in a timely manner. Therefore, the TVA Cooperatives' motion is untimely and the Commission should deny the motion for this reason alone. Moreover, the relief the Cooperatives seek will prejudice KCTA. Not only does KCTA require further information in preparation of its case, but it has relied on the schedule the parties established in good faith and has made plans to conduct these depositions accordingly. Nevertheless, on February 10, counsel for the Cooperatives declined even to commit to produce his witnesses on the deposition dates in the event that the Commission has not ruled on their Motion for a Protective Order by then.

II. The Cooperatives' Motion Is Another Attempt to Stonewall Discovery in This Case.

The Cooperatives have acted in an obstructive manner throughout discovery. Their latest motion, which incorporates the same recycled and baseless arguments, is simply part of their

ongoing effort to deny KCTA discovery to which it is entitled. As they have done repeatedly in previous filings, the Cooperatives continue to reiterate – incorrectly – that this proceeding involves a "pure question of law." TVA Coops' Motion, at 5, 8. As KCTA has noted before, this theory of the proceeding is expressly contradicted by the Commission's August 6, 2013 Order granting KCTA's application for rehearing, where 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).

To support their theory of preemption, the TVA Cooperatives have argued that the TVA regulates the Cooperatives' pole attachment rates. KCTA is entitled to understand how the TVA regulates those rates, if at all. The Cooperatives have also argued 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.[1]

In short, under the Cooperatives' narrow and unmoored theory of this case, it is enough for them to assert, without any supporting evidence (and, indeed, contrary to the evidence produced thus far in discovery), that the TVA regulates their pole attachment rates – end of story. But the Cooperatives' approach runs contrary to the Commission's August 6, 2013 Order that gave KCTA a right to discovery, including depositions. And it is also contrary to the well-established principle that there is a "presumption against preemption" and the Cooperatives have

[1] KCTA incorporates by reference its arguments in its Motion to Compel the TVA Cooperatives to Produce Cost Data, filed on November 20, 2013, and its Motion to Compel Documents Responsive to KCTA's Supplemental Requests for Information, filed on January 2, 2014.

the burden of proof to establish that the TVA's regulation of their electric rates somehow extends to and preempts the Commission's unquestioned and exclusive jurisdiction to regulate pole attachment rates. *See Michigan Bell Telephone Co. v. McImetro Access Transmission Servs., Inc.*, 323 F.3d 348, 358 (6th Cir. 2003) (citing *Springsteen v. Consol. Rail Corp.*, 130 F.3d 241, 244 (6th Cir. 1997)). KCTA is entitled to discovery in this case, including the noticed depositions of the Cooperatives.

III. The Cooperatives Have Failed to Establish Good Cause for Why the Commission Should Issue a Protective Order.

The Kentucky Rules of Civil Procedure provide that a court may issue a protective order "for good cause shown." CR 26.03(1). The burden of establishing "good cause" rests with the movant, and "to show good cause, a movant for a protective order must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements." *GATX Corp. v. Appalachian Fuels, LLC*, No. 09-41-DLB, 2011 WL 4015573, at *5 (E.D. Ky. Sept. 9, 2011) (quoting *Nix v. Sword*, 11 Fed. Appx. 498, 500 (6th Cir. 2001)).[2]

The Cooperatives' motion does not set forth any specific arguments regarding why the discovery KCTA seeks in its depositions of the cooperatives is annoying, embarrassing, oppressive, or constitutes and undue expense or burden. *See* CR 26.03(1). Indeed, the Cooperatives do not even identify which of the approximately 34 categories of issues are, in their view, over-broad or irrelevant. The Cooperatives merely state, in conclusory fashion, that these depositions will "cause undue burden and expense." TVA Coops' Motion, at 7. And the

[2] *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).

Cooperatives simply demand that, to the extent the depositions are permitted to go forward at all, they should be limited to "inquiries regarding documents produced" – whatever that means.

As this Commission well knows, the standards for relevance during discovery are broad. 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.").

Furthermore, as KCTA has noted before, "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."). Nor have the Cooperatives met their obligations to demonstrate by "specific facts" why any particular subjects identified in the deposition notices would cause "clearly defined and serious injury." *GATX Corp.*, 2011 WL 4015573, at *5. To the contrary, instead of making any effort to meet their burden of demonstrating why a protective order is necessary or what specific designated subject categories are objectionable, the Cooperatives seek to have the depositions quashed in their entirety, or so limited as effectively to achieve that result.

The topics KCTA has identified for the depositions are specific and relevant to this proceeding. There is nothing oppressive or harassing about them. Because the Cooperatives have failed to justify filing their motion out of time and have also failed to meet their burden to establish good cause for a protective order, the Commission should deny the Cooperatives' motion.

CONCLUSION

For the reasons stated above, KCTA asks the Commission to deny the TVA Cooperatives' Motion for a Protective Order and permit the depositions to proceed as scheduled.

Respectfully submitted,

/s/ Laurence J. Zielke

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Kentucky Cable Telecommunications Association's Opposition to the TVA Cooperatives' Motion for a Protective Order has been served on all parties of record via hand delivery, facsimile, or electronically this 10th day of February, 2014.

/s/ Laurence J. Zielke
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