

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

**In the Matter of:**

<b>The Petition of the Kentucky Cable</b>	)	
<b>Telecommunications 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 STATUS REPORT  
AND REQUEST FOR ACTION**

The Kentucky Cable Telecommunications Association (“KCTA”) submits this 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.

**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. After discovery began, the TVA Cooperatives commenced their campaign to deny KCTA its right to discovery of relevant information in this matter. The argument the Cooperatives have advanced over and over again –

contrary to the Commission's August 6, 2013 Order – is that this proceeding is a “pure question of law.”

The ongoing dispute regarding the scope of relevant discovery in this case has resulted in two motions to compel, a contested motion for the issuance of a subpoena *duces tecum* to the Tennessee Valley Public Power Association (“TVPPA”), and a motion for a protective order. 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.

Pending resolution of this proceeding, one of KCTA's largest members, Time Warner Cable (“TWC”), has deferred paying the exorbitant – not to mention unreasonable – pole attachment fees charged by the TVA Cooperatives. The pole attachment rates being charged by 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. One of the Cooperatives went so far as to threaten to terminate TWC's pole attachment agreement if it did not receive payment by March 31.

Because the Cooperatives have refused to produce any of their cost data in this proceeding, KCTA and TWC have no way of calculating what the appropriate rate is under the Commission's methodology. TWC is in the process, however, of making an interim payment of \$7.50 per attachment – a rate that is more in line with those charged by other utilities – for the period August through December 2013. But it is doing so under protest, and subject to true up, whether up or down, based on the resolution of this and any subsequent proceedings.

In light of the parties' uncertainty regarding the amounts that should properly be due, 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 additional discovery to obtain the documents the Commission approves and to take such depositions as allowed by the Commission. At that time, the matter may be suitable for a summary decision on the merits, or, if necessary, via a short hearing.

### **BACKGROUND**

On August 6, 2013, the Commission issued an Order granting KCTA's application for rehearing, finding 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, Order, at 3 (Ky. PSC Aug. 6, 2013). At or around that time, TWC began withholding payment of the Cooperatives' unreasonable pole attachment fees pending the Commission's ruling regarding its jurisdiction to regulate the TVA Cooperatives' pole attachment rates.

#### ***KCTA's First Motion to Compel***

On October 10, 2013, the Commission issued a Procedural Order, setting forth a schedule for discovery in this matter. Pursuant to that Procedural Order, the parties exchanged their first requests for information on October 24, 2013. Given the Cooperatives' argument that Commission regulation of their pole attachment rates would hinder cost recovery and result in electric ratepayers subsidizing pole attachers, KCTA sought the Cooperatives' cost data. On November 14, the TVA Cooperatives objected to this request. KCTA moved to compel the

production of the Cooperatives' cost data because KCTA is entitled to test the Cooperatives' assertion that their rates are cost-based. This motion was fully briefed as of December 3, 2013.

*KCTA's Second Motion to Compel*

On December 2, 2013, the parties filed supplemental requests for information. Among other things, KCTA requested all pole attachment agreements, joint use agreements, and pole license agreements between the Cooperatives and all pole users; the pole rates the Cooperatives charged to an ILEC and a cable entity for each of the last ten years; invoices for pole attachment fees the Cooperatives sent to all pole attachers for each of the past three years; total pole attachment revenue the Cooperatives received from licensee attachers for each of the years 2008 to present; the Cooperatives' "surplus revenues" as defined in their TVA contracts for each of the last five years; and the identity of any TVA representatives who may testify on the Cooperatives' behalf. On December 23, the Cooperatives objected to these requests.

On January 2, 2014, KCTA moved to compel the production of this information,<sup>1</sup> arguing that these requests are designed to rebut the Cooperatives' primary basis for its preemption argument – that Commission regulation of the Cooperatives' pole rates would conflict with the TVA's requirement that the Cooperatives provide low retail electric rates to end users.<sup>2</sup> In its Motion, KCTA argued that these documents are especially important because the limited discovery the Cooperatives have provided to KCTA shows *zero* involvement by the TVA in the regulation of the Cooperatives' pole attachment agreements – even the Cooperatives' contracts with the TVA are silent on this issue. And the TVA Cooperatives' pole attachment rates vary

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<sup>1</sup> KCTA also asked the Commission to compel the production of documents the Cooperatives have wrongly withheld on the basis of attorney-client privilege.

<sup>2</sup> 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.

widely, with one Cooperative charging a telephone cooperative \$11.00 per attachment in 2013, while it charged KCTA members \$29.16 per attachment at the same time. Another cooperative charged KCTA members \$14.48 while charging other attachers as little as \$5.00. The disparities in pole rates, both among the Cooperatives and even among different customers of the same Cooperative, make it even more obvious that the TVA not only has no involvement in setting the TVA Coops' pole attachment rates, but also that the rates the TVA Coops charge KCTA's members are not required to ensure cost recovery.

KCTA's second motion to compel was fully briefed as of January 16, 2014.

*KCTA's Motion for Issuance of a Subpoena Duces Tecum*

On January 15, 2014, KCTA filed Notices of Deposition and a Motion for Issuance of a Subpoena *Duces Tecum* to the TVPPA. KCTA seeks testimony and documents from the TVPPA because – from the limited documents the TVA Cooperatives produced during discovery – KCTA has learned that some of the TVA Cooperatives charge KCTA members pole attachment rates as set by the TVPPA for use with an incumbent telephone company pursuant to a “joint use” arrangement. KCTA has requested discovery from the TVPPA primarily to confirm the lack of TVA's involvement in TVPPA's setting these pole attachment rates.<sup>3</sup> On January 22, the Cooperatives opposed KCTA's motion.<sup>4</sup> This motion was fully briefed as of January 29, 2014.

*Depositions on Indefinite Hold*

On February 6, the Cooperatives filed a motion with the Commission, asking it to quash the depositions that had been noticed on January 15 in their entirety, to limit the scope of the depositions, or to issue a protective order staying the depositions pending the resolution of the

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<sup>3</sup> 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.

<sup>4</sup> The TVPPA itself did not oppose the subpoena request or move to quash any subpoena.

pending motions to compel. The Commission granted the Cooperatives' motion, in part, on February 19, staying the depositions pending resolution of KCTA's motions to compel. *See* Case No. 2012-00544, Order, at 3-4 (Ky. PSC Feb. 19, 2014). The Commission deferred its consideration of the Cooperatives' request to cancel or limit the scope of the depositions pending its consideration of KCTA's motions to compel. *See id.* at 4.

### RECENT DEVELOPMENTS

In the last two months several notable events relevant to this proceeding have occurred.

1. On February 17, two days before the Commission stayed the proceeding, the Commission received a letter from William D. Johnson, President and Chief Executive Officer of the TVA.<sup>5</sup> The letter "reaffirm[s] TVA's position in this matter and reiterate[s] TVA's view that its position as the exclusive retail rate regulator for distributors of TVA power, including services related to such rates, is consistent with both federal laws and the decisions of the courts of Kentucky." The letter also states that "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." KCTA, however, does not contest that the TVA has authority to regulate the Cooperatives' "retail [electric] rates." Nor does KCTA dispute that TVA would like to see the TVA Coops recover their "full cost" for pole attachments. But the issue as framed by this Commission is whether the TVA "has or *exercises* any jurisdiction." Case No. 2012-00544, Order, at 4 (Ky. PSC Aug. 6, 2013) (emphasis added). Not only does the TVA's letter carefully avoid making any representation that the TVA actually "exercises . . . jurisdiction" over the Cooperatives' pole attachment rates, but the letter provides no evidence of any such "exercise."

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<sup>5</sup> The TVA's letter was never served on KCTA's counsel, but was entered on the docket on February 17, 2014. Other than responding to an earlier request from the Commission and sending the letter received by the Commission on February 17, TVA has declined to enter an appearance in this case.

Obviously, this is no oversight; and the evidence thus far in the record of this proceeding indicates that the TVA does not exercise any such jurisdiction. Furthermore, the TVA's concern that the TVA Cooperatives do not charge less than the cost incurred in providing pole attachment space is a far different issue than has been raised by KCTA here. KCTA asserts that the Cooperatives charge rates that are much *higher* (not lower) than cost-based rates. Since the Commission's pole attachment rates are themselves intended to assure full cost recovery, exercise by the Commission of its own statutory and exclusive jurisdiction over pole attachment rates in Kentucky would not conflict with the jurisdictional concerns expressed by the TVA. In short, like the previous letters from Cynthia Herron of the TVA, Mr. Johnson's letter is more notable for what it does not say than for what it does.

Furthermore, TVA's general references to its authority over the Cooperatives' "rates" and "services" is meaningless out of context. Only those "rates" and "services" actually subject to the TVA's exercise of its jurisdiction are relevant here. And whether this Commission's regulation of pole rates would interfere with any jurisdiction exercised by the TVA is the "mixed question of fact and law" being explored in this proceeding. It is meaningless for the TVA to assert that this Commission may not engage in an "activity" that would "affect the distributor's cost of service." That "cost of service" is made up of innumerable costs that the TVA does not regulate in any way. The record developed thus far indicates that the Cooperatives have a completely free hand in setting their pole attachment rates. As noted above, those rates vary enormously among the Cooperatives and even among the different parties that attach to a particular Cooperative's poles. To the extent that the TVA simply accepts whatever revenue the Cooperatives earn from pole attachments as part of their "cost of service" – and the evidence adduced thus far indicates that this is what the TVA does – it cannot be said that any effort by

this Commission to exercise its “unquestionable” and exclusive jurisdiction to hold the Cooperatives’ pole rates to cost would interfere with the TVA’s exercise of its jurisdiction.

2. On February 19, 2014, the Tennessee Attorney General issued Opinion No. 14-20.<sup>6</sup> The Opinion addressed a question almost identical to that posed by this declaratory ruling proceeding: What jurisdiction does Tennessee have to regulate pole attachment rates “in light of the TVA’s position . . . that it is the ‘exclusive retail rate regulator for the distributors of TVA power’ and that its ‘oversight over the pole attachment rates of these distributors is sufficient’”? *Tenn. AG Opinion No. 14-20*, at 1. The Attorney General’s Opinion, similar to this Commission’s August 6 Order in this proceeding, notes that “[r]esolution of the preemption question, therefore, turns on whether the TVA has *exercised* its broad authority over the rates and revenues of its distributors so as to foreclose regulation of pole attachment rules by the State of Tennessee.” *Id.* at 4 (emphasis added). The Attorney General opines that “any provision in a TVA contract expressly addressing pole attachment rates would preempt state law.” *Id.* at 5. But the Attorney General notes that the TVA contracts filed in this Kentucky case do not contain any such language. And the Attorney General also notes the “general presumption against preemption of state regulation.” *Id.* The Attorney General concludes that, “[i]n the absence of *direct regulation* by the TVA Board of pole attachment rates, therefore, regulation by the State of Tennessee of the rates, terms and conditions of pole attachments would not be clearly preempted by the TVA Act, provided that the specific form of regulation adopted by the State does not affect either the distributors’ rates for electric power or their ability to comply with their agreements with the TVA.” *Id.* at 5-6 (emphasis added). That proviso, of course, is the same fact-laden issue presented to this Commission by KCTA’s petition.

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<sup>6</sup> KCTA filed this Opinion with the Commission on February 24, 2014.



3. On March 4, 2014, Warren Rural Electrical Cooperative Corporation sent a “Pole Attachment Rentals Past Due Notice” to TWC. *See* Warren Letter, attached as Exh. A. Included with the letter was an invoice for TWC’s pole attachment fees for the period July 1, 2013 through December 31, 2013 totaling over \$109,000 at a pole attachment rate of \$25.26. In the letter, Warren notified TWC that it intended to assess a 6% late fee retroactive to August 10, 2013, and terminate TWC’s pole attachment agreement if it did not pay by March 31, 2014.

On March 26, TWC received a phone call from a representative of West Kentucky Rural Electric Cooperative Corporation, notifying TWC that it had not received payment on its pole attachment invoices, totaling over \$54,000.

KCTA acknowledges that TWC owes Warren and West Kentucky compensation because it has attached, and continues to attach, its equipment to the Cooperatives’ poles. But the rates the Cooperatives are charging are unconscionable. And because the Cooperatives have steadfastly refused to provide cost data to KCTA, it has no way to calculate what the Cooperatives’ rates would be under the Commission’s pole rate methodology as set forth in Commission decisions, including Administrative Case No. 251. Thus TWC will pay the Cooperatives for the second half of 2013 at an annual rate of \$7.50 per attachment. TWC will make this payment 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.

## **REQUEST FOR ACTION**

TWC has withheld payment of the invoices for its pole attachment fees since mid-2013. This nonpayment has not been an issue until now, when two of the Cooperatives demanded payment within weeks of each other. 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 rule on all pending discovery motions as soon as possible. Once the Commission rules, KCTA will need a short period of additional discovery to obtain whatever documents the Commission approves and to take depositions, to the extent permitted by the Commission. After that, this matter can move toward a conclusion.

## **CONCLUSION**

For the reasons stated above, KCTA asks the Commission to rule on all pending discovery as soon as possible so that this matter can proceed.

Respectfully submitted,

/s/ Laurence J. Zielke

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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 Status Update and Request for Action has been served on all parties of record via hand delivery, facsimile, or electronically this 1st day of April, 2014.

/s/ Laurence J. Zielke