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 MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Kentucky Rules of Civil Procedure, the Kentucky Cable Telecommunications Association ("KCTA") hereby moves for summary judgment against Hickman-Fulton Counties Rural Electric Cooperative Corporation ("Hickman-Fulton"), Pennyrile Rural Electric Cooperative Cooperation ("Pennyrile"), Tri-County Electric Membership Corporation ("Tri-County"), Warren Rural Electric Cooperative Corporation ("Warren"), and West Kentucky Rural Electric Cooperative Corporation ("West Kentucky") (collectively the "TVA Cooperatives" or "Cooperatives") and asks the Kentucky Public Service Commission ("Commission") to issue a declaratory order affirming its jurisdiction to regulate pole attachment rates, terms, and conditions of the TVA Cooperatives. The Commission has a statutory duty to exercise its jurisdiction in the absence of substantial evidence demonstrating that TVA has preempted that jurisdiction. As explained in this Motion, no such evidence has been adduced in this proceeding.

If the Commission does not grant summary judgment as requested here, KCTA requests the Commission to promptly set this matter for evidentiary hearing. The TVA Cooperatives have cynically and blatantly abused the failure of any regulatory authority to regulate their pole

attachment rates and practices, and have thumbed their noses at this Commission by steadfastly refusing to cooperate in the discovery process as ordered. Meanwhile, KCTA's members and the citizens of the Commonwealth are being injured. KCTA respectfully requests that the Commission act promptly to resolve this matter.

INTRODUCTION

This straightforward case raises an issue of federal preemption. Unless preempted here by the Tennessee Valley Authority ("TVA"), the Commission must exercise its "exclusive" and "unquestioned" jurisdiction over the TVA Cooperatives' pole attachments, as it does over other utilities in Kentucky. The evidence adduced in discovery in this case unequivocally demonstrates that **TVA Plays No Role Whatsoever In Connection With The TVA Cooperatives' Pole Attachment Rates**. Indeed, the TVA does not even know what those rates are. Nor does TVA know what the Cooperatives' pole attachment costs are, or what rates the Cooperatives pay to attach to the poles of others. Pole attachment revenues and expenses are simply inputs over which the TVA exercises no more control than it does over other revenues or expenses of the Cooperatives. There is no genuine issue of material fact in this matter, and the Commission should grant KCTA's petition.

KCTA's members provide critical high-speed communication services to residents of Kentucky. Excessively high pole attachment rates are an obstacle to KCTA's members' ability to provide and expand those services. The impact of high pole attachment rates is especially acute in rural areas, where there are more poles per mile than households. *See* FCC's National Broadband Plan, at 110, *available at* http://transition.fcc.gov/national-broadband-plan/

national-broadband-plan.pdf. It is no coincidence that these rural areas are the most likely to be unserved by communications services providers, limiting residents' access to cable and broadband, and hampering economic growth.

In the absence of pole attachment regulation, utilities act as monopoly providers of these essential facilities. *See Nat'l Cable & Telecom. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) ("Since the inception of cable television, cable companies have sought the means to run a wire into the home of each subscriber. They have found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles. Utilities, in turn, have found it convenient to charge monopoly rents."); *Am. Elec. Power Corp. v. FCC*, No. 11-1146, Slip Op., at 8 (D.C. Cir. Feb. 26, 2013) ("Cable companies sought access to the poles for their own network equipment; the utilities, in turn, sought to charge monopoly rents for that access.") (internal quotation marks omitted). The TVA Cooperatives have behaved here as one would thus expect – by charging monopoly rates. For example, the current average pole attachment rate on a three-user pole charged by regulated electric utilities in Kentucky is approximately $4.65 per pole. By comparison, one of the TVA Cooperatives charges KCTA members $31.08 per attachment on a three-user pole. That is *seven times* higher than the average rate as regulated by the Commission.

Kentucky law obligates the Commission to regulate the rates and services of utilities, including cooperative utilities, in the Commonwealth. Ky. Rev. Stat. § 278.040; *see also Ky. CATV Ass'n v. Volz*, 675 S.W.2d 393, 396 (Ky. App. Ct. 1983); *In re Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space*, Case No. 8040, Aug. 21, 1981 Order, at 5. The Commission's pole attachment jurisdiction is both "exclusive" and "unquestioned." *See Volz*, 675 S.W.2d at 396; *Ballard Rural Telephone Coop. Corp. v. Jackson*

Purchase Energy Corp., 2005 WL 858940, at *3 (Ky. PSC Mar. 23, 2005). Unless its jurisdiction is preempted by federal law, the Commission is required by state law to assert its jurisdiction here.

KCTA filed a petition in December 2012, asking the Commission to issue a declaratory order affirming this exclusive and unquestioned jurisdiction to regulate the pole attachment rates, terms, and conditions of the TVA Cooperatives. In their response, the TVA Cooperatives argued that, for over 80 years, this Commission has recognized that TVA has "complete authority . . . over the rates and services of the TVA Cooperatives." But this is not the case. The Commission regulated the Cooperatives' retail electric rates until 1979, when a federal court held that the Commission's jurisdiction over the Coops' electric rates was preempted by a *direct conflict*; the Coops could not comply with Kentucky law without breaching a specific provision of their TVA contracts regarding the escalation of electric rates. *TVA v. Energy Reg. Comm'n of Ky.*, Civ. Action No. 79-0009-P (W.D. Ky. Sept. 25, 1979). But here, there is no conflict – direct or otherwise – with regard to the Commission's regulation of the Cooperatives' pole attachment rates.

The sole issue for resolution here, as stated by the Commission, is a "mixed question of fact and law": whether "TVA has, or does exercise, jurisdiction over the pole attachment rates of the TVA Cooperatives." Aug. 6, 2013 Order, at 3. Based in large part on two letters from TVA which KCTA had no opportunity to rebut, the Commission initially denied KCTA's petition. But in recognition that its reliance on these letters "was not supported by substantial evidence," the Commission granted rehearing to consider whether the TVA actually exercises pole attachment jurisdiction. *Id.* at 2. The Commission granted rehearing specifically to give KCTA

"an opportunity to challenge" as a factual matter, the TVA letters. The Commission expressed the question before it as follows:

> The question before us is whether or not TVA has or exercises any jurisdiction, be it through the establishment of a ratemaking formula, review, or simply oversight responsibility in connection with ratemaking, over the pole attachment rates of the TVA Cooperatives.[1]

Id. at 4.

KCTA conducted discovery pursuant to the Commission's procedural order, culminating with depositions of each Cooperative the week of March 9, 2015. As KCTA will demonstrate in more detail below, those depositions established the following:

- **Not one of the Cooperatives has communicated its pole attachment rates to TVA; nor has TVA inquired regarding those rates**.

- **Not one of the Cooperatives has any evidence that TVA was consulted before the Cooperatives determined what pole rates would be charged. At least one of the Cooperatives raised its pole attachment rates by more than 36 percent in 2010 without any consultation with or notification to TVA.**

- **The Cooperatives charge widely varying annual pole attachment rates to different parties, ranging from as little as $5.00 to as much as $27.00 in 2010. All without any input by TVA.**

- **The agreements between the Cooperatives and TVA do not address pole attachment rates.**

- **The Cooperatives also pay pole attachment rates to other electric and telephone companies when the Cooperatives use their poles. Those rates are not approved by or discussed with TVA, any more than are the rates that the Cooperatives charge.**

- **The Cooperatives are not aware of any directive or order from TVA regarding pole attachment rates. The only communications from TVA regarding pole rates consist of three letters from TVA to the Commission generated in this proceeding. Those letters do little more than note that pole rates should be sufficient to cover the costs**

[1] On February 14, 2014, while discovery in this matter was pending, TVA sent a further letter urging the Commission's "continued forbearance from regulation of the rates and services" of the TVA Cooperatives. TVA's Reaffirmation of Position, docketed Feb. 17, 2014. But no additional facts regarding any TVA involvement with pole attachment rates were submitted.

of pole attachments and not subsidize third parties – something that this Commission's pole attachment regulation would ensure.

- **The Cooperatives do not report pole attachment expenses to TVA.**
- **The only information submitted to TVA regarding pole attachment revenues is included in a line item on monthly and annual reports that (i) contains other revenues besides pole attachment revenues and (ii) nets out pole attachment payments made to other utilities for the Cooperatives' use of their poles.**

KCTA also submitted a request to the TVA under the Federal Freedom of Information Act ("FOIA"). The request asked for documents that would substantiate the Cooperatives' claim that the TVA regulates their pole attachment rates. The TVA provided a handful of documents in response to KCTA's request, none of which provide any evidence of TVA regulation of the Cooperatives' pole attachment rates.

Without proof – or evidence, for that matter – that TVA has exercised its authority to regulate the rates, terms, and conditions of pole attachments, this Commission has an obligation to do so. And the Cooperatives' belligerent and reckless conduct while this matter has been pending before the Commission should further compel prompt exercise by the Commission of its jurisdiction. As KCTA has explained in prior filings, one of KCTA's largest members, Time Warner Cable ("TWC"), has deferred paying the unreasonable attachment fees charged by the TVA Cooperatives. TWC made interim payments – subject to true-up – based on the resolution of this and subsequent proceedings. Last year, Warren threatened to terminate TWC's pole attachment agreement if it did not receive the full payment, and later demanded an unconscionable "late fee" both on amounts paid and amounts not yet owed. It also denied TWC any new attachments or transfers until all amounts were paid. Meanwhile, West Kentucky worked in concert with the City of Murray to attempt to unlawfully interfere with the proposed sale of TWC to Comcast unless TWC paid the full amount the Cooperative demanded for pole

attachments. And in February of this year, Pennyrile issued a press release threatening that, in less than a week, it intended to cut power to TWC's facilities and forcibly remove TWC's equipment from its utility poles if TWC did not remit allegedly past due pole attachment fees. The press release was intended – and stated as much – to encourage TWC's customers to view TWC as being unwilling to meet its financial obligations and to force TWC to pay to Pennyrile the unreasonable pole attachment rates that had caused KCTA to seek relief from this Commission in the first place.[2] Because the pole attachments rates, terms, and conditions of the TVA Cooperatives currently are not regulated by *any* entity at all, the Cooperatives are able to charge exorbitant pole attachment fees and engage in abusive tactics. The Cooperatives simply are not accountable to anyone.

Based on the discovery that KCTA has now taken, it is clear that it is entitled to summary judgment. Because there are no material facts in dispute and the law is clear, the Commission should grant KCTA's motion for summary judgment and enter an order affirming the Commission's jurisdiction to regulate pole attachment rates, terms, and conditions of the TVA Cooperatives. Should the Commission fail to grant the motion for summary judgment, however, KCTA requests that this matter be scheduled for hearing as soon as reasonably practical.

LEGAL STANDARD

The Commission looks to Kentucky Rule of Civil Procedure 56 when resolving motions for summary judgment. *Ballard Rural Tel. Coop. Corp. v. Jackson Purchase Energy Corp.*, 2005 WL 858940 (Ky. PSC March 23, 2005). Rule 56 provides that summary judgment is

[2] The dispute between TWC and Pennyrile is the subject of an ongoing proceeding in the United States District Court for the Western District of Kentucky. Interestingly, although this litigation was filed approximately 12 days before the deposition of Pennyrile in this matter before the Commission, no one at Pennyrile had informed TVA about the rate dispute or the litigation that had thus resulted. Exh. 1 (Pennyrile Dep.) at 61.

appropriate where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R. 56.03. Summary judgment "is designed to expedite the disposition of cases and avoid unnecessary trials when no genuine issues of material fact are raised." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). To withstand a motion for summary judgment, the opposing party must "present[] at least some affirmative evidence showing the existence of a genuine issue of material fact for trial" *City of Florence v. Chipman*, 38 S.W.2d 387, 390 (Ky. 2001). Under this standard, the Commission should grant KCTA's motion for summary judgment.

ARGUMENT

I. This Commission Has Exclusive Jurisdiction Over Pole Attachment Rates.

The Commission has exclusive jurisdiction over the rates and services of utilities, including cooperative utilities, in Kentucky. *Ky. CATV Ass'n v. Volz*, 675 S.W.2d 393, 396, (Ky Ct. App. 1983). The rates and services subject to that jurisdiction include the rates, terms and conditions of pole attachments. *Id.* The Kentucky Court of Appeals has stated "that the statutory scheme confers broad jurisdiction over the use of the 'facilities' of *all* utilities." *Id.* (emphasis added). More recently, the Commission noted that its jurisdiction over pole attachments is "***unquestionable***." *Ballard Rural Tel. Coop. Corp. v. Jackson Purchase Energy Corp.*, 2005 WL 858940, at *3 (Ky. PSC March 23, 2005) (emphasis added).

II. The Commission's Jurisdiction Over The TVA Cooperatives' Pole Attachment Rates Has Not Been Preempted By TVA.

Courts have identified three ways in which a state statute may conflict with federal law: express preemption, conflict preemption, and field preemption. *In re Schafer*, 689 F.3d. 601,

613-14 (6th Cir. 2012). Express preemption exists where the intent of Congress to preempt state law is explicit. *Id.* The TVA Cooperatives have never argued that the TVA Act expressly preempts the Commission's regulation of the Cooperatives' pole attachment rates – nor could they. There is nothing in the law or regulations that addresses pole attachment rates.

A. Conflict Preemption Is Found Only Where An Actual Conflict Overcomes The Presumption Against Preemption.

1. It is the TVA Cooperatives' burden to rebut the presumption against preemption and to establish that their pole attachment rates have actually been preempted by TVA.

"[W]hen a state law is not expressly preempted, courts must begin with the presumption that the law is valid." *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 358 (6th Cir. 2003). "It will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *Id.* This "presumption against preemption" is strongest where "congress has legislated in a field which the States have traditionally occupied," as courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). The United States Supreme Court has observed that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461, U.S. 375, 377 (1983) (internal citation omitted).

Courts assess conflict preemption in two ways. *First*, courts "consider whether the laws in question conflict such that it is *impossible* for a party to comply with both laws simultaneously." *Schafer*, 689 F.3d at 614 (emphasis added); *Wimbush v. Wyeth*, 619 F.3d 632,

643 (6th Cir. 2010) (describing impossibility preemption as a "demanding defense"). *Second*, courts consider whether "the enforcement of the state law would hinder or frustrate the full purposes and objectives of the federal law." *Schafer*, 689 F.3d at 614. "Conflict preemption analysis should be narrow and precise, to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Wimbush*, 619 F.3d at 643 (internal quotations omitted). "[W]here possible, a court should try to reconcile federal law and state law." *Id.* A state scheme is not preempted "[s]imply because [it] . . . parallels federal [law]." *Id.* Nor is a state law preempted where it furthers, rather than frustrates, federal policy. *See Wyeth*, 555 U.S. at 565.

In the 1979 decision of *TVA v. Energy Regulatory Commission of Kentucky*, No. 79-0009-P (W.D. Ky. Sept. 25, 1979), the United States District Court for the Western District of Kentucky dealt with conflict preemption in holding that TVA's explicit control of electric rates through its contracts with the TVA Cooperatives preempted any Commission regulation of those same rates. Similar decisions were reached by the Commission and the Franklin County Circuit Court regarding related activities, such as borrowings by the TVA Cooperatives from the REA, and other "services" that were directly regulated by TVA. *W. Ky Rural Coop. Corp. v. Energy Reg. Comm'n*, No. 80-CI-1747 (Franklin Cir. Ct. Nov. 12, 1982); *In re Hickman-Fulton Counties Rural Elec. Coop. Corp.*, Case No. 8858 (Ky. PSC June 27, 1983). Each of these decisions was based on a clear finding that regulation of the activity by this Commission would, as a matter of fact, directly conflict with regulation by a federal agency, making it impossible for the Cooperatives to comply with both TVA and Commission regulations. The issue presented by the instant case, therefore, is whether the exercise by this Commission of its "exclusive" and "unquestioned" statutory jurisdiction over pole attachments would, as a matter of fact, conflict

with regulatory authority exercised by TVA. And that is the way the Commission has itself framed the issue. See discussion at pages 4-5, *supra*.

The Commission suggested earlier in this proceeding that it might be KCTA's burden to demonstrate that the Commission has pole attachment jurisdiction. Jan. 17, 2013 Order, at 2. But that suggestion is flatly contradicted by the case law described above. And it is inconsistent with the Commission's recognition in its order on rehearing that any claim that TVA has preempted that jurisdiction as a matter of fact must be proved by substantial evidence. KCTA respectfully submits that it is the Commission's responsibility to assert its jurisdiction unless proof of TVA preemption is established. And it is the Cooperatives' burden to provide such proof.

Furthermore, where the facts are known by one party and not the other, the party with the knowledge cannot hide its knowledge and thereby prevent those facts from being disclosed. *McArthur v. Payne*, 258 S.W. 684, 686 (Ky. 1924) ("It is a principle of law when a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, upon him rests the burden of proof."); *see also U.S. v. One Parcel of Prop. Located at 194 Quaker Farms Rd.*, 85 F.3d 985, 990 (2d Cir. 1996) (citing McCormick on Evidence § 337, at 570 94th ed.(1992)) ("Burden-shifting where one party has superior access to evidence on a particular issue is a common feature of our law."). At the request of the Cooperatives, the Commission denied KCTA an opportunity to depose representatives of TVA and the Cooperatives' trade association, the Tennessee Valley Public Power Association ("TVPPA"), leaving KCTA no opportunity to establish facts related to TVA's preemption except through discovery of the TVA Cooperatives and a FOIA request to TVA. Jan. 8, 2015 Order. But, in a further and cynical effort to prevent KCTA from learning the facts, the Cooperatives' witnesses refused to make any

effort to educate themselves in preparation for their depositions under Kentucky Rule of Civil Procedure 30.02(6). The responsibilities of witnesses to educate themselves for testimony on topics designated in Rule 30.02(6) depositions in Kentucky are clear: "persons so designated [to testify on behalf of the entity] shall testify as to matters know or reasonably available to the organization."

The underlying purpose of Rule 30(b)(6) of the Federal Rules of Civil Procedure – Kentucky Civil Rule 30.02(6)'s counterpart – is to "prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush." *Rainey v. Am. Forest and Paper Assoc.*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998).[3] The Cooperatives "cannot [now] proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition." *Id.* at 94. *See also In re Classicstar Mare Litig.*, MDL No. 1877, 2012 WL 1190888, at *1-2 (E.D. Ky. April 9, 2012) (By failing to produce knowledgeable designees for a Federal Rule 30(b)(6) deposition, defendants "made their own beds, and must now lie in them with respect to the facts.").

KCTA designated items for questions at these depositions, and the Commission approved topics related to the Cooperatives' contentions that TVA regulates their pole attachment rates. Jan. 8, 2015 Order, at 17-18. Nevertheless, the witnesses testifying on behalf of the five TVA Cooperatives made no effort whatsoever to educate themselves on the topics as designated by KCTA and ordered by the Commission. The witnesses spent approximately two hours in discussion with the other Cooperatives' witnesses and counsel to discuss the deposition process.

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[3] *See So. Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 929 n.29 (Ky. 2013) ("[F]ederal court decisions interpreting Federal Rules of Civil Procedure are persuasive authority when interpreting Kentucky Rules of Civil Procedure that were adopted verbatim from their federal counterparts.").

They there reviewed some pleadings filed in the case and the subject categories for the depositions. Pennyrile Dep. at 8-9; Exh. 2 (Hickman-Fulton Dep.) at 6-8; Exh. 3 (Tri-County Dep.) at 8-9. But they did no more, and they were unable to answer many of the most basic questions directly encompassed by the subject categories approved by the Commission. Nevertheless, as explained below, they did testify that the Cooperatives had no knowledge of any TVA involvement with pole attachments that would conflict with the exercise of this Commission's jurisdiction.

B. The Facts Do Not Support Any Finding Of Conflict Preemption.

The evidence adduced at the depositions confirms that TVA plays no role in connection with pole attachment rates, terms or conditions. The Commission's exercise of its jurisdiction over the Cooperatives' pole attachment rates, terms, and conditions would not conflict with TVA's jurisdiction. It would not be impossible for the Cooperatives to comply with both federal and state regulations. Nor would the Commission's regulation of the Cooperatives' pole attachment rates hinder or frustrate the purpose of the TVA Act. In fact, Commission regulation of the Cooperatives' pole attachment rates would be entirely consistent with, and would further the purpose of, the federal law.

State regulation pursuant to the Commission's historic Administrative Case No. 251 would allow the Commission to regulate the terms and conditions of attachment, including requiring that pole rates be based on cost and assuring that pole rates subsidize neither electric rate payers nor cable companies and their customers. TVA would continue to treat pole attachment revenues as inputs for the Cooperatives' revenue requirements, as it does today.

Despite the TVA Cooperatives' failure to cooperate in the discovery process, the facts that KCTA was able to uncover in discovery clearly demonstrate that TVA does not regulate –

and indeed is not even aware of – the TVA Cooperatives' pole attachment rates. Furthermore, TVA plays no greater role in connection with pole attachment rates and revenues than it does with any other revenue or expense input to the Cooperatives' revenue requirements. TVA accepts the costs and revenues of the Cooperatives as they are. Regulation of pole attachment rates, or the terms and conditions of attachment, would conflict with no regulation by TVA.

- **The wholesale power contracts between TVA and the Cooperatives relate specifically to "resale" electric rates to be charged by the Cooperatives, but they are entirely silent with respect to pole attachment rates**. *See generally* Exh. 4 (Excerpts of TVA Coops.' Contracts with TVA); *see also* Exh. 5 (Warren Dep.) at 16, 18; Pennyrile Dep. at 29-32; Exh. 7 (West Kentucky Dep.) at 20. To the extent that the contracts do not allow subsidization of non-electric activities, application of the Commission's pole attachment regulation would simply assure that this does not occur.
- **TVA has not issued any directive or order to any of the TVA Cooperatives regarding pole attachment rates**. *See, e.g.*, Pennyrile Dep. 51; Warren Dep. 34-35; Hickman-Fulton Dep. 29; West Kentucky Dep. 60.
- **The Cooperatives do not report their pole attachment rates to TVA and do not consult with or seek consent from TVA in establishing pole attachment rates**. *See, e.g.*, Pennyrile Dep. 44-46, 51-53; Warren Dep. 35; Hickman-Fulton Dep. 29; Tri-County Dep. 27-28, 37; West Kentucky Dep. 40-41.
- **The Cooperatives do not provide copies of any pole attachment agreements to TVA or consult with TVA on the terms to be included in any pole**

attachment agreements the Cooperatives negotiate. Pennyrile Dep. 42-43, 45; Warren Dep. at 22-23; West Kentucky Dep. 28-29; Hickman-Fulton Dep. 25.

- **The Cooperatives base their pole attachment rates on negotiations in which TVA plays no role and has no knowledge, or simply base them on independent determinations by the Cooperatives' boards**. West Kentucky Dep. 59-60; Warren Dep. 23; Tri-County Dep. 36-37. While one Cooperative (Tri-County) uses a cost-based formula for pole rates charged to some of its pole attachment customers, it charges AT&T a rate that bears no relationship to costs – indeed, the rate Tri-County charges AT&T is almost double the rate charged to some users and more than five times the rate charged to still others. Tri-County Dep. 23-24, 32. Meanwhile, other Cooperatives charge rates to parties that have no relationship to their costs. Warren Dep. 34; West Kentucky Dep. 23, 55-56; Hickman-Fulton Dep. 20.
- **The Cooperatives admit that their pole attachment rates could be different from what they charge – all without any input from TVA**. Pennyrile Dep. 46; West Kentucky Dep. 41; Hickman-Fulton Dep. 28-29. Indeed, West Kentucky increased its pole attachment rates by 36 percent in 2010 without even notifying TVA. West Kentucky Dep. 27-29, 53-54.
- **The Cooperatives do not even report pole attachment revenues or expenses separately to TVA**. Their pole attachment revenues are reported to TVA only as part of a line item in monthly and annual financial reports that includes other revenues from "rental of electric property." Not only do these entries include other revenues, but they do not even include all pole attachment revenues. The

Cooperatives also attach to other parties' poles, also for a fee. The pole revenues reported to TVA are **net** of the expenses incurred in attaching to these other parties' poles. Tri-County Dep. 42-43; Warren Dep. 35-37. For some TVA Cooperatives, the netting effect is substantial. For example, Warren netted out more than $27,000 in payments made to AT&T for attachment to AT&T's poles in 2011 in reporting its revenues for rental from electric property. Warren Dep. 31; Exh. 6 (Excerpt of Warren Dep. Exh. 36).

- **None of the Cooperatives can even recall the last time they communicated with TVA about a pole attachment matter**. Pennyrile Dep. 61; Warren Dep. 38; West Kentucky Dep. 66.

KCTA also submitted a FOIA request to the TVA, seeking (1) documents reflecting communications between the Cooperatives and the TVA concerning pole attachment rates or revenues, and (2) documents of the TVA Board of Directors that concern pole attachment rates charged by the Cooperatives. In response, the TVA provided a total of seven documents. Consistent with the other evidence KCTA adduced in this proceeding, those documents fail to show any involvement by the TVA with the Cooperatives' pole attachment rates.[4] *See* Exh. 9.

The proof, as they say, is in the pudding. And further proof of the lack of TVA involvement with the Cooperatives' pole attachment rates – and the lack of conflict with any such regulation by this Commission – is here demonstrated by the wide variations in the actual rates charged by the Cooperatives. Those rates vary hugely, not only among the different

[4] Two of the documents are communications between the TVA and the Cooperatives regarding KCTA's petition in this matter, and are responsive to KCTA's Request for Information 1-15. But, consistent with their ongoing failure to cooperate in the discovery process, none of the Cooperatives produced these documents.

Cooperatives, but also among the different rates as charged the same Cooperative to third parties. For example:

In 2010 West Kentucky charged Windstream Communications **$27.00**, cable operators **$25.00,** and West Kentucky Rural Telephone Cooperative **$12.50**.

In 2010 Tri County charged AT&T **$27.00,** Windstream Communications **$17.83**, cable operators **$13.75**, and other attachers **$5.00.**

The Cooperatives explained at their depositions that these varying rates were simply the product of decisions by their boards or negotiations with others. Tri-County Dep. 36; West Kentucky Dep. 59-60. Beyond this, the Cooperatives have no explanation for their varying rates. *See, e.g.,* Hickman-Fulton Dep. 27. The Cooperatives have never asked TVA for permission to charge these rates, or even advised TVA about them. West Kentucky Dep. 47; Pennyrile Dep. 51-53; Warren Dep. 35. The failure of TVA to make any effort to control, or even to review, the Cooperatives' pole attachment rates makes clear that the Commission's limiting of pole attachment rates by the methodology used in Administrative Case No. 251 would have no effect on TVA's exercise of its jurisdiction over the Cooperatives' electric rates. There is no evidence to suggest that rates set according to the Commission's rate methodology would interfere with any regulation by TVA.

At the end of the day, TVA simply treats pole attachment revenues like it treats all other inputs to the Cooperatives' electric rate revenue requirement. TVA does not attempt to control pole attachment rates any more than it attempts to control the state and local taxes or interest rates that the Cooperatives pay. Pennyrile Dep. 38-39; West Kentucky Dep. 25; Hickman-Fulton Dep. 25-26. Indeed, TVA treats pole attachment revenues no differently from how it treats the expenses that the Cooperatives incur in attaching to the poles of other parties. TVA does not

know – and has never approved – the rates the Cooperatives pay to attach to the poles of others. Pennyrile Dep. 59-60; Warren Dep. 28, 37; West Kentucky Dep. 26-29. Even though the expenses incurred for attaching to others' poles have a direct effect on the Cooperatives' net revenues, these fees are simply treated as expenses, like any other business expense that TVA does not control. Pennyrile Dep. at 60-61. In other words, rather than overseeing or regulating the Cooperatives' pole attachment rates or revenues, TVA simply takes into account *all* of the Cooperatives' revenues (including pole attachment revenues), and *all* of the Cooperatives' expenses (including the Cooperatives' pole attachment expenses), and the net is what TVA uses to set the Cooperatives' revenue requirement. Pennyrile Dep. 37-38. From that revenue requirement, TVA sets the Cooperatives' electric rates. Pennyrile Dep. 37.[5]

C. TVA's Letters Raise Preemption Issues, But Do Not Demonstrate Preemption.

TVA has chosen not to intervene in this proceeding and has, instead, merely submitted factually vague and unverified letters to the Commission. It was in recognition that it should not have relied on these letters to deny KCTA's Petition in 2013 that the Commission granted KCTA's Petition for Rehearing and ordered that the proceeding should go forward to determine, as a factual matter, whether TVA actually has preempted pole attachment regulation. TVA's letters merely raise the questions designated by the Commission for resolution in this case. They do not answer those questions.

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[5] TVA's lack of awareness of the Cooperatives' pole attachment revenues is further supported by a situation that arose between Mediacom, a cable provider, and West Kentucky, between the years 2004 and 2011. During that period of time, Mediacom paid West Kentucky less than the full attachment rate. West Kentucky Dep. 51. The underpayment was significant. Exh. 8 (Excerpt of West Kentucky Dep. Exh. 27). As a result, West Kentucky's revenues were less than they would have been had Mediacom paid the full pole attachment rate. West Kentucky Dep. 51-52. Yet TVA was not informed of the change in West Kentucky's revenue. *Id.* at 51.

The first letter, sent by Cynthia Herron, Director, Retail Regulatory Affairs at TVA to each of the Cooperatives, noted that TVA is the "exclusive retail rate regulator" for the Cooperatives, meaning that TVA regulates the Cooperatives' retail electric rates. That proposition has never been at issue here. Ms. Herron also noted that TVA has no objection to the Cooperatives sharing their facilities for pole attachment purposes "as long as [the Cooperative] recovers the costs associated with pole attachment rentals and that the electric rate payers do not subsidize the costs of these rentals." Exhibit 2 to TVA Coops.' Jan. 24, 2013 Resp. to PSC's Jan. 17, 2013 Order. The second letter, also from Ms. Herron, responded to a letter from Jeff Derouon, Executive Director of the Commission, who asked TVA whether it was asserting that it had exclusive jurisdiction over the Cooperatives' pole rates and if it had any objection to the Commission exercising pole attachment jurisdiction. Ltr. from C. Herron, docketed June 18, 2013. While Ms. Herron expressed the desire that the Commission not "alter the status quo," she presented no facts to the Commission demonstrating any conflict that would be created by the Commission's regulation of the Cooperatives' pole rates according to its historic pole rate methodology. Indeed, she merely noted that pole attachment revenues (like other revenues and expenses) are considered in determining the Cooperatives' revenue requirement. She again noted that TVA would not wish that the Cooperatives subsidize pole attaching parties, but she did not indicate any basis for such a concern if rates were regulated by this Commission. *Id.* Indeed, because the Commission's pole attachment rate methodology ensures that pole owners' costs – including a reasonable rate of return – are fully covered by pole attachment rates regulated by the Commission, TVA need have no such concern.

D. The Commission's Findings In Its June 28, 2013 Order Have Been Shown To Be Erroneous.

In its Order of June 28, 2013, in reliance on the TVA letters, the Commission made certain findings. The Commission then recognized in its Order of August 6, 2013 granting KCTA's Motion for Rehearing, that the TVA letters did not constitute "substantial evidence" of TVA preemption. Indeed, the TVA's unverified letters do not constitute probative evidence at all. But more to the point, the evidence adduced in discovery shows that the Commission's findings in its June 28, 2013 Order are erroneous.

Based on Ms. Herron's letters, the Commission found in its June 28, 2013 Order that TVA asserts "some sort of regulatory control over pole attachments" due to Ms. Herron's statement that TVA allegedly requires the TVA Cooperatives to recover their full costs associated with pole attachments. June 28, 2013 Order at 6. But the evidence shows that TVA has no knowledge of the TVA Cooperatives' pole attachment costs, which are not reported to it. And, in any case, the Commission's exercise of its jurisdiction would be wholly consistent with such a requirement. The Commission also found that TVA "explicitly establishes requirements for how pole attachment fees are calculated to avoid having to raise [electric] retail rates" and that TVA has established a "comprehensive, top to bottom regulatory scheme where the TVA looks at every aspect of the TVA Cooperatives' revenues and establishes requirements for those revenues." Yet the evidence adduced in discovery demonstrates that these statements are not accurate. TVA has not established any requirements for how pole attachment fees are to be calculated. Indeed, the TVA Cooperatives charge widely varying pole attachment rates of which TVA is wholly ignorant and over which TVA exercises no control.

E. The Proper Resolution Here Is To Follow the Analysis of the Opinion of the Tennessee Attorney General.

The Tennessee Attorney General recently issued a legal opinion, addressing the same issue that is before this Commission. The Attorney General arrived at the same conclusion that KCTA has urged all along – that TVA may have the authority to regulate pole attachment rates, but it has not done so. *See* Exh. 10. The Attorney General stated that, given the general presumption against federal preemption of state regulation – especially in the area of utility regulation, where Congress has recognized the states' traditional authority via the Pole Attachment Act – "in the absence of direct regulation by the TVA Board of pole attachment rates . . . regulation by the [state] of the rates, terms, and conditions of pole attachments would not be clearly preempted." *Id.* at 5.

The Cooperatives have argued that the Commission's regulation of their pole attachment rates would undermine TVA's mandate that the Cooperatives provide low retail electric rates to end users because Commission regulation would allegedly not permit full cost recovery. *See* TVA Coops' Resp. to Ky. PSC's Jan. 17, 2013 Order, at 7 ("Commission regulation would directly infringe on TVA's ongoing efforts to ensure that the TVA Cooperatives 'recover [the] full cost associated with the pole attachment' in connection with the performance of its duties as 'the exclusive retail rate regulator for the distributors of TVA power.'"). These concerns are easily and satisfactorily addressed by the Commission's exercise of jurisdiction through application of the Commission's pole attachment rate formula – a formula that recovers the utility's fully allocated costs. *See In re Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments,* Admin. Case. No. 251, Sept. 17, 1982. The Commission establishes pole attachment rates which are "fair, just and reasonable." *Id.* at 3. It uses a fully allocated rate methodology that takes the embedded cost of an average pole of the utility,

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 used for pole attachments. *See id*. at 8. Under this rate methodology, cable operators "pay their equitable share of all the utility's costs in providing services." *Id.* at 11

Because the Cooperatives can comply with both federal and state regulation, and because Commission regulation of the Cooperatives' pole attachment rates, terms, and condition would further the purpose of, rather than frustrate, the purpose of TVA Act, there is no conflict preemption.

C. Field Preemption Requires A Finding That Federal Regulation Is So Comprehensive As To Leave No Room For Supplementary State Regulation.

Field preemption occurs when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Fednav, Ltd. v. Chester*, 547 F.3d 607, 618 (6th Cir. 2008) (quoting *Ohio Mfrs. Assoc. v. Akron*, 801 F.2d 824, 828 (6th Cir. 1986)). "Field preemption also occurs when an 'Act of Congress . . . touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* at 618-19 (quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978)).

As a first step in addressing the issue of field preemption, a court must first "define the relevant field" by reviewing the purpose of the federal legislation at issue. *Id.* at 619. Once the relevant field has been defined, a court must "ascertain Congress' intent in enacting the federal statute at issue." *Id.* at 620. "Congress' intent is often divined inferentially, by measuring the comprehensiveness of federal legislation in the field, or by assessing the dominance of the federal interests reflected in that legislation." *Id.*

The purpose of the TVA Act, and thus the relevant field, is well known. TVA "was established by Congress in 1933 primarily to provide navigation, flood control and agricultural and industrial development and to promote the use of electric power in the Tennessee Valley region." *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 403 n.2 (6th Cir. 2006) (citing TVA 2002 Annual Report at 2). The TVA Cooperatives have argued that this field is so broad that it encompasses anything that could indirectly affect TVA's promotion of the use of electric power via its provision of low rates to consumers. This argument, taken to its logical conclusion, would encompass anything that somehow affects the end retail rate for electricity, including the prices of all inputs which the evidence shows TVA does not make any effort to control, such as state and local taxes, interest payments and pole rentals paid by the Cooperatives to attach to poles of other utilities. Nothing in the TVA Act indicates that Congress intended to preempt the Commission's regulation of pole attachments, and it strains credulity to argue that the regulatory field assigned to TVA by Congress encompasses the Cooperatives' pole attachment rates. As a result, there is no field preemption here.

III. The Commission Can Regulate The TVA Cooperatives' Pole Rates And Agreements Through Tariff or Complaint Proceedings.

In terms of how the Commission might exercise its jurisdiction to ensure that the TVA Cooperatives' pole attachment rates, terms and conditions are just and reasonable, the Commission has several choices. It could require the filing of pole attachment tariffs, as required of other cooperatives in Kentucky. Or the Commission could exercise its jurisdiction simply by allowing the parties to negotiate, and if the parties cannot reach agreement, the Commission could "conduct an investigation and establish rates that are fair, just and reasonable," as the Commission determined to do with joint pole users. *See Ballard Rural Tel. Coop Corp.* v. *Jackson Purchase Energy Corp.*, 2005 WL 858940 (Ky. PSC March 23, 2005). In

any case, in its assertion of jurisdiction, the Commission should clearly state a commitment that its regulation of pole rates of the TVA Cooperatives will ensure that the rates will neither provide a subsidy to cable operators nor deprive the Cooperatives of recovery of the full costs of their pole attachment service.

CONCLUSION

The Commission should grant KCTA's Motion for Summary Judgment, and it should issue a declaratory order affirming its exclusive jurisdiction to regulate pole attachment rates, terms, and conditions of the TVA Cooperatives. Despite the Cooperatives' failure to cooperate in discovery, no material issues of fact exist: TVA does not regulate pole attachment rates and the assertion of the Commission's "unquestioned" jurisdiction would not be inconsistent with any regulation by TVA. If, however, the Commission, for any reason, believes that the case is not yet ripe for resolution, KCTA requests that the Commission designate the matter for a prompt hearing.

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 for Summary Judgment has been served on all parties of record via hand delivery, facsimile, or electronically this 13th day of April, 2015.

_/s/ Laurence J. Zielke_____

Laurence J. Zielke