

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

**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)**

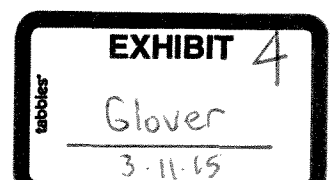
Case No. 2012-00544

**THE TVA COOPERATIVES' RESPONSE
TO THE JANUARY 17 ORDER**

Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyriple Rural Electric Cooperative Corporation, Tri-County Electric Membership Corporation, Warren Rural Electric Cooperative Corporation, and West Kentucky Rural Electric Cooperative Corporation (collectively, the "TVA Cooperatives"), by counsel, and in response to the January 17, 2013 Order (the "Order") of the Public Service Commission of the Commonwealth of Kentucky (the "Commission") in this matter, hereby jointly submit this Response. In short, the TVA Cooperatives respectfully request that the Commission enter an Order affirming that it lacks the jurisdiction to regulate the pole attachment rates of cooperatives that purchase electricity from the Tennessee Valley Authority.

I. PROCEDURAL BACKGROUND

The legal matters at the heart of this case have a nearly eighty-year history, beginning with the passage of the Tennessee Valley Authority Act (the "TVA Act") in 1933. 16 U.S.C. § 831 *et seq.* The TVA Act was passed at the height of the Great Depression to remedy a wide



range of environmental, economic, and technological issues, including the delivery of low-cost electricity and the management of natural resources. *From the New Deal to the New Century*, TVA, <http://www.tva.com/abouttva/history.htm> (retrieved February 6, 2013). At the outset, the TVA “announced [its] intention to regulate local intrastate rates and service by a so called ‘yardstick’ method through federally subsidized competition which will supplant state regulation as inadequate and unsatisfactory.” *TVA v. Tennessee Electric Power Co.*, 90 F.2d 885, 890 (6th Cir. 1937) (emphasis added). In this way, the TVA could ensure that the economically depressed areas of the country that it was created to serve had low-cost access to the energy needed for economic development and the improvement of the quality of life of the area’s residents.

The complete authority of the TVA over the rates and services of TVA Cooperatives has been recognized for eighty years since the TVA came into existence. *See TVA, et al. v. Energy Regulatory Comm’n of Kentucky*, No. 79-0009-P, slip op. (W.D. Ky. Sept. 25, 1979) (attached as Exhibit 1)¹. The TVA interprets the TVA Act in this same manner. *See* Letters from Cynthia L. Herron, Director, TVA Retail Regulatory Affairs, to the TVA Cooperatives (Jan. 24, 2013) (attached as Exhibits 2 to 6). The Commission has taken this stance as well. *See The Application of Hickman-Fulton Counties Rural Electric Cooperative Corporation for an Order Authorizing Said Corporation to Borrow One Hundred Eighty-Nine Thousand Dollars (\$189,000) From the National Rural Utilities Cooperative Finance Corporation for the Purpose of Construction, Improvement and Operation of Electric Distribution and Service Facilities in Hickman, Fulton, Graves and Carlisle Counties, Kentucky*, Order, Ky. P.S.C. Case No. 8858 (June 27, 1983) (attached as Exhibit 7) (“In January 1983, the Commission received correspondence from [the] TVA stating that in its opinion the principle enunciated in the 1979

¹ The Energy Regulatory Commission of Kentucky (ERC) is the predecessor agency to the Commission.

federal court decision would apply to service as well as rates. The Commission agreed with this interpretation and has returned all tariffs to the TVA-supplied cooperatives”); Letter from William M. Sawyer, General Counsel, Public Service Commission to Senator William L. Quinlan, Chairman, Kentucky Joint Interim Committee on Energy (March 2, 1983) (attached as Exhibit 8) (“[T]he PSC received correspondence from TVA stating that it was TVA’s belief that the principle enunciated in [*TVA, et al. v. Energy Regulatory Comm’n of Kentucky*] would apply to service as well as rates. . . . [I]t is our conclusion that TVA is right on this point and that federal rather than state law governs the service as well as the rates of all TVA-supplied utilities”); Letter from Don Mills, Executive Director, Public Service Commission to Albert P. Marks, Counsel to Cumberland Electric Membership Corp. (Aug. 27, 1993) (attached as Exhibit 9) (opining that “no aspect of a TVA distribution cooperative’s operations [are] subject to [the Commission’s] jurisdiction”).

On December 3, 2012, the Kentucky Cable Telecommunications Association (“KCTA”)² filed with the Commission a petition (the “Petition”) for a declaratory order that would reverse this eighty year history by extending the Commission’s jurisdiction to the regulation of pole attachment rates and services of cooperatives that purchase and resell electricity from the TVA. *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*, Petition, Ky.

² KCTA members include Access Cable TV, Armstrong Cable Services, Big Sandy Broadband, C & W Cable, Comcast, Harlan Community TV, Inter Mountain Cable, Irvine Community TV, Reimer Communications, Lycom Communications, Mediacom, Suddenlink, Time Warner Cable, and TVS Cable. *The Kentucky Cable Telecommunications Association Response to the Commission’s January 17, 2013 Order Requiring a Listing of the Cable Companies On whose Behalf the KCTA Petition Was Filed*, Response, P.S.C. Case No. 2012-00544 (Jan. 24, 2013). Of those members, Access Cable TV, Time Warner Cable, Comcast, and Mediacom have attachment to poles of the TVA Cooperatives. *Id.*

P.S.C. Case No. 2012-00544 (Dec. 3, 2012). Notwithstanding established Commission policy and federal case law regarding state non-regulation of the rates and services of TVA-supplied electric utilities, KCTA claims that the Commission has both the authority and duty to regulate the TVA Cooperatives' provision of pole attachment rates and services. The Commission subsequently entered the Order, seeking a response from the TVA Cooperatives.

As the TVA Cooperatives agree, "KCTA bears a considerable burden to prove its claim that the Commission does have jurisdiction to regulate pole attachments of TVA Cooperatives." Order at 2. KCTA does not meet this burden.

II. DISCUSSION & ANALYSIS

A. The Commission Lacks Authority to Regulate the Rates and Services of Electric Cooperatives That Purchase Electricity from the TVA.

"Since [1981], no one has asserted, as KCTA does now, that the Commission has jurisdiction to regulate the pole attachments of the TVA Cooperatives." Order at 2. Indeed, KCTA's argument is a novel one. KCTA argues that nothing in Commission or federal policy and precedent precludes Commission jurisdiction over the pole attachment rates charged by the TVA Cooperatives. Petition at ¶ 17. As the Commission notes, however, "KCTA's petition includes no support for its allegations that . . . Commission regulation of pole attachment rates is not preempted by the TVA's rate jurisdiction." Order at 2-3.

It is established that Commission regulation of the TVA Cooperatives' rates and services is preempted by federal law. *TVA, et al. v. Energy Regulatory Comm'n of Kentucky* at 5. It is also established that pole attachment revenues are a direct component of the retail rate-setting function performed exclusively by the TVA for the TVA Cooperatives. (*See* Letters from

Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.) Therefore, the Commission does not have jurisdiction to regulate pole attachment rates and services of the TVA Cooperatives.

The seminal case on the issue of Commission's authority to regulate the rates and services of the TVA Cooperatives is *TVA, et al. v. Energy Regulatory Comm'n of Kentucky*. The United States District Court for the Western District of Kentucky held there that "direct conflict exists between an exercise of federal authority granted [to the] TVA by Congress and an exercise of state authority granted [to the Commission] by the General Assembly of Kentucky." *Id.* at 15. The Commission has interpreted this opinion to mean that "Commission regulation of the TVA Cooperatives' retail electricity rates was preempted because it directly conflicted with TVA regulation of those same rates." Order at 2. In its January 24, 2013 letters to the TVA Cooperatives, the TVA likewise agrees that it is "the exclusive retail rate regulator for the distributors of TVA power." (See Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.)

This preemption extends not only to "rates," but also to "services."³ It is the interpretation of both the Commission and the TVA that "federal rather than state law governs the service as well as the rates of all TVA-supplied utilities." (See Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6; Letter from William M. Sawyer to Senator William L. Quinlan, Exh. 8.) Moreover, the Commission and Kentucky courts have held that "the rates charged for pole attachments are 'rates' within the meaning of KRS 278.040, and that the pole attachment itself is a 'service' within the meaning of the statute." *Kentucky CATV*

³ Under KRS 278.010(13), "service" includes "any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure, and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility, but does not include Voice over Internet Protocol (VoIP) service."

Association v. Volz et al. 675 S.W.2d 393, 396 (Ky. Ct. App. 1983). Consequently, federal preemption precludes the PSC from regulating the TVA Cooperatives' pole attachments, which are but a particular subspecies of the broader "rates and services" regulated exclusively by the TVA. See *TVA, et al. v. Energy Regulatory Comm'n of Kentucky*, *supra*.

KCTA argues that TVA regulation only precludes Commission regulation to the extent the two directly conflict. Petition at ¶ 18. This is a misstatement of well-established principles of law and the District Court's opinion in *TVA, et al. v. Energy Regulatory Comm'n of Kentucky*. The District Court in *TVA* states merely that "[w]hen compliance with the legitimate directions of a state government is impossible without violating the legitimate directions of the federal government, Article IV §2 of the United States Constitution, the Supremacy Clause, demands that the exercise of federal authority supersede the exercise of state authority." *TVA, et al. v. Energy Regulatory Comm'n of Kentucky* at 5 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963); *McDermott v. Wisconsin*, 228 U.S. 115). KCTA's extension of that holding into an otherwise unsupported claim that preemption occurs only where there is a direct conflict completely misconstrues the scope of that case, as well as the now eighty-year history underlying the TVA's exclusive jurisdiction over the rates and services of its member cooperatives.

Under the Supremacy Clause, U.S. CONST. art. IV, cl. 2., any state law that conflicts with federal law is pre-empted. *E.g. Gibbons v. Ogden*, 22 U.S. 1 (1824). Conflict arises where it would be impossible to comply with both the state and federal regulations, or when the state law imposes an obstacle to the achievement of Congress's discernible objectives. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). In addition, even in the absence of a direct conflict between state and federal law, a conflict exists if the state law is an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). Congress has clearly stated that it is an objective of the TVA Act that “power shall be sold at rates as low as are feasible,” 16 U.S.C. § 831n-4(f). Here, Commission regulation would directly infringe on the 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.” (See Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.) The cost-based rates the TVA Cooperatives collect in connection with the pole attachment services they provide directly impact their end-users’ retail rates which are set by the TVA. Therefore, Commission regulation is pre-empted.

B. KCTA Incorrectly Argues That the TVA Does Not Regulate the Pole Attachment Rates of Its Member Cooperatives.

KCTA argues not only that the Commission has the authority to regulate the TVA Cooperatives’ pole attachment rates, but also that the Commission should regulate these rates because the TVA allegedly does not. Petition at ¶ 21. The Order rightly recognizes that “KCTA’s petition includes no support for its allegations that the TVA does not regulate the pole attachment rates of the TVA Cooperatives.” Order at 2. That omission, alone, is fatal to the KCTA, as the party bearing the burden of proof. The KCTA’s claim is incorrect, in any event. Accordingly, KCTA’s argument fails as a matter of both law and fact.

Once again, it bears reiteration that it is a principal objective of the TVA Act that “power shall be sold at rates as low as are feasible.” 16 U.S.C. § 831n-4(f). To achieve this Congress granted the TVA – consistent with its status as the exclusive regulator of member cooperative rates and services – broad powers over retail rates and conditions of service. These powers

include the express authority to “include in any contract for the sale of power such terms and conditions, including resale rate schedules, and [to] provide for such rules and regulations as in its judgment may be necessary or desirable” to effectuate the intent of the TVA Act. 16 U.S.C. § 831i.

In response to a request from the TVA Cooperatives, the TVA provided guidance as to the scope of its regulatory authority over the Cooperatives. (*See* Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.) The TVA’s position is that it “is the exclusive retail rate regulator for the distributors of TVA power, including the five Kentucky cooperatives.” *Id.* In the course of regulating the retail rates of the TVA Cooperatives, “TVA requires that a distributor recover its full cost associated with the pole attachment and not place any unfair burdens on the electric ratepayers by ensuring full cost recovery.” *Id.* Clearly, the TVA considers its member cooperatives’ pole attachment rates and services to play an important role in the context of the ultimate retail rate paid by its member cooperatives end-users. (*See* Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6) (“TVA becomes concerned when any electric asset gets used for other purposes. . . . [U]se [of] property and personnel jointly for the electric systems and other operations [is] subject to agreement between [the Cooperatives] and [the] TVA as to appropriate cost allocations”). Not only would Commission involvement in this process create unnecessary confusion, contention, and expense, it would clearly infringe the TVA’s recognized role as “the exclusive retail rate regulator for the distributors of TVA power.” (*See* Letters from Cynthia L. Herron to the TVA Cooperatives, Exhs. 2 to 6.)

Therefore, KCTA’s petition that the Commission must regulate the TVA Cooperatives’ pole attachment rates and services should be denied.

C. Even if the TVA Did Not Regulate Its Member Cooperatives' Pole Attachment Rates and Services, It Cannot Be Said That the TVA Has Abdicated Its Authority to Do So to the States.

Even assuming, solely for the sake of argument, that the TVA did not directly regulate pole attachment rates and services of its member cooperatives, that does not confer upon the Commonwealth a right to do so through the Commission. The United States Court of Appeals for the D.C. Circuit, recognizing the complexity of the economic relationship between electricity supplier and customer, has found that “it is no more possible [for FERC] to set forth all of the practices affecting rates and services than it is to set forth all of the terms and conditions of a contract, leaving nothing whatever to be implied or to be governed by an unspecified standard of reasonableness.” *City of Cleveland, Ohio v. FERC*, 773 F.2d 1368, 1370 (D.C. Cir. 1985) (emphasis original). In that case, which arose in the context of Federal Power Act,⁴ the Court affirmed federal jurisdiction over rate and service issues even though the Federal Energy Regulatory Commission was “willing to leave as many practices unspecified as is ordinarily the case.” *City of Cleveland, Ohio* at 1371 (emphasis added).

The same principles apply here. The TVA has a broad regulatory scheme in place and plenary authority over the rates and services of TVA-supplied utilities. *See TVA, et al. v. Energy Regulatory Comm'n of Kentucky*. Even if we assume for the sake of argument that the TVA does not regulate pole attachment rates, it does not follow that it has abdicated the authority to do so. As the *City of Cleveland* court counsels, the absence of specific TVA practices regarding pole attachment rates and services does not – as the KCTA contends – mean that jurisdiction lies elsewhere. Even so, there is no basis for the KCTA’s argument because the TVA Cooperatives’

⁴ 16 U.S.C. §§ 791a-828c.

pole attachment rates and services are direct inputs to the broader rate-setting function overseen exclusively by the TVA.

D. The KCTA Attempts to “Wag the Dog” When It Seeks Regulation of the TVA Cooperatives for the Benefit of Its Unregulated Cable Providers.

The Commission’s charge to regulate the rates and services of certain utilities derives from the underlying statutory and policy goal of ensuring fair, just, and reasonable rates for the customers of those utilities. See *In the Matter of the Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space* at 10. “Under KRS 278.030 and KRS 278.040, [the] Commission has the authority to consider the interests of the subscribers of cable television services, as well as the interest of the consumers of the utility services, in the exercise of its jurisdiction over utility rates and services.” *In the Matter of the Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space* at 11. Thus, when the Commission considers the interest of cable subscribers when regulating utilities, it does so only because it already regulates the other rates and services of the utility. In essence, cable television providers and their subscribers ride the coattails of the utility customers for whose benefit the Commission has jurisdiction.

Consequently, the KCTA’s reliance on *In the Matter of the Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space* is misplaced. The electric utilities in that case were not TVA members. The end-user customers of the utilities were, in fact, intended to receive the benefit of Commission regulation of rates and services. Here, the end-user customers of the TVA Cooperatives are protected by the TVA’s regulation of rates and services, so there is no underlying “hook” on which the Commission can hang the supplemental jurisdiction the KCTA claims should be exercised over the TVA Cooperatives’ pole attachment

rates and services. Consequently, there is no basis for regulation of the TVA Cooperatives' pole attachment rates.

III. CONCLUSION

Historically, and under settled principles of law, the Commission does not have jurisdiction over the TVA Cooperatives' rates and services. Any Commission regulation is preempted under federal law and is unnecessary because the TVA regulates the TVA Cooperatives' rates and services. The Order the KCTA requests would extend the scope of the Commission's regulatory beyond its proper and traditional purpose and would upset eighty years of established law and policy.

In conclusion, the TVA Cooperatives respectfully request that the Commission enter an Order affirming that it lacks the jurisdiction to regulate the pole attachment rates of cooperatives that purchase electricity from the Tennessee Valley Authority.

Respectfully submitted,

/s/ Edward T. Depp
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Suite 2500
101 South Fifth Street
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Counsel to the TVA Cooperatives

Exhibit 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

TENNESSEE VALLEY AUTHORITY,
ET AL.,
PLAINTIFFS,

v.

CIVIL ACTION
NO. 79-0009-P

ENERGY REGULATORY COMMISSION
OF KENTUCKY (FORMERLY
PUBLIC SERVICE COMMISSION
OF KENTUCKY),
DEFENDANTS.

SUMMARY JUDGMENT

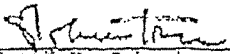
For the reasons stated in the Memorandum Opinion
this day entered,

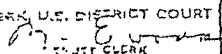
IT IS ORDERED AND ADJUDGED that the plaintiffs'
motion for Summary Judgment be, and hereby is, SUSTAINED.

This is a final and appealable judgment and there is
no just cause for delay.

IT IS FURTHER ORDERED that enforcement of plaintiffs'
injunction be STAYED during the time in which any notice
of appeal may be filed.

DATED: September 25, 1979.


Edward H. Johnstone
Judge, United States District Court

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CLERK, U.S. DISTRICT COURT
BY 
CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

TENNESSEE VALLEY AUTHORITY,
ET AL.,
PLAINTIFFS,

v.

CIVIL ACTION
NO. 79-0009-P

ENERGY REGULATORY COMMISSION
OF KENTUCKY (FORMERLY
PUBLIC SERVICE COMMISSION
OF KENTUCKY),
DEFENDANTS.

MEMORANDUM OPINION

Plaintiffs, Tennessee Valley Authority (TVA) and various distributors of TVA electric power in Kentucky brought suit under 28 U.S.C. §§1331, 1337, 1345 and 2201-2202 asking for declaratory and injunctive relief preventing the Energy Regulatory Commission of Kentucky (ERC) from exercising any authority over the rates charged by the TVA distributors. Plaintiffs have moved for summary judgment. The Court is of the opinion that this motion should be granted.

The TVA, a United States Government corporation, was created by the Tennessee Valley Authority Act of 1933. The act authorizes the TVA to generate and sell electric power under contracts for terms of up to twenty years. In 1935 Section 10 of the Tennessee Valley Authority Act was amended to provide that:

. . . the [TVA] Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act. . . .

49 Stat. 1076 (1935), 16 U.S.C. §831i (1976).

Pursuant to this congressional grant of authority, the TVA contracted to sell electrical power to plaintiff TVA distributors. These distributors then resell the power to consumers in Kentucky.

One purpose of Congress in creating the TVA was to establish a "yardstick" with which to measure utility rates around the country. That is, by charging TVA with the duty to supply electrical power at the lowest possible cost, a national standard of fairness was established with regard to utility rates. In describing the TVA yardstick, the 1938-1939 Joint Congressional Committee report placed special emphasis on the retail rates charged by TVA distributors:

(B) The Yardstick

The resolution in subsection (g) directs the committee to investigate "Whether by accounting methods and cost charges applicable to private industry, the electric rates of the Authority provide a legitimate, honest 'yardstick' of equitable rates of private industry.

Regardless of the numerous and conflicting descriptions of the yardstick, it can be defined as follows: The yardstick is not in the Authority's wholesale rates, but in the retail rates of the various municipalities and other local organizations that have purchased Authority power and distributed it at unusually low rates. If their operations are shown to be of a kind that may be substantially duplicated in other parts of the country, their rates may be considered a Nationwide yardstick, or measure of results to be expected.

Report of the Joint Comm. on the Investigation of the Tennessee Valley Authority, S. Doc. No. 56, 76th Cong., 1st Sess., pt. 1, at 179, 190, 197-98 (1939).

On the other hand, four of the plaintiff distributors are Kentucky rural electric cooperatives. These four cooperatives were created pursuant to the provisions of an Act of the General Assembly of Kentucky incorporated into K.R.S. Chapter 279. The other named plaintiff distributors

are a Tennessee rural electric cooperative and a Tennessee municipality that sell electric power in Kentucky. The same legislative act enables these non-resident entities to distribute power to a distance of not more than three miles from the state boundary.

The Kentucky laws, in addition to providing for the creation of these resident cooperatives, also impose limitations and obligations with regard to their operations. Specifically the state law provides that these and all other distributors so created or doing business under the Act are subject to the general supervision of the Public Service Commission (now ERC).¹

For the purpose of this action the intention of the Kentucky General Assembly was twofold: (1) To permit the creation or operation of the plaintiff distributors or their like; and (2) to subject those distributors to ERC supervision.

¹ K.R.S. 279.210 provides in part:

(1) Every corporation formed under KRS 279.010 to 279.220 shall be subject to the general supervision of the Public Service Commission, and shall be subject to all the provisions of KRS 278.010 to 278.450 inclusive, and KRS 278.990.

K.R.S. 279.220 provides in part:

(1) Any rural electric cooperative corporation organized under a law of any state contiguous to this state, which law is substantially similar to the law under which such corporations may be organized in this state, may extend its operations into this state for a distance not exceeding three miles from the boundary between that state and this state, . . .

(2) The operations of such corporation within this state shall be subject to the supervision of the Public Service Commission, and the commission may take the necessary action to require the corporation to furnish adequate service at reasonable rates. If the corporation fails to comply with the regulations and requirements of the commission it shall forfeit the privilege granted by this section.

The TVA and the ERC have each sought to fulfill their legislative mandates. On the federal side, TVA, in exercising the power delegated to it by Congress, has set resale rates to be followed by its distributors by including the following language in the TVA and distributors contracts:

5. Resale Rates. In order to assure a wide and ample distribution of electric energy in the area served by [the TVA distributor], the parties agree as follows:

(a) [The TVA distributor] agrees that the power purchased hereunder shall be sold and distributed to the ultimate consumer without discrimination among consumers of the same class, and that no discriminatory rate, rebate, or other special concession will be made or given to any consumer, directly or indirectly.

(b) [The TVA distributor] agrees to serve consumers . . . at and in accordance with the rates, charges, and provisions set forth . . . and not to depart therefrom. . . .

The contracts with the TVA distributors contain provisions which allow resale rates to increase as the cost of fuel used by the distributors increases.

Over on the state side, the ERC, in responding to the obligation delegated to it by the General Assembly of Kentucky, ordered the named TVA distributors to set retail rates by reference to fuel escalation schedules differing from the fuel escalation provisions imposed by the TVA contract.

ERC argues that no actual conflict exists between the regulation undertaken by it and the fuel escalation provisions in the contracts between TVA and the TVA distributors. The ERC points out that the statutory mandate imposed on it by the Kentucky Revised Statutes -- to see that utility rates are fair, just, and reasonable -- does not conflict with TVA's mission to make low-cost power available to domestic and rural consumers.

This contention ignores the fact that it is impossible for the TVA distributors to comply with the ERC regulation without breaching contracts with the TVA. This Court finds direct conflict exists between an exercise of federal authority granted TVA by Congress and an exercise of state authority granted ERC by the General Assembly of Kentucky.

When compliance with the legitimate directions of a state government is impossible without violating the legitimate directions of the federal government, Article IV §2 of the United States Constitution, the Supremacy Clause, demands that the exercise of federal authority supersede the exercise of state authority. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), United States v. Georgia Public Service Commission, 371 U.S. 285 (1963), McDermott v. Wisconsin, 228 U.S. 115 (1912).

The United States Congress and the General Assembly of Kentucky each have the ultimate power over the entities they create. Congress can curtail the authority of TVA⁽²⁾ The General Assembly can alter the authority of electrical cooperatives established under its acts.

⁽¹⁾ Mr. Justice Burger observed in Tennessee Valley v. Hill, 437 U.S. 153, 98 S.Ct. 2279 (1978),

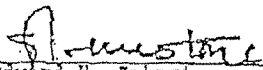
Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . .

. . . in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'commonsense and the public weal'.

But so long as plaintiff cooperatives distribute power purchased from TVA they must comply with the legitimate conditions imposed upon them by TVA.

An appropriate order is this day entered.

DATED: September 25, 1979.



Edward H. Johnstone
Judge, United States District Court

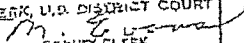
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CLERK, U.S. DISTRICT COURT
BY 
DEPUTY CLERK

Exhibit 2



Tennessee Valley Authority, PO Box 292409, OCP 1F, Nashville, Tennessee 37229-2409

January 24, 2013

Mr. Gregory H. Grissom
Manager/President/CEO
Hickman-Fulton Counties Rural Electric Cooperative Corporation
Post Office Box 190
Hickman, Kentucky 42050-0190

Dear Mr. Grissom:

It has come to our attention that the Kentucky Public Service Commission (KPSC) is considering a petition from the Kentucky Cable Telecommunications Association (KCTA) seeking to demonstrate that the KPSC has the authority to regulate pole attachment terms for Tennessee Valley Authority electric cooperatives. In light of this development, we have been asked about TVA's position on the regulation of the pole attachment terms for the distributors of TVA power.

As you know, TVA is the exclusive retail rate regulator for the distributors of TVA power, including the five Kentucky cooperatives. As the regulator, TVA works with its distributors to keep retail rates as low as feasible and to ensure that the operations of the electric system are primarily for the benefit of the consumers of electricity. TVA becomes concerned when any electric asset gets used for other purposes. In the interest of efficiency and economy, a power distributor may use property and personnel jointly for the electric systems and other operations subject to agreement between distributor and TVA as to appropriate cost allocations.

Regarding pole attachment rental fees, TVA requires that a distributor recover its full cost associated with the pole attachment and not place any unfair burdens on the electric ratepayers by ensuring full cost recovery. TVA does not object to joint facilities as long as the power distributor recovers the costs associated with pole attachment rentals and that the electric rate payers do not subsidize the costs of these rentals.

TVA is committed to working with distributors to ensure that together, we carry out the objective of the TVA Act, which is to sell power to all of the ratepayers at the lowest rates feasible.

Please do not hesitate to contact me at (615) 232-6865 if you have further questions.

Sincerely,

A handwritten signature in cursive script that reads "Cynthia L. Herron".

Cynthia L. Herron
Director
Retail Regulatory Affairs

Exhibit 3



Tennessee Valley Authority, PO Box 292409, OCP 1F, Nashville, Tennessee 37229-2409

January 24, 2013

Mr. Eston Glover
President/CEO
Pennyrite Rural Electric Cooperative Corporation
Post Office Box 2900
Hopkinsville, Kentucky 42241-2900

Dear Mr. Glover:

It has come to our attention that the Kentucky Public Service Commission (KPSC) is considering a petition from the Kentucky Cable Telecommunications Association (KCTA) seeking to demonstrate that the KPSC has the authority to regulate pole attachment terms for Tennessee Valley Authority electric cooperatives. In light of this development, we have been asked about TVA's position on the regulation of the pole attachment terms for the distributors of TVA power.

As you know, TVA is the exclusive retail rate regulator for the distributors of TVA power, including the five Kentucky cooperatives. As the regulator, TVA works with its distributors to keep retail rates as low as feasible and to ensure that the operations of the electric system are primarily for the benefit of the consumers of electricity. TVA becomes concerned when any electric asset gets used for other purposes. In the interest of efficiency and economy, a power distributor may use property and personnel jointly for the electric systems and other operations subject to agreement between distributor and TVA as to appropriate cost allocations.

Regarding pole attachment rental fees, TVA requires that a distributor recover its full cost associated with the pole attachment and not place any unfair burdens on the electric ratepayers by ensuring full cost recovery. TVA does not object to joint facilities as long as the power distributor recovers the costs associated with pole attachment rentals and that the electric rate payers do not subsidize the costs of these rentals.

TVA is committed to working with distributors to ensure that together, we carry out the objective of the TVA Act, which is to sell power to all of the ratepayers at the lowest rates feasible.

Please do not hesitate to contact me at (615) 232-6865 if you have further questions.

Sincerely,

A handwritten signature in cursive script that reads "Cynthia L. Herron".

Cynthia L. Herron
Director
Retail Regulatory Affairs

Exhibit 4



Tennessee Valley Authority, PO Box 292409, OCP 1F, Nashville, Tennessee 37229-2409

January 24, 2013

Mr. Paul Thompson
Executive Vice President/General Manager
Tri-County Electric Membership Corporation
Post Office Box 40
Lafayette, Tennessee 37083-0040

Dear Mr. Thompson:

It has come to our attention that the Kentucky Public Service Commission (KPSC) is considering a petition from the Kentucky Cable Telecommunications Association (KCTA) seeking to demonstrate that the KPSC has the authority to regulate pole attachment terms for Tennessee Valley Authority electric cooperatives. In light of this development, we have been asked about TVA's position on the regulation of the pole attachment terms for the distributors of TVA power.

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Please do not hesitate to contact me at (615) 232-6865 if you have further questions.

Sincerely,

A handwritten signature in cursive script that reads "Cynthia L. Herron".

Cynthia L. Herron
Director
Retail Regulatory Affairs

Exhibit 5



Tennessee Valley Authority, PO Box 292409, OCP 1F, Nashville, Tennessee 37229-2409

January 24, 2013

Mr. Gary K. Dillard
President/CEO
Warren Rural Electric Cooperative Corporation
Post Office Box 1118
Bowling Green, Kentucky 42102-1118

Dear Mr. Dillard:

It has come to our attention that the Kentucky Public Service Commission (KPSC) is considering a petition from the Kentucky Cable Telecommunications Association (KCTA) seeking to demonstrate that the KPSC has the authority to regulate pole attachment terms for Tennessee Valley Authority electric cooperatives. In light of this development, we have been asked about TVA's position on the regulation of the pole attachment terms for the distributors of TVA power.

As you know, TVA is the exclusive retail rate regulator for the distributors of TVA power, including the five Kentucky cooperatives. As the regulator, TVA works with its distributors to keep retail rates as low as feasible and to ensure that the operations of the electric system are primarily for the benefit of the consumers of electricity. TVA becomes concerned when any electric asset gets used for other purposes. In the interest of efficiency and economy, a power distributor may use property and personnel jointly for the electric systems and other operations subject to agreement between distributor and TVA as to appropriate cost allocations.

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TVA is committed to working with distributors to ensure that together, we carry out the objective of the TVA Act, which is to sell power to all of the ratepayers at the lowest rates feasible.

Please do not hesitate to contact me at (615) 232-6865 if you have further questions.

Sincerely,

A handwritten signature in cursive script that reads "Cynthia L. Herron".

Cynthia L. Herron
Director
Retail Regulatory Affairs

Exhibit 6



Tennessee Valley Authority, PO Box 292409, OCP 1F, Nashville, Tennessee 37229-2409

January 24, 2013

Mr. David Smart
President/CEO
West Kentucky Rural Electric Cooperative Corporation
Post Office Box 589
Mayfield, Kentucky 42066-0589

Dear Mr. Smart:

It has come to our attention that the Kentucky Public Service Commission (KPSC) is considering a petition from the Kentucky Cable Telecommunications Association (KCTA) seeking to demonstrate that the KPSC has the authority to regulate pole attachment terms for Tennessee Valley Authority electric cooperatives. In light of this development, we have been asked about TVA's position on the regulation of the pole attachment terms for the distributors of TVA power.

As you know, TVA is the exclusive retail rate regulator for the distributors of TVA power, including the five Kentucky cooperatives. As the regulator, TVA works with its distributors to keep retail rates as low as feasible and to ensure that the operations of the electric system are primarily for the benefit of the consumers of electricity. TVA becomes concerned when any electric asset gets used for other purposes. In the interest of efficiency and economy, a power distributor may use property and personnel jointly for the electric systems and other operations subject to agreement between distributor and TVA as to appropriate cost allocations.

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TVA is committed to working with distributors to ensure that together, we carry out the objective of the TVA Act, which is to sell power to all of the ratepayers at the lowest rates feasible.

Please do not hesitate to contact me at (615) 232-6865 if you have further questions.

Sincerely,

A handwritten signature in cursive script that reads "Cynthia L. Herron".

Cynthia L. Herron
Director
Retail Regulatory Affairs

Exhibit 7

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of

THE APPLICATION OF HICKMAN-FULTON)
COUNTIES RURAL ELECTRIC COOPERATIVE)
CORPORATION FOR AN ORDER AUTHORIZING)
SAID CORPORATION TO BORROW ONE HUNDRED)
EIGHTY-NINE THOUSAND DOLLARS (\$189,000.00))
FROM THE NATIONAL RURAL UTILITIES COOPERA-)
TIVE FINANCE CORPORATION FOR THE PURPOSE)
OF CONSTRUCTION, IMPROVEMENT AND OPERATION)
OF ELECTRIC DISTRIBUTION AND SERVICE)
FACILITIES IN HICKMAN, FULTON, GRAVES AND)
CARLISLE COUNTIES, KENTUCKY)

CASE NO.
8858

O R D E R

On September 27, 1979, the United States District Court for the Western District of Kentucky ruled that the Commission has no authority to regulate the rates of electric utilities in Kentucky that buy their power from the Tennessee Valley Authority ("TVA"), Tennessee Valley Authority, et al. v. Energy Regulatory Commission of Ky., Civil Action No. 79-0009-P, W.D. Ky., September 27, 1979, unpublished opinion. In January 1983, the Commission received correspondence from TVA stating that in its opinion the principle enunciated in the 1979 federal court decision would apply to service as well as rates. The Commission agreed with this interpretation and has returned all tariffs to the TVA-supplied cooperatives.

On November 12, 1982, the Franklin Circuit Court issued its opinion in West Kentucky RECC v. Energy Regulatory Commission, Civil Action No. 80-CI-1747, to the effect that the Rural Electrification Administration ("REA") falls within the classification of the "federal


government or any agency thereof" and, accordingly, borrowings from REA are exempt from Commission scrutiny under the provisions of KRS 278.300(10).

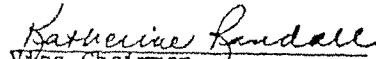
The Commission, having considered the decisions of the United States District Court, the Franklin Circuit Court and being advised, is of the opinion and finds that, absent jurisdiction over rates, service and borrowings from REA, any attempt to exercise jurisdiction over other borrowings by TVA-supplied rural electric cooperatives including the National Rural Utilities Cooperative Finance Corporation, the lender herein, would be ineffectual.

IT IS THEREFORE ORDERED That this case be and it hereby is dismissed.

Done at Frankfort, Kentucky, this 27th day of June, 1983.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Secretary

Exhibit 8



First Draft

COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

March 2, 1983

Senator William L. Quinlan
Chairman
Joint Interim Committee on Energy
Room 21 - Capitol Annex
Frankfort, Kentucky 40601

Dear Senator Quinlan:

On September 25, 1979, the United States District Court for the western district of Kentucky ruled that the Kentucky Public Service Commission had no authority to regulate the rates of electric utilities in Kentucky that buy their power from the Tennessee Valley Authority. The court's ruling was based upon the fact that Congress gave TVA the power to set the retail rate for all customers who purchase electricity from TVA under a wholesale contract. The power of the federal government to set the retail rate for these utilities takes precedence over the power of the state to likewise set the rate. Accordingly, since 1979 the PSC has not exercised any jurisdiction over the retail rates of the following utilities operating in Kentucky: Hickman-Fulton RECC, Pennyrile RECC, Warren RECC, West Kentucky RECC, Tri-County Electric Membership Corporation, and Jellico Electric Company.

In January of this year, the PSC received correspondence from TVA stating that it was TVA's belief that the principle enunciated in the 1979 federal court decision would apply to service as well as rates. TVA thus contends that none of its wholesale customers operating in Kentucky are subject to any of the PSC's regulations governing the provision of electrical service to customers. The PSC has considered this matter and it is our conclusion that TVA is right on this point and that federal rather than state law governs the service as well as the rates of all TVA-supplied utilities. Since construction projects by utilities are also related to the rates and service of the utilities, the PSC believes it cannot legally certificate construction projects for these utilities. Accordingly, the PSC wishes to inform your committee that our agency will no longer regulate the rates, service, or construction of the aforementioned six utilities operating in Kentucky which purchase their electricity from the TVA.

Senator William L. Quinlan
March 2, 1983
Page Two

If you or any member of your committee have questions regarding this matter, please feel free to contact our agency at anytime.

Very truly yours,

William M. Sawyer
William M. Sawyer
General Counsel

Exhibit 9



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION
710 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

August 27, 1993

RECEIVED

AUG 30 1993

GENERAL COUNSEL

Albert P. Marks, Esq.
Marks, Shell, Maness & Marks
114 South Second Street
Post Office Box 1149
Clarksville, Tennessee 37041-1149

Re: Cumberland Electric Membership Corp.

Dear Mr. Marks:

The Commission Staff has reviewed your request for a legal opinion as to whether Cumberland Electric Membership Corporation, a Tennessee Valley Authority Distribution Cooperative, is required to seek a Certificate of Public Convenience and Necessity from this Commission prior to borrowing funds from the Rural Electrification Administration and the National Utilities Cooperative Finance Corporation.

For those utilities subject to our jurisdiction, KRS 278.020 prohibits the construction of utility facilities until the Commission has issued a Certificate of Public Convenience and Necessity, and KRS 278.300 prohibits the issuance of any evidence of indebtedness by a utility without prior Commission approval.

As you know, the District Court for the Western District of Kentucky ruled in TVA, et al. v. Energy Regulatory Commission, Civil Action No. 79-0009-P (W.D. Ky. Sept. 27, 1979), the Commission was preempted on rate regulation by the TVA, a federal agency. The Commission subsequently concluded that TVA's service requirements similarly preempt those of Kentucky, leaving no aspect of a TVA distribution cooperative's operations subject to our jurisdiction. (See Opinion Letter dated March 2, 1983 attached hereto.) Thus, Cumberland Electric Membership Corporation is not required to either obtain a Certificate of Public Convenience and Necessity prior to constructing facilities or obtain any authorization in connection with the issuance of indebtedness.

If you have any further questions, please contact Richard Raff of our Legal Staff.

Sincerely yours,

A handwritten signature in cursive script that reads "Don Mills".

Don Mills
Executive Director

fb
Attachment

Forest Skaggs



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION
730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940
March 2, 1983

Senator William L. Quinlan
Chairman
Joint Interim Committee on Energy
Room 21 - Capitol Annex
Frankfort, Kentucky 40601

Dear Senator Quinlan:

On September 25, 1979, the United States District Court for the western district of Kentucky ruled that the Kentucky Public Service Commission had no authority to regulate the rates of electric utilities in Kentucky that buy their power from the Tennessee Valley Authority. The court's ruling was based upon the fact that Congress gave TVA the power to set the retail rate for all customers who purchase electricity from TVA under a wholesale contract. The power of the federal government to set the retail rate for these utilities takes precedence over the power of the state to likewise set the rate. Accordingly, since 1979 the PSC has not exercised any jurisdiction over the retail rates of the following utilities operating in Kentucky: Hickman-Fulton RECC, Pennyriple RECC, Warren RECC, West Kentucky RECC, Tri-County Electric Membership Corporation, and Jellico Electric Company.

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Senator William L. Quinlan
March 2, 1983
Page Two

If you or any member of your committee have questions regarding this matter, please feel free to contact our agency at anytime.

Very truly yours,

William M. Sawyer

William M. Sawyer
General Counsel