COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

The Petition of the Kentucky Cable Telecommunications Association for a Declaratory Order that the Commission Has Jurisdiction to Regulate the Pole Attachment Rates, Terms, and Conditions of Cooperatives That Purchase Electricity from the Tennessee Valley Authority	)))))))	**Case No. 2012-00544**

KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION'S OPPOSITION TO THE TVA COOPERATIVES' MOTION FOR SUMMARY JUDGMENT

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

INTRODUCTION

The TVA Cooperatives' motion for summary judgment is completely unmoored from the evidence and the law. In its motion, the Cooperatives repeatedly refer to "undisputed facts" that purportedly show that the TVA exercises exclusive authority over the Cooperatives' pole attachment rates. But as demonstrated in detail in KCTA's Motion for Summary Judgment,[1] there are *no* facts – much less "undisputed facts" – that support the TVA Cooperatives' contention. Rather, the undisputed facts show that the TVA plays no role whatsoever with the TVA Cooperatives' pole attachment rates.

First, the so-called "evidence" on which the Cooperatives rely is derived almost exclusively from three letters the TVA sent to the Commission regarding this proceeding – letters that the Commission has previously determined do not constitute substantial evidence.

[1] KCTA's Motion for Summary Judgment, filed with the Commission on April 13, 2015, is incorporated by reference.

Those letters are conclusory and do not provide *any* evidence on the issues the Commission created this proceeding to consider. In contrast, the actual evidence, adduced in discovery of this proceeding, makes clear that the TVA does not exercise any such authority. Furthermore, the letters did not result from any formal agency process at which evidence was introduced and considered. In other words, the TVA letters cannot be interpreted as relying on any findings of fact not otherwise before this Commission. Even if the letters could be interpreted to reflect any "determinations" by the TVA, they would not be entitled to deference under well-established principles of administrative law.

Second, the Commission's regulation of the Cooperatives' pole attachment rates is not preempted by federal law under any theory of federal preemption. There is no conflict preemption because it is not impossible for the Cooperatives to comply with both state and federal regulations, and Commission regulation would not hinder or frustrate the underlying purpose of the TVA Act. To the contrary, the Commission's regulation of the Cooperatives' pole attachment rates would further the purpose of the Act by ensuring that the rates do not result in the electric rate payers subsidizing the costs of the attachments. The evidence presented by KCTA demonstrates that the TVA will simply continue to treat pole attachment revenue as wholly unregulated inputs for the Cooperatives' revenue requirement – as it does today. The TVA does not make any more effort to control these inputs than it does other inputs to the Cooperatives' expenses and revenues. And the TVA's uninvolved acceptance of these inputs does not reflect any exercise of regulatory jurisdiction, any more than the TVA's acceptance of state and local tax expenses reflect any exercise of regulatory jurisdiction over those state and local taxes.

Nor can the Cooperatives credibly argue that the TVA Act preempts the field, to include pole attachment rates. The Cooperatives have failed to provide any meaningful analysis of why field preemption should apply. In fact, their brief is devoid of *any* analysis of this issue. Field preemption of the breadth advocated by the Cooperatives would mean that the TVA regulates *every* input into the revenue requirements on which retail electric rates are based. But the evidence presented to the Commission demonstrates that this clearly is not the case.

Third, the TVA does not have the sweeping authority the Cooperatives suggest. Rather, courts provide meaningful and careful review of that authority on a case-by-case basis. The TVA Cooperatives do not – and cannot – cite to a single case affording the TVA the broad field preemption the Cooperatives claim. The cases all deal with specific issues, the vast majority related only to electric rates. That the TVA has unquestioned jurisdiction over electric rates – a postulate that KCTA does not dispute – does not mean that it exercises field preemption. And no case of which we are aware holds that it does.

Fourth, United States Supreme Court precedent places the burden of proving preemption in this case squarely on the TVA Cooperatives. KCTA has outlined the overwhelming case law demonstrating that there is a presumption against preemption, especially where a party claims preemption in a field that has traditionally been subject to the police power of the States, such as any type of utility regulation. The Cooperatives have repeatedly chosen not to address, much less distinguish, that case law. Rather, they simply regurgitate a single line from a Commission order that initially denied KCTA's petition, without acknowledging that the order has been overruled by a subsequent Commission decision.

The actual evidence, as related in KCTA's Motion for Summary Judgment, demonstrates that the TVA has exercised no authority over pole attachment rates. Indeed, the TVA is not even

made aware of what those rates are or what revenues they generate. The Cooperatives charge a wide range of pole rates, some so low as to raise issues of a possible subsidy by the electric rate payers, and others so high as to result in an apparent subsidy by the attaching parties and their customers. Yet the TVA has never even requested information from the TVA Cooperatives concerning the rates or the Cooperatives' costs associated in providing a pole attachment service.

The Cooperatives' position is ultimately untenable and indefensible. This Commission has a statutory duty to exercise its jurisdiction in the absence of substantial evidence demonstrating that the TVA has actually preempted that jurisdiction by exercising its own authority over pole attachments. No such evidence has been presented by the Cooperatives. To the contrary, the evidence that the TVA does NOT exercise any such authority is uncontroverted. The Commission should therefore deny the Cooperatives' Motion.

ARGUMENT

I. The Cooperatives Barely Acknowledge the Facts Adduced in Discovery Here.

According to the Cooperatives' Motion for Summary Judgement, the key legal precedents controlling this proceeding are to be found in the Commission's initial order denying KCTA's Petition, and almost all relevant facts were in the record before the Commission determined that no "substantial evidence" had been introduced of actual preemption by the TVA. Thus, the Cooperatives quote or cite to the initial order no less than seven times, as if the order had not been reversed on reconsideration. *See* Aug. 6, 2013 Order, at 3. But not only have the Commission's statements on which the Cooperatives rely been reversed, to the extent they purport to be based on facts, the Commission recognized on reconsideration that its prior factual findings were without basis: "To the extent that our June 28 Order [denying KCTA's Petition]

relied upon two letters from TVA, which KCTA did not have an opportunity to challenge, our decision was not supported by substantial evidence." *Id.*

The primary "facts" on which the Cooperatives now rely continue to be unverified letters submitted to the Commission by the TVA. Two of the three TVA letters were part of the record that, as the Commission recognized on reconsideration, failed to provide any "substantial evidence" of TVA regulation of pole attachment rates. *Id.* And the third TVA letter is virtually the same in substance as the first two. Not one of these letters provides any factual basis. Nor can the letters be considered to be based on any findings of fact by TVA, as they do not reflect any such findings, and the TVA has conducted no proceedings at which any facts could be developed. The letters assert that the TVA has authority to regulate electric rates, that the TVA has a duty to keep electric rates low, and that the TVA requires the TVA Cooperatives to charge pole attachment rates that "ensure[] full cost recovery." As recognized by the Commission in its order on reconsideration, these letters may not be considered proof for the matters asserted, and the evidence presented to the Commission in KCTA's Motion for Summary Judgment demonstrates that neither the TVA nor the Cooperatives have made any actual effort to determine whether pole rates cover the costs of providing pole attachments.[2]

Other than the three TVA letters, the only other "facts" relied on by the Cooperatives are (i) a single sentence in TVA's contract with the Cooperatives regarding electric rates, (ii) its own self-serving interrogatory answer, which merely establishes that electric rates are based on a "revenue requirement" that reflects all expenses and revenues, including pole attachment

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[2] The Commission refused to permit KCTA to conduct discovery of the TVA. Jan. 8, 2015 Order, at 10, 16. Nevertheless, the testimony of the Cooperatives, and the TVA's responses to KCTA's FOIA request make clear that the TVA has no involvement with the Cooperatives' pole attachment rates.

revenues, and (iii) the fact that the TVA receives revenue information from the Cooperatives – information that simply "nets out" pole revenues and expenses and combines the net revenues with other non-pole attachment revenues.

First, the TVA's wholesale power contracts with the Cooperatives, on which the Cooperatives rely, do not mention pole attachments either explicitly or implicitly. The sentence in the contracts provides that the Cooperative "may use property and personnel jointly for the electric system and for other operations, subject to agreement between Cooperative and TVA as to appropriate allocations . . . ." Exh. 4 to KCTA's Mot. Summ. J. (Excerpts of TVA Coops.' Contracts with TVA); *see also* Warren Dep. at 16, 18; Pennyrile Dep. at 29-32; West Kentucky Dep. at 20. Not only is it unclear whether pole attachments even qualify as "other operations," but the evidence establishes that no such "agreement[s] . . . as to appropriate allocations" have ever been reached. This sentence from the contracts does not establish that the TVA exercises any regulatory authority over pole attachments.

Second, the uniform Interrogatory response of the five Cooperatives, quoted in the Cooperatives' Motion, is not only (obviously) a self-serving assertion of their counsel; it is also basically a truism that is not contested or probative. The Interrogatory response merely recites the undisputed fact that the TVA considers the Cooperatives' revenues and expenses in setting its electric rates. What the Interrogatory response does not say, and what is probative here, is that (i) the TVA simply accepts this input, as it accepts other expenses and revenues, without any effort to "regulate" the amount; and (ii) the TVA does not know, and makes no effort to know, either what the pole attachment rates are or their resulting revenues. The witnesses for the

Cooperatives[3] testified that they do not disclose pole attachment rates to the TVA, do not consult with the TVA in setting pole attachment rates and often set their widely varying pole attachment rates without any reference to cost. *See, e.g.*, Pennyrile Dep. 44-46, 51-53; Warren Dep. 23, 34, 35; Hickman-Fulton Dep. 20, 29; Tri-County Dep. 27-28, 36-37; West Kentucky Dep. 23, 40-41, 55-56, 59-60.

Third, the witnesses for the Cooperatives testified that not only do they *not* provide the TVA information regarding their pole rates, they do not even provide pole attachment expense or revenue information to the TVA in a form that would allow the TVA to know what those rates or revenues are. As KCTA explained in its Motion for Summary Judgment, these "data" are reported to the TVA only as part of a line item in financial reports that includes other revenues from "rental of electric property." KCTA's Mot. Summ. J., at 15-16, 18. And 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. The TVA has no idea what the Cooperatives' pole attachment revenues are, and it has never requested that information. Without any knowledge on that fundamental issue, there can be no oversight or regulation of the pole attachment rates or revenues. The 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 one of the many inputs that the TVA uses to set the Cooperatives' revenue requirement. Pennyrile Dep. 37-38. From that revenue requirement, the

[3] The witnesses testified on behalf of the TVA Cooperatives pursuant to Kentucky Rule of Civil Procedure 30.02(6).

TVA sets the Cooperatives' electric rates. That pole attachment revenues and expenses, unknown as they are to the TVA, are factored into the Cooperatives' revenue requirements does not amount to regulation of pole attachment rates by the TVA. Nor is there any indication that Commission regulation of those rates would affect the TVA's regulation of electric rates.

Fourth, the pole attachment rates the Cooperatives charge vary greatly – not only the rates charged by the different Cooperatives, but also the rates charged by a single cooperative to different attaching parties. As KCTA explained in its Motion for Summary Judgment, during a single year, West Kentucky charged Windstream Communications $27.00 per attachment and West Kentucky Rural Telephone Cooperative a rate of $12.50. During that same year, Tri-County charged AT&T $27.00, Windstream Communications $17.83, and other attachers $5.00. The Cooperatives explained that they never asked the TVA for permission to charge these rates, nor did they consult with the TVA about them. West Kentucky Dep. 47; Pennyrile Dep. 51-53; Warren Dep. 35. Rather, either the Cooperatives' boards simply decided on these rates, or the rates resulted from negotiations with the attaching parties. Tri-County Dep. 36; West Kentucky Dep. 59-60. The TVA makes no effort to control, or even to review, the Cooperatives' pole attachment rates.

II. The Facts Do Not Support Any Theory of Federal Preemption of the Commission's Jurisdiction to Regulate the Cooperatives' Pole Attachment Rates.

A. There Is No Evidence to Support a Finding of Conflict Preemption.

The Cooperatives cite to myriad cases holding that the TVA has preempted the regulation of electric rates *See Bekaert Corp. v. City of Dyersburg*, No. 07-2316, 2009 U.S. Dist. LEXIS 130381, at *9-10 (W.D. Tenn. May 20, 2009) (finding that the TVA's authority to set electric rates extends to the method by which a TVA distributor calculates a resale rate schedule); *4-County Elec. Power Assoc. v.* TVA, 930 F. Supp. 1132, 1138 (S. D. Miss. 1996) (holding that the

TVA's determinations about the level of electric rates necessary to recover the various costs of operating TVA's power system, as well as the terms and conditions of TVA's power contracts, including specifically the length of contracts, are part of TVA's unreviewable rate-making responsibilities); *Mobil Oil Corp. v. TVA*, 387 F. Supp. 498, 503 (N.D. Ala. 1974) (holding that the minimum bill provision of an industrial customer's contract with TVA should be treated as an integral portion of the electric rates the TVA had fixed). The TVA's exclusive responsibility for setting electric rates, of course, is not disputed. The Cooperatives' effort to imply that the language of these cases, referring to "[electric] rates," should also necessarily be read to apply to "pole attachment rates" is cynical and disingenuous. In considering conflict preemption, the Commission must look to the actual activity that is alleged to be preempted. And none of the cases cited by the Cooperatives deals with pole attachment regulation.

As KCTA explained in its Motion for Summary Judgment, in *TVA v. Energy Regulatory Commission of Kentucky*, No. 79-0009-P (W.D. Ky. Sept. 25, 1979), the Western District of Kentucky dealt with conflict preemption in holding that the 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 the 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 the federal agency, making it impossible

for the Cooperatives to comply with both TVA and Commission regulations.[4] There is no such direct conflict in this case.[5]

As noted above, the TVA does not regulate the Cooperatives' pole attachment rates in any way. It does not know what those rates are. *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. It has not provided the Cooperatives with any standards for how those rates should be determined. West Kentucky Dep. 59-60; Warren Dep. 23; Tri-County Dep. 36-37. And the Cooperatives neither advise the TVA of changes in their pole attachment rates nor consult with it regarding changes. West Kentucky Dep. 27-29, 53-54.

The only argument that the Cooperatives can marshal for its claim of conflict preemption is that the TVA considers pole attachment revenue in calculating its revenue requirement for setting electric rates. But as noted above, the TVA equally considers all revenues and all expenses in setting revenue requirements – without making any effort to regulate any of these inputs. Like the Cooperatives' expenses for state and local taxes, the TVA simply accepts the

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[4] The Cooperatives cite 1983 and 1993 letters from the Commission regarding its lack of jurisdiction over the TVA Cooperatives regarding the Cooperatives' rates and services. The rationale in these letters is based on *West Kentucky Rural Electric Cooperative v. Energy Regulatory Commission*, and like that case, extend only to instances where there is a direct conflict between federal and state regulation.

[5] The Cooperatives cite a number of cases where the Commission has stated that its jurisdiction does not extend to the TVA. These cases also involve the Commission's regulation of an activity that would directly conflict with the TVA's regulation. *See In re Application of East Ky. Power Coop. for a Certificate of Public Convenience and Necessity*, Case. No. 2005-00207 (Ky. PSC Sept. 19, 2005) (quoting *In re Application of E. Ky. Power Coop. for a Certificate of Public Convenience and Necessity*, No. 2004-00423 (Ky. PSC June 10, 2005) (explaining that the Commission does not have jurisdiction over Warren RECC's electric rates); *In re Assessment of Ky.'s Elec. Generation, Transmission, and Distribution Needs*, Case No. 2005-00090 (acknowledging that the Commission has no jurisdiction over the TVA or the TVA Cooperatives regarding generation of electricity); *In re Review of the Adequacy of Ky.'s Generation Capacity and Transmission Sys.*, Case No. 387 (Ky. PSC Dec. 20, 2001) (same).

net pole attachment revenues that are reported. Pennyrile Dep. 38-39; West Kentucky Dep. 25; Hickman-Fulton Dep. 25-26. As explained above, those revenues are net of the pole attachment expenses that the Cooperatives pay to other pole owners – which are also unknown to the TVA and are also unregulated – and are not broken out in the financial reports that the TVA receives from other revenues from "rental of electric property." Pennyrile Dep. 59-60; Warren Dep. 28, 37; West Kentucky Dep. 26-29. Indeed*, the TVA makes no effort whatsoever to regulate, control, or even to know what those revenues are.*

In short, the Cooperatives' claims of conflict preemption are not supported by the facts. The TVA does not regulate or even know what rates the Cooperatives are charging, any more than it knows what rates the Cooperatives are paying other pole owners to attach to their poles. Nor does it know what revenues the Cooperatives receive from pole attachments, or what expenses it pays for pole attachments. That these are inputs – like all other revenues and expenses – and that these inputs are used by the TVA in determining the Cooperatives' revenue requirements for setting electric rates does not mean that the TVA controls or regulates them. And without that activity, there can be no conflict preemption foreclosing this Commission from exercising its own statutory responsibility to regulate the Cooperatives' pole rates.

The TVA Cooperatives argue that the Commission should defer to the TVA's "determination" that it has exclusive jurisdiction over the Cooperatives' electric rates and services under the principle of deference outlined in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the Cooperatives misunderstand both the nature of *Chevron* deference and how it is applied. *Chevron* deference applies to statutory interpretation. *See, e.g.*, *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (holding that a court must defer under *Chevron* to an agency's interpretation of a *statutory ambiguity* that

concerns the scope of the agency's jurisdiction). The dispute here is not about statutory interpretation, but is about whether the TVA actually regulates pole attachment rates. That "mixed question of law and fact," Aug. 6, 2013 Order, at 3, is not a matter on which the TVA's assertions are entitled to deference. It is a matter of evidence to be presented and ruled on by the Commission. Furthermore, *Chevron* analysis depends on the nature of the agency's "determination." Where an agency determination results from neither a formal adjudication nor a formal notice-and-comment rulemaking, *Chevron* deference does not apply. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Informal agency statements, such as those contained in opinion letters and policy statements, are not published regulations that have been subject to the rigors of the Administrative Procedure Act and therefore "lack the force of law." *Id.*; *see also Reno v. Koray*, 515 U.S. 50, 61 (1995). For all these reasons the three factually vague and unverified letters that the TVA sent to the Commission regarding KCTA's Petition are not entitled to *Chevron* deference.

B. The TVA Act Does Not Occupy the Field.[6]

The Cooperatives cite case law that describes the general standards for field preemption, but they fail to apply the law to the facts of this case. It is not enough to say only that "Congress granted the TVA broad authority and discretion" to provide for rules and regulations that may be necessary to effectuate the underlying purpose of the TVA Act, and then cite a number of cases

[6] The Cooperatives incorrectly state that "KCTA has repeatedly and falsely asserted that the 'parties agree' that the question presented is one of conflict preemption only." Coops.' Br. at 21, n.19. To support this proposition Cooperatives cite KCTA's Reply in Support of its Petition – which was filed on March 1, 2013, in response to the Cooperatives' initial filing in this case, filed on February 15, 2013. It is a verifiable fact that the Cooperatives *did not raise the issue of field preemption* in their February 2013 filing. The Commission was the first to raise the issue of field preemption in its June 28, 2013 Order that initially denied KCTA's petition, but has since been overruled.

that do not even address the concept of field preemption. *E.g., Dean v. TVA*, 668 F. Supp. 646 (E.D. Tenn. 1987) (addressing the justiciablity of the TVA's breach of contract claim and whether subject matter jurisdiction was proper); *Young v. TVA*, 606 F.2d 143 (6th Cir. 1979) (addressing whether the TVA has the power of condemnation). In fact, the Cooperatives fail to engage in any analysis of field preemption at all. It is completely irrelevant that "multiple courts have interpreted Congress's grant of ratemaking authority to the TVA broadly." Coops.' Br. at 22. KCTA does not challenge the TVA's authority to set electric rates, and indeed agrees that the Commission's authority over the Cooperatives' electric rates is preempted. That does not, however, establish field preemption that would extend to the Commission's jurisdiction over pole attachment regulation.

As KCTA explained in its Motion for Summary Judgment, the first step in addressing the issue of field preemption is to "define the relevant field" by reviewing the purpose of the federal legislation at issue. *Fednav, Ltd. v. Chester*, 547 F.3d 607, 619 (6th Cir. 2008). 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. But the Cooperatives have failed to explain the basis for their argument. They cite no legislative history or other probative evidence to support their assertion that the TVA Act "touches a field in which the federal interest is so dominant that the federal system [is] assumed to preclude enforcement of state laws on the same subject." Coops.' Br., at 24. Simply saying it does not make it so. And as with other arguments the Cooperatives advance, they have failed to acknowledge that, taken to its logical conclusion, the argument is undermined by the fact that the TVA does not regulate every input to the calculation of the end retail rate for electricity.

It is noteworthy that the Cooperatives have been unable to find a single case holding that the TVA exercises field preemption broad enough to cover the regulation of pole attachments. And indeed, they have found nothing in the TVA Act or its legislative history to indicate that Congress intended to preempt the Commission's regulation of pole attachments. This is similar to the case on which the Cooperatives' most heavily "rely" in arguing field preemption, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), in which the Court rejected the petitioner's assertion of field preemption of a state utility commission's jurisdiction over several matters based on a federal law. The Court concluded that "where Congress has not foreclosed state action by adopting a policy of its own on such matters [, *i]nto these fields it has not moved*." *Id.* at 237 (emphasis added).

Rather than attempting to cobble together an analysis of case law to support their theory of field preemption, the Cooperatives cite cases that have little or no relevance to this case. If anything, these cases show that courts are thoughtful and thorough in their reasoning when it comes to the breadth of the TVA's authority. The courts' careful and deliberate examination of the TVA Act and congressional intent are in contrast to the Cooperatives' glib and conclusory

rationale underlying their contentions regarding the TVA's regulation of the Cooperatives' pole attachment rates. For example, in *Dean*, the court closely examined case law and executive orders to determine that a breach of contract claim between the TVA and the Department of Energy was justiciable, but that the TVA erred when it brought the claim in the Eastern District of Tennessee, rather than the United States Claims Court. *Dean*, 668 F. Supp. at 650-56. Similarly, in *Young*, the court exhaustively parsed the statutory construction of the relevant passages of the TVA Act and its legislative history to hold that the TVA had the authority to build a power plant on a site located on a river outside the Tennessee River's watershed. *Young*, 606 F.2d at 146-48. *See also TVA v. Welch*, 327 U.S. 546 (1946) (citing legislative intent and express provisions of the TVA Act to hold that the TVA has the power to acquire lands by purchase or condemnation which it deems necessary to carry out the Act's purpose).

Contrary to the Cooperatives' Motion, these cases do not stand for the proposition that the TVA has carte blanche by way of "expansive powers conferred on the TVA by Congress." Coops.' Br. at 6. Rather, these cases stand for the proposition that a careful analysis is required when the TVA attempts to assert broad authority. The Cooperatives have engaged in no such thorough analysis. Rather, the Cooperatives cite passages of the TVA Act that describe the TVA's authority to "make rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable," and that the TVA 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." But as KCTA has explained, the TVA *has not made any* "rules or regulations" regarding the Cooperatives' pole attachment rates. Nor has it included any terms and conditions

regarding the same. This language of the TVA Act, therefore, has no bearing on the issue in this case.

IV. The Burden Is on the TVA Cooperatives to Rebut the Presumption Against Preemption.

The Cooperatives argue that KCTA has introduced no evidence to create a genuine issue of material fact. In support they cite to one line from the Commission's first Order establishing this case, in which the Commission suggested that KCTA has the burden to prove that the Commission has jurisdiction over the Cooperatives' pole attachment rates. Yet the Cooperatives have never acknowledged that the Commission's suggestion is inconsistent with its later order of August 2013 granting KCTA's Application for Rehearing, in which the Commission stated that the Cooperatives' claim that the Commission's jurisdiction is preempted must be supported by substantial evidence. Aug. 6, 2013 Order, at 3. Likewise, the Cooperatives have failed to grapple with, or otherwise distinguish, the overwhelming case law stating that, in lieu of express preemption of state law, courts must begin with the presumption that the state law is valid. *See, e.g.*, *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 358 (6th Cir. 2003); *see also Rice*, 331 U.S. at 230 ("We 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."). This presumption against preemption is especially strong where there is a claim of preemption in a field that has been traditionally associated with the police power of the states. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). And the regulation of utilities is unquestionably a function 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).

CONCLUSION

The Commission should deny the Cooperatives' Motion for Summary Judgment. The undisputed facts show that TVA does not regulate pole attachment rates, and that exercise by this Commission of its "exclusive" and "unquestioned" jurisdiction is not inconsistent with any regulation by TVA.

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 Opposition to the TVA Cooperatives' Motion for Summary Judgment has been served on all parties of record via hand delivery, facsimile, or electronically this 12th day of June, 2015.

/s/ Laurence J. Zielke

Laurence J. Zielke