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

APPLICATION FOR REHEARING

The Kentucky Cable Telecommunications Association ("KCTA"), pursuant to KRS 278.400, and 807 KAR 5:001 Section 4, respectfully submits this Application for Rehearing and modification of the Commission's June 28, 2013 Order in this proceeding. Specifically, KCTA requests the Commission to (1) reconsider the June 28, 2013 Order on the basis that there is an insufficient factual record in this proceeding; and (2) set this matter for live hearing on a date to be determined to explore and ultimately answer the fundamental factual question at issue in this proceeding: whether the Tennessee Valley Authority ("TVA") regulates the pole attachments and pole attachment rates of five Kentucky electric distribution cooperatives that purchase their power from the TVA.[1]

A. The June 28, 2013 Order is Not Based on Substantial Evidence.

The ultimate ***legal*** question to be decided is whether the Commission has the jurisdiction to regulate the pole attachment rates of the five Kentucky cooperatives that purchase TVA

[1] These cooperatives are: Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyrile Rural Electric Cooperative Cooperation, Tri-County Electric Membership Corporation, Warren Rural Electric Cooperative Corporation, and West Kentucky Rural Electric Cooperative Corporation.

power. The Commission's jurisdiction to regulate poles is broad. See In re Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space, Case No. 8040 (Ky. PSC Aug. 21, 1981); Kentucky CATV Ass'n v. Volz, 675 S.W.2d 393 (Ky. Ct. App. 1983); Ballard Rural Telephone Coop. Corp. v. Jackson Purchase Energy Corp., 2005 WL 858940 (Ky. PSC Mar. 23, 2005). Only in the case of clear preemptive intent and authority can that jurisdiction be trumped. See, e.g., Black v. Dixie Consumer Prods. LLC, No. 10-5498, 2013 WL 645954 at *6 (6th Cir. Feb. 22, 2013); see also TVA v. Energy Regulatory Comm'n of Kentucky, Civ. Action No. 79-0009-P (W.D. Ky. Sept. 25, 1979) ("TVA v. ERC"). In TVA v. ERC, the court found the agency's jurisdiction over retail electric-service rates of TVA cooperatives preempted because federal law assigned the responsibility for regulating retail electric-service rates to TVA.

In these proceedings, the Commission essentially concluded that because the TVA regulates retail electric service rates and argues that it oversees pole rents because of their effects on retail electric rates, the Commission's jurisdiction is preempted. The sole factual bases for the Commission's finding that it does "not have jurisdiction over the pole attachment cooperative rates of the TVA"[2] are provided in two letters written by Cynthia Herron, a Director of Retail Regulatory Affairs at TVA. The first letter,[3] which was transmitted to each of the five Kentucky TVA cooperatives, contains only Herron's bare, unsworn and unverified two-sentence assertion expressing a TVA interest in pole costs of its Kentucky cooperative distributors. The second letter,[4] also unsworn and unverified and with no exhibits or other material that could be credibly described as "evidence," merely responded to the Commission's request for additional

[2] June 28, 2013 Order at 1.

[3] Letter from Cynthia L. Herron, Director, Retail Regulatory Affairs, Tennessee Valley Authority, to Gary K. Dillard, President/CEO, Warren Rural Electric Cooperative Corporation (January 24, 2013) ("January 24th Letter").

[4] Letter from Cynthia L. Herron, Director Retail Regulatory Affairs, Tennessee Valley Authority, to Jeff Derouen, Executive Director, Public Service Commission (May 16, 2013) ("May 16th Letter").

information. The statements in these letters do not qualify as substantial evidence sufficient to sustain the Commission's June 28, 2013 Order. See Kentucky Com. on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981) (An agency's findings are clearly erroneous if unsupported by substantial evidence.); see also 500 Assocs. v. Natural Res. & Envtl. Prot. Cabinet, 204 S.W.3d 121, 132 (Ky. App. 2006) ("The test of substantiality of the evidence is whether…it has sufficient probative value to induce conviction in the minds of reasonable persons.").

Though both letters provide vague information about TVA's interest in regulation of pole attachments, they provide no clear and direct evidence that TVA does in fact regulate pole rates. The first letter states:

> Regarding pole attachment 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 the electric rate payers do not subsidize the costs at these rentals.[5]

Falling short of a representation that the TVA regulates the poles of the five Kentucky cooperatives, the statement, at most, express some interest in ensuring that pole rates are not set too low or that third-party pole usage otherwise burdens the TVA system. In the second letter (responding to the Commission's further information request) the TVA states that the "revenue received from pole attachment fees is…considered in TVA's assessment of each distributor's revenue requirements"[6] The TVA also asserts a connection between full cost recovery for use of distribution assets and TVA wholesale power contract administration. Finally, TVA argues that

[5] January 24th Letter at 1.
[6] May 16th Letter at 1.

TVA "oversight of the pole attachment rates of these distributors is sufficient"[7] to pre-empt this Commission. This letter at its core is advocacy, not the substantial evidence necessary for the Commission to conclude that its pole regulatory authority is preempted. See Commonwealth Revenue Cabinet v. South Hopkins Coal Co., 734 S.W.2d 476, 479 (Ky. App. 1987) ("To support a reasonable inference, there must be sufficient proof to tilt the balance from possibility to probability."); see also Medley v. Bd. of Educ., 168 S.W.3d 398, 405 (Ky. App. 2004) (Finding that a teacher's statement a videotape would improve teaching performance is insufficient for a court to determine the request for the tapes was made pursuant to a legitimate educational interest).

But even if these TVA expressions of its interest in or oversight of poles is tantamount to regulation, the TVA's articulated concerns would not be affected by the exercise of jurisdiction here because the Kentucky pole attachment formula time and again has been found to be fully compensatory to the pole owner. See, e.g., FCC v. Florida Power Corp., 480 U.S. 245, 254 (1987); Alabama Power Co. v. FCC, 311 F.3d 1357, 1370-71 (11th Cir. 2002); In re. Adoption of a Standard Methodology for Establishing Rates for CATV Pole Attachments, Admin. Case No. 251, Sept. 17, 1982 . Thus, any action by this Commission to set the TVA cooperatives' pole rates at compensatory levels would not interfere with the TVA's only stated concern: preventing a TVA-to-communications-attacher subsidy.

B. The Commission Should Ensure That Staff and the Parties Have The Opportunity to Adequately Explore and Develop the Relevant Evidence.

As it now stands, the Commission simply does not have a sufficient factual record. A hearing is needed to ensure that the Commission's decision is based on substantial evidence. Fortunately, the factual issues here are both finite and discrete: (1) does the TVA actually

[7] Id.

regulate pole attachments? and (2) does this Commission's regulation of poles (in particular its pole rate formula) impinge on the TVA's legitimate pole-based interests?

Determining whether the TVA's professed concerns and asserted oversight of poles rise to the level of preemptive regulation requires that both the author of the TVA letters, Cynthia Herron, as well as the five employees of the Kentucky cooperatives, be called as witnesses. Among the questions to be answered at hearing are:

1. Does the TVA have a pole-rate formula?
2. Does the TVA require its Kentucky distribution cooperatives to follow the formula?
3. If not, what is the process that the TVA follows to ensure that the pole attachment rates do not undercompensate (or overcompensate) its cooperatives?
4. How often does TVA review pole attachment rates?
5. What is the process for rate (and for term-and-condition) review?
6. Does the TVA require its cooperatives to file verified financial and plant data specifically related to poles – and third-party attachments?
7. Is there a complaint process that attachers may use to seek relief from high cooperative rates as well as unreasonable terms and conditions of attachment?
8. What percentage of total individual cooperative system/service revenues are comprised of pole-attachment rental revenues? What is their effect on retail electric service regulation?
9. Does the TVA regulate other aspects of the pole-attachment relations between communications attachers and TVA cooperatives in Kentucky?

10. What are the pole-rate disputes, or pole-attachment regulatory proceeding that the TVA has undertaken since 1981?

Answers to these and other questions related to the TVA's view that it regulates pole attachments are absolutely essential before the Commission can lawfully declare that it lacks the jurisdiction to regulate the pole-attachment rates of the five Kentucky TVA cooperatives. See 500 Assocs., 204 S.W.3d at 132; see also Commonwealth Revenue Cabinet, 734 S.W.2d at 479.

CONCLUSION

For these reasons, Petitioner KTCA respectfully requests that the Commission grant this Application for Rehearing and set this proceeding for evidentiary hearing as soon as practicable.

Respectfully Submitted,

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