

**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	)	CASE NO.
REGULATE THE POLE ATTACHMENT RATES,	)	2012-00544
TERMS, AND CONDITIONS OF	)	
COOPERATIVES THAT PURCHASE	)	
ELECTRICITY FROM THE TENNESSEE	)	
VALLEY AUTHORITY	)	

**REPLY TO RESPONSE TO APPLICATION FOR REHEARING**

The Kentucky Cable Telecommunications Association (“KCTA”), submits this Reply to the Response filed on behalf of the five TVA Cooperatives on July 25, 2013 in this proceeding.

To divert this Commission from exploring the basis for and the extent to which the TVA actually regulates pole attachment rates – or does not – the TVA Cooperatives misstate the history of PSC regulation and mischaracterize the record. They also fail even to address the failure of any party to provide any statutory basis for the TVA to regulate pole attachment rates.

First, the law is far from “settled” on the Commission’s jurisdiction over the pole attachment rates charged by the TVA Cooperatives. The Commission has unquestioned jurisdiction over pole rates generally, and the TVA has exercised its preemptive authority over retail electric rates. But whether the TVA has the statutory authority to, or does, exercise similar preemptive authority over pole attachment rates the questions before the Commission now are very much “unsettled,” even after the Commission’s June 28, 2013 Order. Hence KCTA’s Petition for Declaratory Ruling and its Application for Rehearing here.

Second, nothing in the limited record of this proceeding establishes that the TVA has actually exercised preemptive authority over the TVA Cooperatives' pole attachment rates. To the contrary, the letters from the TVA's Director scrupulously avoid any statement to the effect that the TVA actually has authority to or does regulate the TVA Cooperatives' pole attachment rates. To be sure, the TVA has clear statutory power to regulate retail electric rates. In doing so, the TVA apparently considers off-setting pole attachment revenues to be sure that electric ratepayers do not provide a subsidy to the pole attaching entities. But nothing in Ms. Herron's correspondence provides any statutory authority for the TVA to actually regulate pole attachment rates, or suggests that the TVA makes any effort to ensure that pole attachment rates are just and reasonable and do not subsidize retail electric ratepayers. To the contrary, the TVA's jurisdiction, and its sole stated concern, relates to the Coops' electric rates – not whether the Coops' pole attachment rates are unreasonably high.

**This Commission Has NOT Previously Addressed Whether It May Exercise Jurisdiction Over TVA Cooperatives' Pole Attachment Rates.**

This Commission has never previously addressed whether it may exercise jurisdiction over the pole attachment rates of the TVA Cooperatives. In the absence of the exercise of conflicting jurisdiction by the TVA, of course, this Commission unquestionably has jurisdiction over the TVA Cooperatives' pole attachment rates. While KCTA agrees that Congress *could* displace this Commission's pole attachment jurisdiction, the questions raised here – and certainly not decided on the record – are whether Congress has done so and whether the TVA actually exercises such jurisdiction if it exists.

The TVA Cooperatives grossly misstate the history of regulation of the TVA Cooperatives in Kentucky. In fact, this Commission once regulated various aspects of the TVA Cooperatives' business, stepping back from that regulatory jurisdiction only on determinations

that directly conflicting regulation of the TVA Cooperatives was actually exercised by the TVA. At least before the June 18, 2013, Order denying KCTA's Petition in this matter, no decision of this Commission had ever eschewed jurisdiction over the TVA Cooperatives in the absence of the clear exercise of conflicting jurisdiction by the TVA.

**The Letters From The TVA's Director Of Retail Regulatory Affairs Do Not Establish That The TVA Regulates Pole Attachment Rates.**

KCTA continues to maintain that the legal issue presented by this case is straightforward: "whether the PSC's '*unquestionable*' jurisdiction over the pole attachment rates, terms and conditions of the cooperatives that receive their power from the TVA has been preempted by any concurrent jurisdiction exercised by the TVA." KCTA Reply, filed March 1, 2013, at 3 (emphasis in original). The question involves both whether the TVA has statutory jurisdiction to regulate pole attachments and also whether that jurisdiction has been "exercised." Only if the TVA has the regulatory jurisdiction and actually *exercises* that jurisdiction over pole attachment rates is the PSC's "unquestionable" jurisdiction displaced. *See id., quoting Ballard Rural Telephone Coop. Corp. v. Jackson Purchase Energy Corp.* 2005 WL 858940 \*3 (Ky PSC Mar. 23, 2005).

The Commission based its decision here primarily on its interpretation of a letter submitted on May 16, 2013 by Cynthia L. Herron, Director Retail Regulatory Affairs, TVA. The PSC Staff had requested Ms. Herron to address certain questions in a letter dated April 29, 2013.<sup>1</sup> Neither the Staff's letter nor the TVA's response was served on KCTA, and KCTA did

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<sup>1</sup> Ms. Herron had written five virtually identical letters to the TVA Cooperatives dated January 24, 2013 – obviously at their request. The letters basically made the point that the TVA tries to keep the rates for retail electricity low and that the TVA requires its distributors to recover its costs related to pole attachments and not to subsidize the costs of pole rentals. Even after the Commission asked her to clarify her earlier letter, Ms. Herron failed to provide any indication that the TVA actually regulates pole attachment rates. *See infra.*

not learn of their existence until after they were placed in the public docket on June 18, 2013. Before KCTA had an opportunity to respond, the Commission issued its decision on June 28, 2013, finding that, relying on its interpretation of Ms. Herron's letter, the PSC's jurisdiction has been preempted.

Had the Commission afforded KCTA the opportunity, KCTA would have pointed out that nowhere does Ms. Herron state that the TVA has the regulatory jurisdiction over pole attachments or actually exercises it. The Commission's statement in its Order to the effect that "the TVA . . . explicitly establishes requirements for how the pole attachment fees are calculated . . ." is not based on any evidence and stretches Ms. Herron's carefully worded language well beyond any reasonable bounds. Indeed, Ms. Herron does not say that the TVA "establishes" how pole attachments are calculated. She says instead that the TVA considers pole attachment fees in assessing revenue requirements, that it requires "each distributor to charge a pole attachment fee that ensures full cost recovery so that no unfair burdens are placed on the electric ratepayers," that "a full cost recovery may include usable space, safety space, and height," and that "TVA does have oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA power to ensure consistency with the wholesale power contract." Herron Letter, May 16, 2013. What Ms. Herron is saying is that, to some extent which is unclear, the TVA takes account of pole attachment revenues in setting retail electric rates. But that is far different from regulating pole rates. Nowhere does Ms. Herron refer to any statute giving the TVA jurisdiction over pole attachment rates, as opposed to simply regulating electric rates. Nor does she refer to any proceeding in which the TVA has addressed pole attachment rates or exercised any regulatory jurisdiction over such rates, except possibly for ensuring, *in the context of setting retail "electric" rates*, that retail electric customers do not subsidize pole users.

Nowhere does she suggest that the TVA has afforded pole attachers any right to be heard regarding pole attachment rates. She does not say that the TVA actually reviews pole attachment rates, how they are calculated, or to what extent they may be subsidizing electric payers.

The TVA's express concern that revenues from pole attachments are high enough to prevent a subsidy going from electric ratepayers to pole attaching entities and their customers certainly does not establish that the PSC would be preempted from ensuring that the rates are not so high as to create a subsidy running the other way. Nothing in the TVA's jurisdiction authorizes it to consider whether pole rates are too high, and that is the primary thrust of this Commission's pole attachment jurisdiction. And while the TVA has jurisdiction to regulate electric rates, that jurisdiction would not permit the TVA to require pole rates so high as to subsidize electric ratepayers.

The TVA's asserted exercise of its jurisdiction to consider the revenues from pole attachment rates to be sure that electric ratepayers are not subsidizing companies attaching to the TVA Cooperatives' essential pole facilities does not equate to pole attachment rate regulation. And the Commission's regulation of the TVA Cooperatives' pole attachments – to assure that the pole owner does not charge unreasonable pole rates – would not interfere with any jurisdiction exercised by the TVA, even according to Ms. Herron's letters. For example, that the TVA considers TVA cooperatives' labor costs and the costs imposed by state and local taxes in setting retail electric rates does not mean that the TVA regulates these costs and would foreclose state regulation of these matters. If taxes or labor costs increase, the TVA will take those into account, but it does not "regulate" them. The same can be said for the TVA's consideration of the Cooperatives' pole attachment charges. To the extent that this Commission were to exercise its "unquestionable" pole attachment jurisdiction and set pole attachment rates, the TVA would

take into account the revenue from those rates. But that would not interfere with any regulation exercised by the TVA.

### **Conclusion**

The PSC has “exclusive” jurisdiction over pole attachment charges in Kentucky, and only if the TVA actually exercises conflicting jurisdiction may the Commission decline to exercise that jurisdiction. The questions here are whether the TVA has authority to, and actually does, regulate the TVA pole rates. Only if both questions are answered in the affirmative can this Commission find that its jurisdiction has been preempted. The letters from Ms. Herron do not establish that the TVA exercises any such conflicting jurisdiction. To the extent that her letters raise issues about the extent of the TVA’s exercise of jurisdiction over pole attachments, the Commission should hold a hearing. The record as developed to this point does not provide sufficient support for the determination reached by the Commission in its June 28, 2013 Order.

Accordingly, KCTA requests that its Application for Rehearing be granted.

Respectfully Submitted,

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