COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

The Petition of the Kentucky Cable	)	
Telecommunication Association for a	)	**Case No. 2012-00544**
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	)	

KENTUCKY CABLE TELECOMMUNICATIONS ASSOCIATION'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL THE TVA COOPERATIVES TO PRODUCE COST DATA

The Kentucky Cable Telecommunications Association ("KCTA") submits this Reply to the TVA Cooperatives' ("the TVA Coops" or "the Coops" or "the Cooperatives") Response to KCTA's Motion to Compel production of the Coops' cost data.

In their Response, the Coops effectively abandon their previous argument that the Kentucky Public Service Commission's ("the Commission") exclusive and unquestioned jurisdiction over the regulation of pole attachment rates is preempted because it would undermine the Tennessee Valley Authority's ("TVA") mandate to provide low retail electric rates to end users – an argument for "conflict preemption." Now, in light of the dearth of evidence that the TVA has ever regulated pole attachment rates for the Coops or that the Commission's regulation of their pole attachment rates would in any way prevent the Coops from continuing to provide low retail electric rates to their customers, the Coops change their tactics. They now argue "field preemption" – that TVA's regulatory scheme occupies the entire field. The TVA Cooperatives' change of strategy has no bearing on the issue before the Commission in KCTA's Motion to Compel. The Cooperatives have made cost recovery under

the Commission's rate methodology an issue in this proceeding, and KCTA is entitled to receive the Cooperatives' cost data to rebut that argument.

ARGUMENT

I. Neither Conflict Preemption Nor Field Preemption Precludes the Commission's Regulation of the TVA Cooperatives' Pole Attachment Rates.

The Coops barely address the issue at the heart of the current motions – the production of their cost data. Contrary to what the Coops say in their Response, KCTA is not attempting to transform this petition into a rate-making proceeding. Rather, KCTA's request for the Coops' cost data is a *direct response* to the Coops' argument that the Commission's regulation of the their pole attachment rates would undermine the edict from the TVA to provide low retail electric rates to end users because Commission regulation would allegedly not permit full cost recovery. *See* TVA Coops' Response to KPSC's Jan. 17, 2013 Order, at 7 ("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.'"). The Coops have made this argument repeatedly during this proceeding. But the Coops have dropped the argument in their latest filing, likely because it has been undermined by what the Cooperatives' production fails to show – any TVA regulation of the Cooperatives' pole attachment rates. Now the Coops have changed their position, and appear to rely completely on a theory of field preemption.

In advocating for field preemption, the Coops again neglect to note that "when a state law is not expressly preempted, courts must begin with the presumption that the law is valid." *Michigan Bell Telephone Co. v. McImetro Access Transmission Servs., Inc.*, 323 F.3d 348, 358 (6th Cir. 2003) (citing *Springsteen v. Consol. Rail Corp.*, 130 F.3d 241, 244 (6th Cir. 1997). "It

will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *Id.* (quoting *N.Y. State Dep't of Soc. Servs. v. Dublino*, 41 U.S. 405, 413 (1973) (internal quotation marks omitted)). This "presumption against preemption" is strongest where "congress has legislated in a field which the States have traditionally occupied," as courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). As KCTA has explained in the past, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461, U.S. 375, 377 (1983) (internal citation omitted). Rather than acknowledging this presumption against preemption, the TVA Coops have simplistically argued – under both their conflict preemption and their field preemption arguments – that the TVA Act grants the TVA vague, "broad review powers" with little of the specifics required to advance a viable preemption argument.

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

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

The purpose of the TVA Act, and thus the relevant field, is well known. The 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 Tennessee Elec. Membership Corp.*, 466 F.3d 399, 403 n.2 (6th Cir. 2006) (citing TVA 2002 Annual Report at 2). The TVA Cooperatives argue that this field is so broad that it encompasses anything that could indirectly affect the TVA's promotion of the use of electric power via its provision of low rates to consumers. This argument, taken to its logical conclusion, would encompass anything that somehow affects the end retail rate for electricity, including the prices of all inputs, including any state taxes levied on the Cooperatives or their property. The only specific language the Cooperatives point to is a provision in the contracts between the Cooperatives and the TVA which states that the TVA may allocate costs, but the evidence produced by the Cooperatives to date demonstrates that the TVA does not, in fact, allocate the costs associated with the Cooperatives' poles. Nothing in the TVA Act indicates that Congress intended to preempt the Commission's regulation of pole attachments, and it strains credulity to argue that the regulatory field assigned to TVA by Congress encompasses the Cooperatives' pole attachment rates.

Contrary to the Coops' argument, this Commission regulated their retail electric rates until 1979, when a federal court held that the Commission's jurisdiction over the Coops' electric rates was preempted by a *direct conflict*; the Coops could not comply with Kentucky law without breaching a specific provision of their TVA contracts regarding the escalation of electric rates. *TVA v. Energy Reg. Comm'n of Ky.*, Civ. Action No. 79-0009-P (W.D. Ky. Sept. 25, 1979). Courts have also held that the Commission lacks jurisdiction to review the TVA Coops' borrowing from the Rural Electrification Administration ("REA") because the Coops are specifically exempted from the state statute requiring Commission oversight. *See West Ky. Rural Elec. Coop. Corp. v. Energy Reg. Comm'n*, No. 80-C7-1747 (Franklin Cir. Ct. Nov. 12, 1983); *In re Hickman-Fulton Counties Rural Elec. Coop. Corp.*, Ky. PSC No. 8858 (June 27, 1983). None of these decisions even suggest that the TVA Act preempts the field. Rather, one is based on a specific, direct conflict between federal and state law, and the others on a Kentucky statute that expressly exempts the TVA Coops from the Commission's oversight of their borrowing from the REA. These decisions are hardly consistent with the Coops' position that a broad regulatory framework occupies the entire field .

In any case, the Cooperatives' decision now to focus on an argument of field preemption does not negate the fact that KCTA is entitled to the Coops' cost data. The Coops previously asserted a theory of conflict preemption – that the Commission's regulation of their pole attachment rates would prevent full cost recovery and result in the electric customers subsidizing the attaching entities. While the Coops have apparently changed their strategy mid-stream, they have not conceded that their earlier conflict preemption argument has no merit, and KCTA is entitled to the cost data to rebut it.

II. KCTA's Request for Cost Data Is Neither Overly Broad Nor Unduly Burdensome

As KCTA noted in its motion to compel the Cooperatives to produce their cost data, producing this information would not impose an undue burden on the Cooperatives. As the Terms and Conditions to the contracts between the TVA and the Cooperatives explain in paragraph 1(b), the TVA requires the Cooperatives to maintain their bookkeeping in accordance with FERC accounting standards.[1] Accordingly, this information is routinely maintained by the Cooperatives, and is easily accessible. Beyond broad generalities in arguing that this information is "burdensome," the Coops have provided no specifics demonstrating that that would actually be the case. In addition, KCTA's request is narrowly tailored, and seeks only the information it needs to show that application of the Commission's methodology would not result in a subsidy of the attaching entities, which would rebut any argument of conflict preemption. The Commission should compel production of the Cooperatives' cost data.

CONCLUSION

For the foregoing reasons, the Commission should compel the TVA Cooperatives to produce their cost data as requested in KCTA's First Request for Information Number 20.

[1] Contrary to the statement in their Response, the Cooperatives have not produced all the contracts between the TVA and the Cooperatives. KCTA has not received the original contract between Hickman-Fulton Counties Rural Electric Cooperative Corporation and the TVA, and again seeks its production in its Supplemental Requests for Information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Kentucky Cable Telecommunications Association's Reply in Support of Its Motion to Compel has been served on all parties of record via hand delivery, facsimile, or electronically this 3rd day of December, 2013.

/s/ Laurence J. Zielke
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