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' MOTION FOR SUMMARY JUDGMENT

Pursuant to Civil Rule 56.02, Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyrile 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, jointly move the Public Service Commission of the Commonwealth of Kentucky (the "Commission") for summary judgment on the jurisdictional issue presented in the Kentucky Cable Telecommunication Association's ("KCTA") Petition for 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 (the "Petition").

In support of their motion, the TVA Cooperatives state as follows.

I. INTRODUCTION

This matter is before the Commission for rehearing on a single question: "whether or not TVA has or exercises any jurisdiction, be it through the establishment of a ratemaking formula,

review, or simply oversight responsibility in connection with ratemaking, over the pole attachment rates of the TVA cooperatives." Aug, 6, 2013 Order, p. 6 ("Order Granting Rehearing"). The Tennessee Valley Authority ("TVA") has explicitly answered that its "oversight extends to the regulation of 'the use of electric system assets [(such as poles)] of the distributors of TVA power.'" (Letter from W. Johnson to J. Derouen (Feb. 14, 2014), a true and accurate copy of which is attached hereto as Ex. 1.) The Commission should defer to the TVA's determination on this issue. The undisputed facts now established in this action confirm the Commission's original legal determination: the KCTA has failed to meet its "considerable burden to prove its claim that the Commission does have jurisdiction to regulate pole attachments of the TVA Cooperatives." June 28, 2013 Order, p. 9 ("Order Denying Petition") (*quoting* Jan. 17, 2013 Order, p. 3 ("Initial Order")). Therefore, the KCTA's Petition should be denied.

Federal law preempts any state regulation of the TVA Cooperatives' pole attachment rates. Congress granted the TVA complete authority over the rates and services of all cooperatives that purchase and resell electricity from the TVA, and the TVA has long operated "to supplant state regulation as inadequate and unsatisfactory." *See* 16 U.S.C. § 831 *et seq.*; *TVA v. Tennessee Electric Power Co*., 90 F.2d 885, 890 (6th Cir. 1936).

Furthermore, the undisputed facts demonstrate that the TVA possesses exclusive oversight responsibility for the TVA Cooperatives' electric rates, including pole attachment rates. The undisputed facts also establish that any change to the TVA Cooperatives' pole attachment rates would necessarily impact their electric service rates, which even the KCTA concedes are regulated exclusively by the TVA. Any attempt by the Commission to regulate the TVA Cooperatives' pole attachment rates would therefore unavoidably conflict with the TVA's exclusive jurisdiction.

While acknowledging on the one hand that the question before the Commission is purely one of jurisdiction, the KCTA has repeatedly sought to transform this narrow action into a broader referendum on the reasonableness of the TVA Cooperatives' pole attachment rates. Yet, inexplicably, the KCTA has never sought relief from the TVA. Instead, it attempts to convince the Commission to overstep its jurisdictional authority by arguing that the TVA's exclusive oversight does not—in the KCTA's opinion—adequately account for pole attachments. (*See generally* Reply of the Kentucky Cable Telecommunications Association (March 1, 2013) ("KCTA Reply").) The Commission should reject these efforts.

In the KCTA's own words, the Petition "raises an issue of federal preemption, and nothing more." (KCTA Reply at 1-2.) The TVA Cooperatives agree.

The facts established in this action are consistent with the law: only the TVA has oversight responsibility for the TVA Cooperatives' electric rates, including pole attachment rates. The Commission is preempted from exercising jurisdiction as the KCTA requests. Accordingly, for the reasons discussed in detail below, the TVA Cooperatives respectfully request that the Commission grant this motion and deny the KCTA's Petition.

II. PROCEDURAL HISTORY

A. THE COMMISSION'S DENIAL OF THE KCTA'S PETITION.

On December 3, 2012, the KCTA filed its Petition seeking a declaratory order that the Commission has jurisdiction over the TVA Cooperatives' pole attachment rates. (*See generally* Petition.) The Commission expressed skepticism because it has never regulated the TVA Cooperatives' pole attachment rates, and it has not exercised any jurisdiction whatsoever over the TVA Cooperatives for more than 30 years. Initial Order at p. 2. The TVA Cooperatives opposed the Petition on the grounds that Commission regulation of the TVA Cooperatives'

electric rates and services is preempted by federal law. (*See generally* The TVA Cooperatives' Response to the January 17 Order (Feb. 15, 2013) ("TVA Cooperatives' Response").)

On June 28, 2013, the Commission properly determined that it does not have jurisdiction over the pole attachment rates of the TVA Cooperatives, and it denied the KCTA's Petition, finding that "Congress has occupied the field" of regulating the TVA Cooperatives' rates and services, and that "[p]ole attachments rates are a component in establishing retail rates, and the Commission is pre-empted from regulating retail rates." Order Denying Petition at 8.

B. REHEARING GRANTED ON LIMITED QUESTION OF JURISDICTION.

On August 6, 2013, the Commission granted a petition for rehearing filed by the KCTA, but limited the issue on rehearing to whether the TVA has jurisdiction or "oversight responsibility" over the pole attachment rates of the TVA Cooperatives. Order Granting Rehearing at 6. In limiting the issues on rehearing, the Commission rejected the KCTA's assertion that a ruling on the TVA's jurisdiction over pole attachment rates would require "testimony at an evidentiary hearing of a TVA representative and the TVA Cooperatives . . . ." *Id.* at 3-4. It also rejected the KCTA's assertions that "it is relevant and necessary for the Commission to determine whether TVA regulates pole attachment rates using the same or similar methodology as [the Commission], and whether TVA has a procedure for KCTA to file a complaint or otherwise challenge the TVA Cooperatives' pole attachment rates." *Id.*

After multiple disputes related to the KCTA's improper efforts to seek discovery beyond the limited scope of rehearing, and after the KCTA filed multiple improper substantive briefs under the guise of providing "status reports," the Commission issued an order in January of 2015 strictly limiting the scope of the KCTA's discovery requests and reiterating the limited scope of this rehearing. *See* Jan. 8, 2015 Order, p. 15 (Jan. 8, 2015) ("Discovery Order"). Subsequently,

the KCTA filed a motion for summary judgment, and the Parties jointly agreed to a briefing schedule, pursuant to which the TVA Cooperatives file this motion. *See* May 6, 2015 Order (setting procedural schedule).

III. BACKGROUND OF THE TENNESSEE VALLEY AUTHORITY

In 1933, Congress established the TVA through the passage of the Tennessee Valley Authority Act (the "TVA Act"). *See* 16 U.S.C. § 831 *et seq*. Among its other responsibilities, the TVA operates "one of the nation's largest electric power systems," producing and selling electricity to "millions of residential, commercial, industrial and governmental customers" covering an area of "about 80,000 square miles, which includes most of Tennessee, northern Alabama, northeastern Mississippi, southwestern Kentucky and parts of Georgia, North Carolina, and Virginia . . . ." *4-County Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132 (S.D. Miss. 1996).

In order to enable the TVA to meet its Congressionally-imposed duties, including the "objective that power shall be sold at rates as low as are feasible," 16 U.S.C. § 831n-4(f), the TVA Act:

> empower[s] and authorize[s the TVA] to sell the surplus power not used in its operations . . . and in the sale of such current by the [TVA] Board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members . . . . In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power . . . to **make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable** . . . . [T]he Board is [also] authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use . . . . [T]he Board is [also] **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 chapter . . . ."

16 U.S.C. § 831i (emphases added). The authority granted by Congress to the TVA is intentionally broad. As one court explained:

> From its inception, TVA has enjoyed an independence possessed by perhaps no other federal agency. The original House Committee stated upon TVA's inception: 'We intend that [TVA] shall have much of the essential freedom and elasticity of a private business corporation.' TVA's independence is underscored by its corporate form, its maintenance of a separate legal staff, its removal from centralized control in Washington, its discretionary ratemaking authority, and its exemption from at least 16 provisions of the Administrative Procedures Act.

Dean v. TVA, 668 F. Supp. 646, 652, n. 1 (E.D. Tenn. 1987) (citations omitted). These broad powers and discretion are reinforced by the statutory obligation that the TVA Act "must be liberally construed to carry out the purposes of Congress which are, Inter alia, to promote interstate commerce and the public welfare." *Young v. TVA*, 606 F.2d 143, 145 (6th Cir. 1979) (*citing* 16 U.S.C. § 831dd ("This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, . . . and promote interstate commerce and the general welfare"); *TVA v. Welch*, 327 U.S. 546, 551 (1946)).[1]

The KCTA asks the Commission to ignore these expansive powers conferred on the TVA by Congress, a contravention of more than eight decades of authority and practices establishing the TVA's broad discretion and regulatory independence.

[1] *See also, e.g., Hoke Co., Inc. v. TVA*, 854 F.2d 820, 825 (6th Cir. 1988) ("The TVA Act is to be 'liberally construed to carry out the purposes of Congress'") (*quoting United States v. An Easement and Right-of-Way*, 246 F. Supp. 263, 269 (W.D. Ky. 1965) ("In interpreting the scope and statutory and constitutional authority of the TVA, this court is required to construe the TVA Act liberally")); *id.* at 826 ("TVA has been given broad authority by Congress to enter into contracts in order to carry out TVA's powers."); *PRI Pipe Supports v. TVA*, 494 F. Supp. 974, 977 (N.D. Miss. 1980) (discussing exemption of TVA from Administrative Procedure Act's government procurement provisions).

IV. STATEMENT OF UNDISPUTED FACTS

The TVA Cooperatives are five not-for-profit electric cooperatives in Kentucky that purchase power from the TVA for the benefit of their members. In addition to distributing electric power, the TVA Cooperatives allow KCTA members to attach their equipment to utility poles for an established fee per attachment, billed in regular installments.

The KCTA is a trade association representing several investor-owned cable companies that have attached their equipment to the TVA Cooperatives' utility poles, and that now seek to have the Commission – not the TVA – exert authority over the TVA Cooperatives' pole attachment rates. (*See generally* Petition.)

A. THE TVA, NOT THE COMMISSION, REGULATES THE TVA COOPERATIVES' ELECTRIC RATES.

The TVA Act authorizes the TVA to sell surplus power and grants it broad discretion 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 the TVA Act. 16 U.S.C. § 831i (emphasis added). Pursuant to this broad grant of power, the TVA has exerted complete and exclusive authority over the rates and services of cooperatives, like the TVA Cooperatives, that purchase and resell electricity from the TVA. *See, e.g., 4-County Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132, 1137 (S.D. Miss. 1996) (referring to the "TVA's having been granted by Congress full discretionary authority with respect to setting rates").[2] Furthermore, as the Sixth Circuit has recognized, shortly after the passage of the TVA Act, the TVA "announced [its] intention to regulate local intrastate rates and service by a so called 'yardstick' method through federally

[2] *See also, e.g., Mobil Oil Corp. v. TVA*, 387 F. Supp. 498, 506-07 (N.D. Ala. 1974) ("the judgment or expertise of the Authority in setting the electric power rates is a matter committed to its discretion by law"); *Bekaert Corp. v. Dyersburg Elec. System*, Case No. 07-2316-STA-dkv, 2009 U.S. Dist. LEXIS 130381 (W.D. Tenn. May 20, 2009), a true and accurate copy of which is attached hereto as Ex. 2 ("Congress entrusted and committed the act of fixing rates that achieve this balance to the judgment and discretion of the TVA Board.").

subsidized competition **which will supplant state regulation** as inadequate and unsatisfactory." *TVA v. Tennessee Electric Power Co.*, 90 F.2d 885, 890 (6th Cir. 1936) (quoted in Order Denying Petition at 5) (emphasis added).

And now, in light of the unique nature of this proceeding, the TVA repeatedly reached out to the Commission and to the TVA Cooperatives to assert its longstanding and exclusive authority over the TVA Cooperatives' electric rates, including pole attachment rates.

In a letter to the Commission after rehearing was granted in this matter, William D. Johnson, the President and CEO of the TVA, explained that the "TVA, as a federal corporation, has under federal law the **exclusive** authority to regulate retail rates and service practices of distributors of TVA power." (Ltr. from W. Johnson to J. Derouen, Ex. 1 (emphasis added); *see also* Letters from C. Herron to the TVA Cooperatives (Jan. 24, 2013), true and accurate copies of which are attached hereto as Ex. 3 ("TVA is the exclusive retail rate regulator for the distributors of TVA power").) Mr. Johnson further explained that the TVA's exclusive "oversight extends to the regulation of 'the use of electric system assets [(such as poles)] of the distributors of TVA power.'" (Ltr. from W. Johnson to J. Derouen, Ex. 1 (clarifying that "TVA requires each distributor to charge a pole attachment fee that ensures full cost recovery"); *see also* Ltrs. from C. Herron to TVA Cooperatives, Ex. 3 ("TVA requires that a distributor recover its full cost associated with the pole attachment"); Letter from C. Herron to J. Derouen (May 16, 2013), a true and accurate copy of which is attached hereto as Ex. 4 ("[I]t is TVA's position that TVA's oversight over the pole attachment rates of these distributors is sufficient.").)

The TVA Cooperatives also acknowledge the TVA's exclusive authority over their rates and services. (*See, e.g.*, The TVA Cooperatives' Responses to KCTA Data Requests[3]; March 11,

[3] Hickman-Fulton Counties Rural Elec. Coop. Corp.'s Responses to KCTA 1-1, 1-2 ("By statute, the TVA has plenary authority over all rates and services of the 10 utilities that purchase and distribute the electricity it

2015 Depo. of E. Glover, Jr. ("Glover Depo."), true and accurate excerpts of which are attached hereto as Ex. 6, p. 7:7-14 (agreeing that the TVA has plenary authority over the TVA Cooperatives); March 12, 2015 Depo. of David Smart ("Smart Depo."), true and accurate excerpts of which are attached hereto as Ex. 7, pp. 17:22-18:11 ("TVA is our complete rate regulator," which includes regulating pole attachment rates); March 13, 2015 Depo. of Paul Thompson ("Thompson Depo."), true and accurate excerpts of which are attached hereto as Ex. 8, p. 13:6-19 (TVA regulates all rates, including "our pole attachment rates").)

In decades of orders and correspondence, the Commission and Commission staff have also recognized the TVA's exclusive authority over cooperatives receiving power from the TVA. *See, e.g.*, May 11, 2007 Order, *In the Matter of an Investigation Into East Kentucky Power Coop., Inc.'s Continued Need for Certified Generation*, Ky. P.S.C. Case No. 2006-00564 ("TVA is not subject to the Commission's regulatory jurisdiction").[4] In fact, the Commission has not exerted any authority "over the TVA Cooperatives since 1979 when the United States District

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generates."); Pennyrile Rural Elec. Coop. Corp.'s Responses to KCTA 1-1, 1-2 (same); Tri-County Elec. Membership Corp.'s Responses to KCTA 1-1, 1-2 (same); Warren Rural Elec. Coop. Corp.'s Responses to KCTA 1-1, 1-2 (same); West Kentucky Rural Elec. Coop. Corp.'s Responses to KCTA 1-1, 1-2 (same). True and accurate copies of these data request responses are attached hereto as Ex. 5.

[4] *See also, e.g.*, December 20, 2001 Order, *In the Matter of a Review of the Adequacy of Kentucky's Generation Capacity and Transmission System*, Ky. P.S.C. Admin. Case No. 387 (recognizing "that the Commission's jurisdiction does not extend to electric systems owned by cities or supplied by the Tennessee Valley Authority"); Sep. 19, 2005 Order, *In the Matter of Application of Easy Kentucky Power Coop., Inc. for a Certificate of Public Convenience and Necessity for the Construction of a 161kV Transmission Project in Barren, Warren, Butler, and Ohio Counties, Ky*, Ky. P.S.C. Case No. 2005-00207 (finding that Warren Rural Electric Cooperative Corporation, a TVA Cooperative, is not "subject to the Commission's jurisdiction") (*citing* June 10, 2005 Order, *In the Matter of the Application of East Kentucky Power Coop., Inc. for a Certificate of Public Convenience and Necessity, and a Site Compatibility Certificate, for the Construction of a 278MW (Nominal) Circulating Fluidized Bed Coal Fired Unit in Mason County, Kentucky*, Ky. P.S.C. Case No. 2004-00423 ("The Commission finds that Warren RECC currently purchases its electric power supply from TVA and, as a consequence, Warren RECC's rates are subject to the exclusive jurisdiction of the TVA, not this Commission.")); Sep. 15, 2005 Order, *In the Matter of an Assessment of Kentucky's Electric Generation, Transmission and Distribution Needs*, Ky. P.S.C. Admin. Case No. 2005-00090, p. 25 (noting that there are "five TVA supplied distribution cooperatives, which provide retail electric service that are not subject to the Commission's jurisdiction"); *id.* at 54-55 (referring to municipal electric systems, the TVA, and the TVA Cooperatives: "None of these suppliers are regulated by the Commission."); *id.* at 56 (referring to "distribution systems served" by the TVA as "nonjurisdictional electric utilities"); *id.* at 74 ("TVA is not jurisdictional to the Commission"); *id.* at 82-82 ("Currently, there are five non-jurisdictional distribution cooperatives operating in Kentucky that purchase their power from TVA.").

Court for the Western District of Kentucky found that Commission regulation of the TVA Cooperatives' retail electricity rates was preempted," and it has never once regulated the TVA Cooperatives' pole attachment rates. Initial Order at p. 2 (*citing TVA v. Energy Regulatory Comm'n of Kentucky*, Case No. 79-0009-P (W.D. Ky. Sep. 25, 1979), a true and accurate copy of which is attached hereto as Ex. 9 (preempting Commission regulation of TVA Cooperative fuel adjustment mechanism). Moreover, for as long as the Commission has regulated pole attachment rates for non-TVA cooperatives, "no one has asserted, as KCTA does now, that the Commission has jurisdiction to regulate the pole attachments of the TVA Cooperatives." *Id.*

In 1983, the Commission found that 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 TVA." June 27, 1983 Order, *In the Matter of the Application of Hickman-Fulton Counties Rural Elec. Coop. Corp. 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*, Ky. P.S.C. Case No. 8858, a true and accurate copy of which is attached hereto as Ex. 10 ("Hickman-Fulton Order") (*citing TVA v. Energy Regulatory Comm'n of Kentucky*, Ex. 9). In its order, the Commission explained that it had deferred to the TVA's broad interpretation of the United States District Court's holding:

> 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.

Id. Similarly, in a letter to the Joint Interim Committee on Energy, the Commission's General Counsel explained that the Commission would not be exercising jurisdiction over "the rates,

service, or construction of . . . utilities operating in Kentucky which purchase their electricity from the TVA" because "[f]ederal rather than state law governs the service as well as the rates of all TVA-supplied utilities." (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), a true and accurate copy of which is attached hereto as Ex. 11.) That same year, the Commission's Executive Director advised an electric utility that "no aspect of a TVA distribution cooperative's operations [are] subject to [the Commission's] jurisdiction." (Letter from Don Mills, Executive Director, Public Service Commission to Albert P. Marks, Counsel to Cumberland Electric Membership Corp. (Aug. 27, 1993), a true and accurate copy of which is attached hereto as Ex. 12.)

The KCTA immediately and explicitly acknowledged the TVA's authority in its Petition: "The TVA is specifically authorized under federal law to set the electric rates of the utilities to which it supplies power." (Petition at ¶ 11.) It also later admitted that "[t]here is no doubt that the TVA regulates the retail electric rates of the TVA Coops." (KCTA Reply at 1.)

Accordingly, there is no genuine issue of material fact that the TVA, not the Commission, regulates the TVA Cooperatives' electric rates.

B. THE TVA COOPERATIVES' POLE ATTACHMENT RATES DIRECTLY IMPACT THEIR ELECTRIC SERVICE RATES.

The undisputed nature of the TVA's exclusive jurisdiction over the TVA Cooperatives' electric rates is particularly important because any adjustment to the TVA Cooperatives' pole attachment rates affects the rates that undisputedly are subject to the TVA's exclusive jurisdiction.

The TVA stressed this point in its letters to the Commission. Mr. Johnson stated that "[a]ny Commission activity with respect to the fees charged by a TVA distributor for the use of

electric system assets [(such as poles)] will directly affect the distributor's cost of service." (Ltr. from W. Johnson to J. Derouen, Ex. 1; *see also* Ltr. from C. Herron to J. Derouen, Ex. 4 ("[t]he revenue received from pole attachment fees is also considered in TVA's assessment of each distributor's revenue requirement").) The TVA Cooperatives explained this process in more detail:

> The retail rates approved by the TVA are calculated based on [the TVA Cooperatives'] revenue requirement. TVA's assessment of the revenue requirement takes into account all revenues, including those for pole attachment services. Any change in [the TVA Cooperatives'] pole attachment revenues will necessarily change its revenue requirement and thus directly impact the retail rate set by the TVA.[5]

The Commission has already recognized that "[p]ole attachment rates are a component in establishing retail rates," and that "[a]ny changes in pole attachment rates would alter the retail rates." Order Denying Petition at 8. Courts have similarly recognized that "[r]evenue from pole attachment agreements is a part of the income of the regulated utilities, and it is a natural activity for the [rate regulator] to consider these pole rental rates when it considers the overall fairness of rates and services for the consumers." *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393, 396 (Ky. 1983).

The KCTA can introduce no evidence to the contrary. Accordingly, there is no genuine issue of material fact that the TVA Cooperatives' pole attachment rates directly affect their electric service rates, which are under the undisputed and exclusive jurisdiction of the TVA.

[5] Hickman-Fulton Counties Rural Elec. Coop. Corp.'s Response to KCTA 1-3; Pennyrile Rural Elec. Coop. Corp.'s Response to KCTA 1-3; Tri-County Elec. Membership Corp.'s Response to KCTA 1-3; Warren Rural Elec. Coop. Corp.'s Response to KCTA 1-3; West Kentucky Rural Elec. Coop. Corp.'s Response to KCTA 1-3. True and accurate copies of these data request responses are attached hereto as Ex. 13.

C. THE TVA RETAINS CONTROL OVER THE TVA COOPERATIVES' POLE ATTACHMENT RATES.

It is undisputed that the TVA has and exercises authority over the TVA Cooperatives' electric rates generally. The undisputed facts also establish that the TVA maintains control over the pole attachment rates specifically.

In its agreements with the TVA Cooperatives, the TVA retained a say in the TVA Cooperatives' use of property such as utility poles:

> In the interest of efficiency and economy, Cooperative may use property and personnel jointly for the electric system and other operations, subject to agreement between Cooperative and TVA as to appropriate allocations, based on direction of effort, relative use, or similar standards, of any and all joint investments, salaries and other expenses, funds, or use of property or facilities.

(Power Contract Between TVA and Pennyrile Rural Elec. Coop. Corp., a true and accurate copy of which is attached hereto as Ex 14, Schedule of Terms and Conditions, 1(a).) This provision is consistent with the TVA's statutory 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 for carrying out the purposes" of the TVA Act. 16 U.S.C. § 831i.

In addition, the TVA Cooperatives submit annual reports to the TVA for regulatory purposes; those reports include an accounting of all operating revenue and expenses. (*See, e.g.*, Annual Reports of Pennyrile Rural Elec. Coop. Corp., Years Ending 2010 Through 2013, a true and accurate copy of which is attached hereto as Ex. 15.) As explained by the TVA Cooperatives' witnesses, the reported revenues and expenses incorporate all pole attachment fees:

> **A: . . . the line entitled rent from electric property, that's the line on which all of our rents would be aggregated under.**
>
> Q: So, this is – That line aggregates rents including pole attachment rents?
>
> **A: Yes.**

(March 13, 2015 Depo. of Warren Ramsey ("Ramsey Depo."), true and accurate excerpts of which are attached hereto as Ex. 16, at p. 36:7-17; s*ee also* Smart Depo., Ex. 7, at p. 61:16-19; Thompson Depo., Ex. 8, at p. 43:2-7; March 11, 2015 Depo. of Debra Weatherford ("Weatherford Depo."), true and accurate excerpts of which are attached hereto as Ex. 17, p. 30:5-14.)

Moreover, the TVA Cooperatives recognize they have an ongoing duty to provide any additional information requested by the TVA. As Mr. Glover testified:

> **A: If they want more questions, they'll ask us.**
>
> Q: Okay. But putting aside their ability to ask questions isn't it true that Pennyrile has not asked TVA to approve the rate that Pennyrile pays to other parties to attach to their poles?
>
> **A: Nor do we approve – ask for approval for any other services that we – we are involved in, but it falls under the TVA as the regulator of our organization, if something is not suiting to them, they'll tell us to change it. I assure you.**

(Glover Depo., Ex. 6, at p. 60:3-16.)

In short, the TVA Cooperatives provide financial data – including pole attachment fee data – to the TVA on a regular basis for regulatory purposes, and the TVA has the authority to demand additional information in order to exercise its statutory authority "to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes" of the TVA Act. 16 U.S.C. § 831i. The KCTA can introduce no evidence to the contrary. Accordingly, there is no genuine issue of material fact that the TVA's agreements memorialize the TVA's authority to oversee its members' use of electric system property, such as poles. There is likewise no genuine issue of material fact that the TVA Cooperatives provide the TVA with financial information regarding use of those electric system assets, including poles.

V. LEGAL STANDARD

In resolving motions for summary judgment, the Commission is "guided by Civil Rule 56 and the principles established by the courts resolving motions for summary judgment." March 23, 2005 Order, *In the Matter of: Ballard Rural Telephone Cooperative Corp., Inc. v. Jackson Purchase Energy Corp*., Ky. P.S.C. Case No. 2004-00036 at *11. Civil Rule 56 provides that summary judgment "shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03.

The Kentucky Supreme Court held that "the proper function for summary judgment . . . is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr*., 807 S.W.2d 476, 482 (Ky. 1991); s*ee also Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992) ("impossible is used [in *Steelvest*] in a practical sense, not in an absolute sense."). Thus, summary judgment is appropriate "where the record shows that there is no real issue as to any material fact with respect to a particular claim or defense thereto." *Continental Casualty Co. v. Belknap Hardware and Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1995); *see also Steelvest*, 807 S.W.2d at 482.

No genuine issues of material fact exist in this matter. Accordingly, the TVA Cooperatives are entitled to summary judgment as a matter of law.

VI. ARGUMENT & ANALYSIS

Only one issue is before the Commission on rehearing: "whether or not TVA has or exercises any jurisdiction, be it through the establishment of a ratemaking formula, review, or

simply oversight responsibility in connection with ratemaking, over the pole attachment rates of the TVA cooperatives." Order Granting Rehearing at 6. The TVA explicitly stated that its "oversight extends to the regulation of 'the use of electric system assets [(such as poles)] of the distributors of TVA power.'" (Ltr. from W. Johnson to J. Derouen, Ex. 1; *see also* Ltr. from C. Herron to J. Derouen, Ex. 4 (TVA "does have oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA"). The Commission should defer to that determination.

Furthermore, the law and the undisputed facts establish that the Commission is preempted from regulating the TVA Cooperatives' pole attachment rates and that the TVA does in fact have oversight responsibility over those rates. The KCTA has introduced no evidence to create a genuine issue as to any material facts, nor can it do so.[6]

The doctrine of field preemption bars Commission jurisdiction over the TVA Cooperatives' pole attachment rates because Congress granted the TVA complete authority over the rates and services of all cooperatives that purchase and resell electricity from the TVA.

The doctrine of conflict preemption also bars Commission jurisdiction over the TVA Cooperatives' pole attachment rates because the TVA exerts oversight responsibility over the TVA Cooperatives' pole attachment rates, and because any regulation of pole attachment rates affects rates exclusively under the jurisdiction of the TVA.

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[6] Whether the TVA's practices comport with the KCTA's or the Commission's views regarding appropriate oversight is irrelevant for purposes of the limited jurisdictional question at issue here. It is sufficient as a matter of law that the TVA has the relevant authority. The Commission has already "specifically 'reject[ed] KCTA's assertion that it is relevant and necessary for the Commission to determine whether TVA regulates pole attachment rates using the same or a similar rate methodology as we do . . . .'" Discovery Order at p. 15 (*quoting* Order on Rehearing at p. 4). Indeed, even an absence of specific historical TVA practices regarding pole attachment rates and services would not be determinative. *See City of Cleveland, Ohio v. FERC*, 773 F.2d 1368, 1370 (D.C. Cir. 1985) (finding 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") (emphasis in original); *see also Bekaert Corp.*, Ex. 2, at *14 (holding that the manner in which a TVA distributor calculates its resale rate is "inextricably intertwined" with TVA's exclusive ratemaking authority, relying in part on a prior holding that "the TVA Act did not even require action by TVA if there was evidence electricity was not being provided at the lowest possible rates to customers" because "there was no language in the TVA Act requiring TVA to enforce its contracts") (*citing Matthews v. Town of Greenville*, 1991 U.S. App. LEXIS 9453 (6th Cir. 1991).

The "KCTA bears a considerable burden to prove its claim that the Commission does have jurisdiction to regulate pole attachments of TVA Cooperatives." Initial Order at 2. The KCTA cannot meet its "considerable burden," and the TVA Cooperatives respectfully request that the Commission grant this motion and deny the Petition.

A. THE COMMISSION SHOULD DEFER TO THE TVA'S DETERMINATION OF THE SCOPE OF ITS OWN JURISDICTION.

The TVA advised that it possesses exclusive jurisdiction over the TVA Cooperatives' electric rates and services. The Commission should defer to that determination.

It is a basic principle of administrative law that administrative agencies are afforded deference when interpreting statutes they are charged with administering. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *see also, e.g., McCarthy v. Middle Tennessee Elec. Membership Corp.*, 466 F.3d 399, 406 (6th Cir. 2006) (recognizing the TVA as an administrative agency). This deference applies equally "to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers." *City of Arlington v FCC*, 133 S. Ct. 1863, 1871 (2013) (*citing, e.g., City of New York v. FCC*, 486 U.S. 57, 64 (1988) (deferring to the FCC's assertion that its regulatory authority extends to preempting conflicting state rules); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (same));[7] *see also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (holding that the

[7] *Also citing* 1 R. Pierce, Administrative Law Treatise §3.5, p. 187 (2010); *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830, n. 7 (1984) (no "exception exists to the normal [deferential] standard of review" for "'jurisdictional or legal question[s] concerning the coverage'" of an Act); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) ("We have never . . . held that such an exception [for issues of statutory jurisdiction] exists to the normal standard of review . . .; indeed, we have not hesitated to defer . . ."); *United States v. Eurodif S. A.*, 555 U.S. 305, 316 (2009) (deferring to Commerce Department's determination that its authority to seek antidumping duties extended to uranium imported under contracts for enrichment services); *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (deferring to Interstate Commerce Commission's view that courts, not the Commission, possessed initial jurisdiction with respect to the award of reparations for unreasonable shipping charges); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123-124, 131 (1975) (deferring to Army Corps of Engineers' assertion that its permitting authority over discharges into water extended to freshwater wetlands adjacent to covered waters).

FCC's interpretation and application of the Pole Attachments Act "to assert jurisdiction over these attachments [at issue in the litigation] is reasonable and entitled to our deference").

Here, the question presented by the Commission is whether the TVA "has or exercises" jurisdiction or "oversight responsibility" over the TVA Cooperatives' pole attachments rates. Order Granting Rehearing, p. 6 (emphasis added). The TVA has explicitly answered this question: "TVA does have oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA power . . . ." (Ltr. from C. Herron to J. Derouen, Ex. 4; *see also* Ltr. from W. Johnson to J. Derouen, Ex. 1 (TVA's "oversight extends to regulation of 'the use of electric system assets [(such as poles)] of the distributors of TVA power'").) In fact, the TVA's jurisdiction over rates is so complete that not even a federal court can second-guess the agency's ratemaking authority. As the Sixth Circuit has explained, "[a] long line of precedent exists establishing that TVA rates are not judicially reviewable." *McCarthy v. Middle Tennessee Elec. Membership Corp.*, 466 F.3d 399, 406 (6th Cir. 2006).[8]

The TVA has repeatedly described itself as having "under federal law the **exclusive** authority to regulate retail rates and service practices of distributors of TVA power." (Ltr. from W. Johnson to J. Derouen, Ex. 1 (emphasis added); *see also* Ltr. from C. Herron to the TVA Cooperatives, Ex. 3 ("TVA is the **exclusive** retail rate regulator for the distributors of TVA power" (emphasis added)); Ltr. from C. Herron to J. Derouen, Ex. 4 (same).) Furthermore, the

[8] *Citing, e.g., 4-County Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132, 1137 (S.D. Miss. 1996) ("Plaintiff acknowledges that by virtue of TVA's having been granted by Congress full discretionary authority with respect to setting rates, TVA's rate-making decisions are beyond the scope of judicial review under the APA"); *Carborundum Co. v. TVA*, 521 F. Supp. 590, 593 (E.D. Tenn. 1981) (noting the "well established legal princip[le] that the setting of power rates under the Tennessee Valley Authority Act is not subject to judicial review"); *Mobil Oil Corp. v. TVA*, 387 F. Supp. 498, 506-07 (N.D. Ala. 1974 ("[T]he judgment or expertise of the Authority in setting the electric power rates is a matter committed to its discretion by law and is not subject to judicial review."); *Ferguson v. Elec. Power Bd. of Chattanooga, Tenn.*, 378 F. Supp. 787, 789 (E.D. Tenn. 1974) ("[T]he matter of rate setting under the Tennessee Valley Authority Act is not subject to judicial review."). *See also Bekaert Corp.*, Ex. 2 ("TVA's statutorily sanctioned authority to set resale rates is limited only by the provision that they not violate the purposes of the TVA Act, and thus, in the absence of a clear violation, rates set by TVA are not subject to judicial review.").

TVA has explicitly addressed its oversight over pole attachment rates, stating that (i) it considers "revenue received from pole attachment fees" when calculating the TVA Cooperatives' revenue requirements for rate regulation purposes, and (ii) "it is TVA's position that TVA's oversight over the pole attachment rates of these distributors is sufficient." (Ltr. from C. Herron to J. Derouen, Ex. 4; *see also* Ltr. from W. Johnson to J. Derouen, Ex. 1 ("TVA requires each distributor to charge a pole attachment fee that ensures full cost recovery").)

This is not idle talk; it is a determination from the agency charged by Congress with overseeing the TVA Cooperatives. Consequently, it is a determination to which the Commission owes administrative deference. *See, e.g.*, *City of Arlington*, 133 S. Ct. at 1871. As the Sixth Circuit has explained, "[t]he construction of a statute by those agencies charged with its execution should be followed unless there compelling indications that it is wrong, especially when Congress with knowledge of the facts has consistently taken no steps to prohibit or curtail the administrative actions; but has approved them." *Young v. TVA*, 606 F.2d 143, 145 (6th Cir. 1979).[9] There are no "compelling indications" here that the TVA is incorrect; indeed, the law, the TVA's determination, the TVA Cooperatives' understanding, and the Commission's longstanding practices are all consistent.

It would be inappropriate and inconsistent with significant legal precedent for the Commission to disregard the TVA's statement of its own jurisdiction and the longstanding practices of both the Commission and the TVA. For this reason, the Commission should grant this motion and deny the KCTA's Petition.

[9] *See also id.* ("a court should give great weight to the frequent, consistent, and long standing construction of a statute by an agency charged with its administration") (*citing, e.g., Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *E. I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977); *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-10 (1975); *NLRB v. Boeing Co.*, 412 U.S. 67, 74-75 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

B. THE COMMISSION IS PREEMPTED FROM EXERCISING JURISDICTION OVER THE TVA COOPERATIVES' POLE ATTACHMENT RATES.

The Commission must also deny KCTA's Petition because the remedy it seeks is preempted by federal law.

Preemption is "a question of law" based on the Supremacy Clause of the United States Constitution. *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 429 (6th Cir. 2009); *Nye v. CSX Transp., Inc.,* 437 F.3d 556, 563 (6th Cir. 2006); *State Farm Bank v. Reardon*, 539 F.3d 336, 341 (6th Cir. 2008).[10]

The Supreme Court has recognized at least two types of implied preemption: field preemption and conflict preemption. *See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992). Field preemption is inferred "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id*. Conflict preemption occurs where compliance with both federal and state regulation is impossible, or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*.

Numerous judicial and administrative decisions have held that state regulators are preempted from regulating TVA-affiliated cooperatives, or have otherwise affirmed TVA authority, in a variety of contexts, including rates,[11] services,[12] borrowing,[13] patronage

[10] For this reason, and the other reasons set forth in this motion, the TVA Cooperatives continue to believe that the issue before the Commission is a purely legal one.

[11] *TVA v. Energy Regulatory Comm'n of Kentucky*, Ex. 9 (Commission preempted from regulating fuel adjustment mechanisms of cooperatives supplied by the TVA because a "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.").

[12] *See* Hickman-Fulton Order, Ex. 10 (deferring to the TVA's determination that the 1979 W.D. Ky. order preempted Commission regulation over the TVA Cooperatives' rates and services).

[13] *See West Ky. RECC v. Energy Reg. Comm'n*, Case No. 80-CI-1747 (Franklin Cir. Ct. Nov. 12, 1982), a true and accurate copy of which is attached hereto as Ex. 18 (REA controls "feasibility of loan approval," and TVA supervises and controls "rates adequate to assure financial soundness").

distribution,[14] collective bargaining agreements,[15] administration of a "Growth Credit Program,"[16] entering into contracts,[17] and even the "methods by which a TVA energy distributor calculates a resale rate schedule . . . pursuant to a power distribution contract."[18]

In this case, both field preemption and conflict preemption bar the Commission from asserting jurisdiction over the TVA Cooperatives' pole attachment rates.

1. The Doctrine of Field Preemption Bars Commission Jurisdiction Over the TVA Cooperatives' Pole Attachment Rates.

Congress granted the TVA exclusive authority to regulate the rates and services of distributors of TVA power like the TVA Cooperatives. Accordingly, Congress has occupied the field, and the doctrine of field preemption bars the Commission from regulating the TVA Cooperatives' pole attachment rates.[19]

Congress's intent to fully preempt state law "may be inferred" in multiple ways. *See, e.g., Self-Insurance Inst. of Am., Inc. v. Snyder* 761 F.3d 631, 637 (6th Cir. 2014) (*citing Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). In some circumstances, "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that

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[14] *McCarthy v. Middle Tennessee Elec. Membership Corp.*, 466 F.3d 399, 407 (6th Cir. 2006) ("contractual provisions that prevent the Cooperative from distributing patronage refunds were created within the TVA's authority to set 'resale rate schedules'"; therefore, "[t]o the extent that Tennessee law imposes additional constraints on the TVA's authority, it is preempted by the TVA Act's express grant of discretion and the APA's prohibition on judicial review").

[15] *See Int'l Ass'n of Machinists and Aerospace Workers v. TVA*, 108 F.3d 658, 663-64 (6th Cir. 1997) ("federal law governs the scope of the duties of the TVA and its employees' unions under collective bargaining agreements," despite no express preemption language in the statute) (*citing, e.g., Bowman v. TVA*, 744 F.2d 1207 (6th Cir. 1984); *Hester v. Int'l Union of Operating Eng'rs*, 941 F.2d 1574, 1580 (11th Cir. 1991)).

[16] *See 4-County Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132, 1138 (S.D. Miss. 1996).

[17] *See Hoke Co., Inc. v. TVA*, 854 F.2d 820, 825-26 (6th Cir. 1988).

[18] *See Bekaert Corp.*, Ex. 2, at *12.

[19] The KCTA has repeatedly and falsely asserted in the past that the "parties agree" that the question presented is one of conflict preemption only. (*See, e.g.*, KCTA Reply at p. 5.) The TVA Cooperatives have argued consistently that field preemption applies and prohibits the Commission from asserting any jurisdiction over their pole attachment rates. Furthermore, although the Tennessee Attorney General recently issued an opinion related to state jurisdiction over pole attachment rates, that opinion failed to account for the doctrine of field preemption, and it should therefore be disregarded. *See* Opinion No. 14-20, Office of Attorney General, State of Tennessee (Feb. 19, 2014). Moreover, and as discussed in more detail in Section VI.B.2, Commission regulation of the TVA Cooperatives' pole attachment rates is still preempted under the doctrine of conflict preemption.

Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (*citing Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569 (1919); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942)). In other circumstances, the federal law "may touch 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.* (*citing Hines v. Davidowitz*, 312 U.S. 52 (1941)). Both circumstances apply here.

Congress granted the TVA broad authority and discretion to "provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of [the TVA] Act." 16 U.S.C. § 831i. This grant of authority "must be liberally construed to carry out the purposes of Congress which are, Inter alia, to promote interstate commerce and the public welfare." *Young v. TVA*, 606 F.2d 143, 145 (6th Cir. 1979) (*citing* 16 U.S.C. § 831dd ("This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, . . . and promote interstate commerce and the general welfare"). As recognized by the courts, the "TVA has enjoyed an independence possessed by perhaps no other federal agency," as reflected by the breadth of its discretion and, as discussed in Section VI.A, the lack of judicial oversight over its ratemaking determinations. *Dean v. TVA*, 668 F. Supp. 646, 652, n. 1 (E.D. Tenn. 1987).

Unsurprisingly, multiple courts have interpreted Congress's grant of ratemaking authority to the TVA broadly, holding that "the judgment or expertise of the Authority in setting the electric power rates is a matter committed to its discretion by law." *Mobil Oil Corp. v. TVA*, 387 F. Supp. 498, 506-07 (N.D. Ala. 1974); *see also 4-County Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132, 1137 (S.D. Miss. 1996) (referring to the "TVA's having been granted by Congress

full discretionary authority with respect to setting rates"); *Bekaert Corp.*, Ex. 2 ("Congress entrusted and committed the act of fixing rates that achieve this balance to the judgment and discretion of the TVA Board."). The broad language of the TVA Act, including the direct order from Congress to "liberally construe" the scope of the TVA's jurisdiction and the consistent interpretation of the TVA Act in the courts, indicates a regulatory scheme "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice*, 331 U.S. at 230.

This conclusion is further supported by the TVA's own unambiguous determination that it possesses exclusive oversight responsibility for all of the TVA Cooperatives' electric rates, including their pole attachment rates. The TVA's determination echoes its longstanding power to "supplant state regulation as inadequate and unsatisfactory." *TVA v. Tennessee Electric Power Co.*, 90 F.2d 885, 890 (6th Cir. 1937). Similarly, the TVA Cooperatives and the Commission have historically viewed the TVA's jurisdiction over its cooperatives as plenary – precisely the kind of "pervasive" authority that makes field preemption appropriate. (*See* Section IV.A, *supra*.) In 1993, the Commission's Executive Director stated in correspondence with an electric cooperative that "no aspect of a TVA distribution cooperative's operations [are] subject to [the Commission's] jurisdiction." (Ltr. from D. Mills to A. Marks, Ex. 12.) The Commission also concluded that "federal rather than state law governs the service as well as the rates of all TVA-supplied utilities." (Ltr. from W. Sawyer to W. Quinlan, Ex. 11.) S*ee also* Hickman-Fulton Order, Ex. 10 (agreeing with TVA's interpretation that a "1979 federal court decision [preempting Commission jurisdiction] would apply to service as well as rates"); n. 4, *supra*. These positions are consistent with the Commission's recent findings in this proceeding, prior to rehearing, that "[t]he TVA has a 'comprehensive, top to bottom regulatory scheme' that occupies

the entire field." Order Denying Petition at 8. The TVA Cooperatives have adopted a similar view of the TVA's authority as plenary and have described the TVA as their "complete rate regulator." (*See, e.g.*, Glover Depo., Ex. 6, p. 7:7-14 (agreeing that the TVA has plenary authority over the TVA Cooperatives); Smart Depo., Ex. 7, pp. 17:22-18:11 ("TVA is our complete rate regulator").

In the face of decades of practices and legal interpretations and the conclusions of the Commission and the TVA itself, the KCTA can provide no evidence to create a genuine issue of material fact on this issue. For these reasons, the "scheme of federal regulation" at issue here is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *Rice*, 331 U.S. at 230, and the doctrine of field preemption prohibits the Commission from exercising jurisdiction over the TVA Cooperatives' pole attachment rates.

There is also a second reason to conclude that field preemption prohibits the Commission from regulating the TVA Cooperatives' pole attachment rates. Specifically, the TVA Act "touch[es] 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." *Rice*, 331 U.S. at 230.

The TVA provides electric power to "millions of residential, commercial, industrial and governmental customers" covering an area of "about 80,000 square miles, which includes most of Tennessee, northern Alabama, northeastern Mississippi, southwestern Kentucky and parts of Georgia, North Carolina, and Virginia . . . ." *4-County Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132 (S.D. Miss. 1996). Within that territory, the TVA is charged by Congress with broad authority to "provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, . . . and promote interstate commerce and the general welfare" 16 U.S.C. § 831dd. In short, the TVA is, by its very nature, a complicated

interstate enterprise with objectives that require the TVA's expert, and unimpeded, regulation. The federal interest in ensuring that appropriate, uniform rules apply to all TVA customers across multiple states is so dominant that it "preclude[s] enforcement of state laws on the same subject." *Rice*, 331 U.S. at 230.[20]

For these reasons, the Commission should affirm its original finding that "Congress has occupied the field of regulating the TVA Cooperatives," and that the Commission is preempted from regulating the TVA Cooperatives' pole attachment rates. Order Denying Petition at 8.

2. The Doctrine of Conflict Preemption Prohibits Commission Jurisdiction Over the TVA Cooperatives' Pole Attachment Rates.

Separate and independent from the field preemption doctrine, the Commission is also preempted from regulating the TVA Cooperatives' pole attachment rates because exerting such authority would conflict with the TVA's regulatory authority. Indeed, the TVA has already expressed concern to the Commission regarding the potential for direct regulatory conflict. (Ltr. from C. Herron to J. Derouen, Ex. 4 ("additional regulation by the Commission could potentially contravene TVA's oversight in this area").

A state law conflicts with federal law if "the state requirement is an obstacle to 'the full purposes and objectives of Congress.'" *Fulgenzi v. PLIVA, Inc.*, 711 F.3d 578, 584 (6th Cir. 2013) (*citing Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Here, as discussed below, any regulation of the

[20] Furthermore, it bears noting that regulation of pole attachments is not a traditional police power reserved to the states as the KCTA has claimed in the past. (*See, e.g.*, KCTA Reply at 4-5.) The Pole Attachment Act of 1978 granted the Federal Communications Commission authority to "regulate the rates, terms, and conditions for pole attachments," but it exempted cooperatives and municipalities from its provisions. *See* 47 U.S.C. § 224(a)(1), (b)(1). State utility commissions were then only permitted to regulate pole attachments upon certification to the FCC, as permitted in the Act. 47 U.S.C. § 224(c). The Commission made that certification in 1981. Initial Order at 2. Even so, it has not exercised any jurisdiction over the TVA Cooperatives since 1979, and therefore has never regulated the TVA Cooperatives' pole attachments. *Id.* Consequently, it is not true that pole attachment regulation is a traditional police power reserved to the states. To the contrary, regulation of pole attachments is a unique, federal subject matter.

TVA Cooperatives' pole attachments by the Commission would be a direct conflict with the TVA's regulation.

First, the record demonstrates that the TVA does, in fact, exert regulatory oversight over the TVA Cooperatives' pole attachment rates. Therefore, any regulation of pole attachment rates by the Commission, as requested by the KCTA, would directly overlap and conflict with the TVA's oversight.

Furthermore, the TVA's CEO and President advised the Commission in this proceeding that the TVA's "oversight extends to the regulation of 'the use of electric system assets [(such as poles)] of the distributors of TVA power.'" (Ltr. From W. Johnson to J. Derouen, Ex. 1; *see also* Ltr. from C. Herron to J. Derouen, Ex. 4 (TVA has "oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA power.").) The TVA's contracts memorialize that principle, providing that the TVA Cooperatives' use of property or facilities such as utility poles is "subject to agreement between Cooperative and TVA . . . ." (*See* Power Contract, Ex 14, Schedule of Terms and Conditions, 1(a).) In addition, the TVA Cooperatives submit annual reports to the TVA which contain an accounting of all operating revenue and expenses, including all pole attachment fees, and they have an ongoing obligation to provide the TVA with other financial information upon request. (*See, e.g.*, Annual Reports, Ex. 15; Ramsey Depo., Ex. 16, at p. 36:7-17; Smart Depo., Ex. 7, at p. 61:16-19; Thompson Depo., Ex. 8, at p. 43:2-7; Weatherford Depo., Ex. 17, p. 30:5-14; Glover Depo., Ex. 6, at p. 60:3-16.) Finally, the TVA uses the information provided by the TVA Cooperatives, including information reflecting pole attachment fees, to calculate the TVA Cooperatives' revenue requirement for ratemaking purposes. (*See* Ltr. from W. Johnson to J. Derouen, Ex. 1 ("TVA requires each distributor to charge a pole attachment fee that ensures full cost recovery"); Ltr. from C. Herron to J. Derouen,

Ex. 4 ("The revenue received from pole attachment fees is also considered in TVA's assessment of each distributor's revenue requirements.").)[21]

Consequently, because the TVA actually exerts regulatory oversight over the TVA Cooperatives' pole attachment rates, any attempt by the Commission to regulate those same rates would be "an obstacle to 'the full purposes and objectives of Congress'" and is therefore preempted by federal law. *Fulgenzi*, 711 F.3d at 584.

Second, the record demonstrates that changes to the TVA Cooperatives' pole attachment rates would affect the electric service rates subject to the undisputedly exclusive jurisdiction of the TVA. Therefore, any regulation of pole attachment rates by the Commission, as requested by the KCTA, would directly conflict with the TVA's ratemaking authority.

It is undisputed that the TVA has exclusive regulatory authority over the TVA Cooperatives' electric service rates. *See* Section IV.A, *supra*. The KCTA even admits that the TVA "is specifically authorized under federal law to set the electric rates of the utilities to which it supplies power." (Petition at ¶ 11; *see also* KCTA Reply at 1 ("[t]here is no doubt that the TVA regulates the retail electric rates of the TVA Coops.").) The undisputed facts also confirm the Commission's initial finding that "[p]ole attachment rates are a component in establishing retail rates," and that "[a]ny changes in pole attachment rates would alter the retail rates." Order Denying Petition at 8; *see also id.* at 9 ("Any tinkering that we would do to pole attachment rates would necessarily impact retail rates, a direct conflict between federal and state law."). *See also* Marcy 27, 2015 Order, *In the Matter of Ky. Cable Telecomm. Ass'n v. Louisville Gas and Elec.*

[21] This analysis is reinforced by the Supreme Court of Kentucky's holding that "rates charged for pole attachments are 'rates' within the meaning of KRS 278.040, and . . . the pole attachment itself is a 'service' within the meaning of the statute." *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393, 396 (Ky. 1983). The TVA Cooperatives' rates and services have long been found to lie outside of the Commission's jurisdiction. *See TVA v. Energy Regulatory Comm'n of Kentucky*, Ex. 9 (Commission jurisdiction over TVA Cooperatives' rates preempted); Hickman-Fulton Order, Ex. 10 (deferring to the TVA's determination that the District Court's order preempted Commission regulation over the TVA Cooperatives' rates and services).

Co., Ky. P.S.C. Case No. 2014-00025 (dismissing the KCTA's complaints about LG&E's pole attachment rates after finding that the proper venue for those complaints is in the pending rate case). The TVA agrees that "[a]ny Commission activity with respect to the fees charged by a TVA distributor for the use of electric system assets (such as poles) will directly affect the distributor's cost of service." (Ltr. from W. Johnson to J. Derouen, Ex. 1; *see also* Ltr. from C. Herron to J. Derouen, Ex. 4 ("[t]he revenue received from pole attachment fees is also considered in TVA's assessment of each distributor's revenue requirement.").) The TVA Cooperatives also agree that "[a]ny change in [the TVA Cooperatives'] pole attachment revenues will necessarily change its revenue requirement and thus directly impact the retail rate set by the TVA." (*See* TVA Cooperatives Data Responses.)[22] Similarly, the Kentucky courts have recognized that "[r]evenue from pole attachment agreements is a part of the income of the regulated utilities, and it is a natural activity for the [rate regulator] to consider these pole rental rates when it considers the overall fairness of rates and services for the consumers." *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393, 396 (Ky. 1983). *See also* The KCTA cannot provide evidence to create a genuine dispute as to these facts.

Based on these undisputed facts, the Commission should affirm its original findings that "[a]ny changes in pole attachment rates would alter the retail rates," and that "[a]ny tinkering that [the Commission] would do to pole attachment rates would necessarily impact retail rates, a direct conflict between federal and state law." Order Denying Petition at 8-9. Consequently, because changes to pole attachment rates would affect the electric service rates under the undisputedly exclusive jurisdiction of the TVA, any attempt by the Commission to regulate pole

[22] Hickman-Fulton Counties Rural Elec. Coop. Corp.'s Response to KCTA 1-3; Pennyrile Rural Elec. Coop. Corp.'s Response to KCTA 1-3; Tri-County Elec. Membership Corp.'s Response to KCTA 1-3; Warren Rural Elec. Coop. Corp.'s Response to KCTA 1-3; West Kentucky Rural Elec. Coop. Corp.'s Response to KCTA 1-3, Ex. 13.

attachment rates would be "an obstacle to 'the full purposes and objectives of Congress'" and is therefore preempted by federal law. *Fulgenzi*, 711 F.3d at 584.

VII. CONCLUSION

Only one issue is before the Commission on rehearing: "whether or not TVA has or exercises any jurisdiction, be it through the establishment of a ratemaking formula, review, or simply oversight responsibility in connection with ratemaking, over the pole attachment rates of the TVA cooperatives." Order Granting Rehearing, p. 6. The answer is: yes, the TVA has jurisdiction, and that jurisdiction is exclusive. The KCTA cannot present evidence to raise genuine issues of material fact on this question. The Commission should defer to the TVA's interpretation of its own enabling law; moreover, any Commission regulation of the TVA Cooperatives' pole attachment rates is preempted by federal law.

Accordingly, the TVA Cooperatives respectfully request that the Commission enter summary judgment in their favor, deny the Petition, and affirm that jurisdiction to regulate the pole attachment rates of the TVA Cooperatives lies exclusively with the TVA.

Respectfully submitted,

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