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' MEMORANDUM IN OPPOSITION TO THE KCTA'S MOTION FOR SUMMARY JUDGMENT

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 and through counsel, for their joint response to the Kentucky Cable Telecommunication Association's ("KCTA") Motion for Summary Judgment (the "Motion"), hereby state as follows.

INTRODUCTION

Only one issue is before the Commission on rehearing: "whether or not [the Tennessee Valley Authority ("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") (emphases added). The law and the undisputed facts establish that the

TVA has and exercises such oversight responsibility. Any decision the Commission makes regarding the TVA Cooperatives' pole attachment rates or services would trespass upon the field of – and directly conflict with – the TVA's exclusive regulatory authority, and consequently is preempted by federal law.[1]

The KCTA disregards these facts and ignores the question presented by the Commission. Worse, the KCTA repeatedly and deliberately misstates the question posed by the Commission, probably because it knows that it cannot prevail on the actual issue at hand.[2] In twenty-four pages of argument in its Motion, not once does the KCTA argue that the TVA lacks the jurisdiction to regulate the TVA Cooperatives' pole attachment rates.

Instead, treating the Commission's pole attachment regulations as a *de facto* benchmark for the TVA, the KCTA simply argues that it believes the TVA does not regulate the TVA Cooperatives' pole attachment rates strictly enough. From that criticism, the KCTA erroneously concludes that "[w]ithout proof . . . that TVA has exercised its authority to regulate the rates, terms, and conditions of pole attachments, this Commission has an obligation to do so." (Motion at 6.)[3] The KCTA's conclusion does not respond to the issue before the Commission, it is incorrect as a matter of law, and it is based on assumptions contradicted by undisputed facts.

The law and the undisputed facts demonstrate that the TVA has exclusive jurisdiction over the TVA Cooperatives' pole attachment rates and services, and that any involvement by the Commission will intrude on the established jurisdiction of the TVA. For these reasons, as

[1] 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). Accordingly, the issue before the Commission is a purely legal one. Nevertheless, the undisputed facts support the same conclusion dictated by the law: the TVA has exclusive jurisdiction over the TVA Cooperatives' pole attachment rates, and the Commission is preempted from acting to regulate those rates.

[2] The KCTA attempts to restate the question at issue here by falsely claiming that "the Commission granted rehearing to consider whether the TVA actually exercises pole attachment jurisdiction." (Motion at 4.)

[3] Notably, this statement regarding whether the "TVA has exercised its authority to regulate the rates, terms, and conditions of pole attachments" appears to concede that the TVA does, in fact, have such authority.

discussed in more detail below, the TVA Cooperatives respectfully request that the Commission deny the KCTA's Motion.

FACTUAL BACKGROUND

The TVA is authorized by Congress "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. Pursuant to that broad authority, the "TVA has enjoyed an independence possessed by perhaps no other federal agency." *Dean v. TVA*, 668 F. Supp. 646, 652, n. 1 (E.D. Tenn. 1987) (citations omitted).

In its zealous desire to discredit the TVA's regulatory authority, the KCTA disregards the TVA's expansive powers and many other undisputed facts that establish that the TVA both has and exercises authority over the TVA Cooperatives' pole attachments. These facts include:

- After the Commission granted rehearing in this matter, the TVA President and CEO informed the Commission 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'" and that the TVA "requires each distributor to charge a pole attachment fee that ensures full cost recovery"[4];

- In response to the Commission's inquiry to the TVA, the TVA's Director of Retail Regulatory Affairs informed the Commission that the TVA has "oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA power" and that "it is TVA's position that TVA's oversight over the pole attachment rates of these distributors is sufficient"[5];

- The TVA's Director of Retail Regulatory Affairs informed the TVA Cooperatives that it regulates their pole attachment rates[6];

- The TVA Cooperatives' executives testified that the TVA has authority over their pole attachment rates[7];

[4] Ltr. from W. Johnson to J. Derouen (Feb. 14, 2014), a true and accurate copy of which is attached hereto as Ex. 1.
[5] Ltr. from C. Herron to J. Derouen (May 16, 2013), a true and accurate copy of which is attached hereto as Ex. 2.
[6] Ltrs. from C. Herron to the TVA Cooperatives (Jan. 24, 2013), true and accurate copies of which are attached hereto as Ex. 3 ("TVA requires that a distributor recover its full cost associated with the pole attachment").
[7] Hickman-Fulton Counties Rural Elec. Coop. Corp.'s Responses to KCTA 1-1, 1-2 ("By statute, the TVA has

- The TVA Cooperatives submit annual filings to the TVA that include all revenues received from rental of electric property such as utility poles[8];

- The TVA Cooperatives' executives testified that the TVA has authority to request any additional information from the TVA Cooperatives[9];

- The TVA's power contracts provide that the TVA Cooperatives' use of property or facilities such as utility poles is "subject to agreement between Cooperative and TVA"[10];

- The Kentucky Supreme Court has held 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"[11]; and

- The KCTA,[12] the Commission,[13] the TVA,[14] and the TVA Cooperatives[15] all agree that the TVA has exclusive authority over the TVA Cooperatives' rates and services.

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plenary authority over all rates and services of the 10 utilities that purchase and distribute the electricity it 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. 4. *See also* March 11, 2015 Depo. of E. Glover, Jr. ("Glover Depo."), true and accurate excerpts of which are attached hereto as Ex. 5, 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. 6, 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. 7, p. 13:6-19 (TVA regulates all rates, including "our pole attachment rates").

[8] *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. 8; March 13, 2015 Depo. of Warren Ramsey ("Ramsey Depo."), true and accurate excerpts of which are attached hereto as Ex. 9, at p. 36:7-17; Smart Depo., Ex. 6, at p. 61:16-19; Thompson Depo., Ex. 7, 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. 10, at p. 30:5-14; Glover Depo., Ex. 5, at p. 60:3-16.

[9] *See, e.g.*, Glover Depo., Ex. 5, at p. 60:3-16.

[10] *See, e.g.*, Power Contract Between TVA and Pennyrile Rural Elec. Coop. Corp., a true and accurate copy of which is attached hereto as Ex. 11, Schedule of Terms and Conditions, 1(a).

[11] *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393, 396 (Ky. 1983).

[12] Petition at ¶ 11 ("The TVA is specifically authorized under federal law to set the electric rates of the utilities to which it supplies power."); Reply of the Kentucky Cable Telecommunications Association (March 1, 2013) ("[t]here is no doubt that the TVA regulates the retail electric rates of the TVA Coops.").

[13] *See, e.g.*, Jan. 17, 2013 Order, p. 3 ("Initial Order") (finding that Commission authority over TVA Cooperatives' rates and services is preempted, and noting that the Commission has never regulated the TVA Cooperatives' pole attachment rates) (*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. 12 (preempting Commission regulation of TVA Cooperative fuel adjustment mechanism)); 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. 13 ("Hickman-Fulton Order") (agreeing with TVA's interpretation that federal preemption applies to TVA Cooperatives' "service as well as rates"); Ltr. from William M. Sawyer, General Counsel, Public Service

The KCTA makes a great show of attempting to buttress its argument with facts, *see* Motion at 5-6, but many of its allegations are misleading.[16] Moreover, the KCTA's factual allegations all relate to how the TVA chooses to regulate pole attachments, not whether the TVA "has or exercises any jurisdiction" over pole attachments. The KCTA presents no facts that demonstrate that the TVA does not have authority over the TVA Cooperatives' pole attachment rates and services – indeed, the KCTA does not even attempt to argue that point.

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. 14 ("[f]ederal rather than state law governs the service as well as the rates of all TVA-supplied utilities."); Ltr. 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. 15 ("no aspect of a TVA distribution cooperative's operations [are] subject to [the Commission's] jurisdiction."). *See also, 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"); 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 East 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.").

[14] Ltr. from W. Johnson to J. Derouen, Ex. 1 ("TVA, as a federal corporation, has under federal law the exclusive authority to regulate retail rates and service practices of distributors of TVA power."); Ltrs. from C. Herron to the TVA Cooperatives, Ex. 3 ("TVA is the exclusive retail rate regulator for the distributors of TVA power").

[15] *See* note 7, *supra*.

[16] For example, the KCTA claims that "[t]he Cooperatives do not report pole attachment expenses to TVA." (Motion at 6.) But the TVA Cooperatives submit annual filings to the TVA that include all revenues received from rental of electric property such as utility poles. (*See, e.g.*, Annual Reports, Ex. 8; Ramsey Depo., Ex. 9, at p. 36:7-17; Smart Depo., Ex. 6, at p. 61:16-19; Thompson Depo., Ex. 7, at p. 43:2-7; Weatherford Depo., Ex. 10, p. 30:5-14; Glover Depo., Ex. 5, at p. 60:3-16.) Similarly, the KCTA claims that the TVA Cooperatives' agreements "do not address pole attachment rates." (Motion at 5.) But the TVA's power contracts provide that the TVA Cooperatives' use of property or facilities such as utility poles is "subject to agreement between Cooperative and TVA." *See* note 10, *supra*.

The undisputed facts establish that the TVA has exclusive authority over the TVA Cooperatives' pole attachment rates and services. The KCTA's arguments amount to nothing more than its dissatisfaction with how the TVA chooses to exercises its regulatory authority; however, that is not a grievance the Commission has the authority to address.

LEGAL STANDARD

Civil Rule 56 provides that summary judgment is appropriate only "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).

ARGUMENT & ANALYSIS

The KCTA's Motion omits material facts that contradict its narrative, misstates the facts established by the record, and then distorts and fails to address the only question before the Commission: whether the 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 law and the undisputed facts demonstrate that the TVA has and exercises such oversight responsibility. Any decision the Commission makes regarding the TVA Cooperatives' pole attachment rates or services would trespass upon the field of – and directly conflict with –

the TVA's exclusive regulatory authority and consequently is preempted by federal law. Accordingly, the KCTA's Motion should be denied.

I. Commission regulation of the TVA Cooperatives' pole attachment rates is preempted by federal law.

A. The doctrine of field preemption bars Commission jurisdiction over the TVA Cooperatives' pole attachment rates.

The KCTA argues that "there is no field preemption" barring Commission regulation of the TVA Cooperatives' pole attachment rates; however, its analysis disregards the tremendous autonomy of the TVA over rates and services of its distributor members. Federal law preempts Commission regulation of the TVA Cooperatives' rates and services. Therefore, any decision the Commission makes regarding the TVA Cooperatives' pole attachment rates or services would impermissibly trespass upon the field of the TVA's exclusive regulatory authority. Accordingly, the KCTA's Motion should be denied.

The KCTA's entire argument is predicated on a misrepresentation of the TVA Cooperatives' position. The TVA Cooperatives do not, as the KCTA claims, argue that the TVA's "field is so broad that it encompasses anything that could indirectly affect TVA's promotion of the use of electric power via its provision of low rates to consumers." (Motion at 23.) Pole attachment rates and services are not merely items "that could indirectly affect" the TVA's efforts to provide low rates because they affect cost or revenue; the amounts paid for pole attachment services are "rates," comparable to other rates charged by utilities, and the provision of pole attachments are "services," comparable to other "services" provided by utilities. *See Volz*, 675 S.W.2d at 396 ("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"). This is undisputed.

It is also undisputed that Congress granted the TVA exclusive authority to regulate the

rates and services of distributors of TVA power like the TVA Cooperatives, and that it also granted the TVA broad discretion in determining how to exercise its regulatory authority. *See* note 12, *supra* (the KCTA acknowledges that the TVA has exclusive authority over the TVA Cooperatives' rates and services); note 13, *supra* (the Commission acknowledges the same); note 14, *supra* (the TVA acknowledges the same); note 7, *supra* (the TVA Cooperatives acknowledge the same). *See also, e.g.*, 16 U.S.C. § 831i (granting the TVA 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. § 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"); *Dean v. TVA*, 668 F. Supp. 646, 652, n. 1 (E.D. Tenn. 1987) (the "TVA has enjoyed an independence possessed by perhaps no other federal agency"). As explained by one court, "Congress entrusted and committed the act of fixing rates that achieve this balance to the judgment and discretion of the TVA Board." *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. 16. *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").

In other words: the law and the undisputed facts demonstrate that Congress has reserved all regulation of the TVA Cooperatives rates and services to the TVA, and that the "field" of rate and service regulation includes pole attachment rates and services. In this context, "the scheme of federal regulation" regarding rates and services is "so pervasive as to make reasonable the

inference that Congress left no room for the States to supplement it." *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In addition, the TVA's authority "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." *Id.* (*citing Hines v. Davidowitz*, 312 U.S. 52 (1941)). Accordingly, state regulation over the TVA Cooperatives' rates and services is preempted by federal law.

For these reasons, the KCTA cannot meet its burden to show that "it would be impossible for [the TVA Cooperatives] to produce evidence at the trial warranting a judgment in [their] favor and against [the KCTA]." *Steelvest*, 807 S.W.2d at 482; CR 56.03. The doctrine of field preemption bars Commission jurisdiction over the TVA Cooperatives' pole attachment rates. The KCTA's Motion therefore should be denied.

B. The doctrine of conflict preemption bars Commission jurisdiction over the TVA Cooperatives' pole attachment rates.

The KCTA also argues that conflict preemption does not bar Commission regulation of the TVA Cooperatives' pole attachment rates. It bases this argument on its erroneous conclusion that the "TVA plays no role in connection with pole attachment rates, terms or conditions." (Motion at 13.) As in its field preemption analysis, the KCTA disregards numerous material facts that invalidate its argument. The undisputed facts show that the TVA Cooperatives report to the TVA their revenues for rent from electric property such as utility poles, and the TVA itself has confirmed 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. 2 (the TVA has "oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA power").) In light of the TVA's oversight over pole attachments, any decision the Commission makes regarding the TVA

Cooperatives' pole attachment rates or services would directly conflict with the TVA's exclusive regulatory authority and is preempted by federal law.

In an effort to avoid this conclusion, the KCTA focuses instead on the nature of the TVA's control over the TVA Cooperatives' pole attachment rates, such as how it exercises its oversight and whether it has issued orders expressly setting rates. (Motion at 14-16.) Many of the KCTA's allegations are misleading;[17] moreover, these allegations relate solely to whether the TVA has chosen to regulate pole attachment rates in a manner similar to how the Commission regulates them. But that issue is entirely irrelevant to the sole question before this Commission: whether the 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. As that central question recognizes, the TVA can possess the authority to regulate the TVA Cooperatives' pole attachment rates yet choose to refrain from regulating those rates in the same manner as the Commission. In such circumstances, any Commission regulation would directly conflict with the TVA's legitimate regulatory choice, and therefore be preempted.

In fact, 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" the Commission does. Jan. 8, 2015 Order, p. 15 (the "Discovery Order") (*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)

[17] For example, the KCTA claims that "[t]he Cooperatives do not report pole attachment expenses to TVA," but the TVA Cooperatives submit annual filings to the TVA that include all revenues received from rental of electric property such as utility poles. (*See, e.g.*, Annual Reports, Ex. 8; Ramsey Depo., Ex. 9, at p. 36:7-17; Smart Depo., Ex. 6, at p. 61:16-19; Thompson Depo., Ex. 7, at p. 43:2-7; Weatherford Depo., Ex. 10, p. 30:5-14; Glover Depo., Ex. 5, at p. 60:3-16.)

(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. 16, at *14 (holding that the manner in which a TVA distributor calculates its resale rate is "inextricably intertwined" with the 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") (citations omitted).

The undisputed facts show that any Commission regulation of the TVA Cooperatives' pole attachment rates would pose "an obstacle to 'the full purposes and objectives of Congress'" by undermining the TVA's broad authority to regulate or refrain from regulation as it sees fit. *See 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)). *See also Dean v. TVA*, 668 F. Supp. 646, 652, n. 1 (E.D. Tenn. 1987) ("From its inception, TVA has enjoyed an independence possessed by perhaps no other federal agency."). The TVA itself has already explicitly informed the Commission of its concerns about conflicting regulation; that warning should not go unheeded. (Ltr. from C. Herron to J. Derouen, Ex. 2 (expressing concern that "additional regulation by the Commission could potentially contravene TVA's oversight in this area").) The TVA President and CEO also informed the Commission 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,'" and the TVA's Director of Retail Regulatory Affairs informed the Commission that the TVA has "oversight responsibility for the pole attachment fees

of the Kentucky distributors of TVA power . . . ." (Ltr. from W. Johnson to J. Derouen, Ex. 1; Ltr. from C. Herron to J. Derouen, Ex. 2.) Even the KCTA acknowledges that state agencies often have been preempted from exerting regulatory authority over the TVA Cooperatives where such a conflict exists. (Motion at p. 10 (*citing TVA v. Energy Reg. Comm'n of Ky.*, No. 79-0009-P (W.D. Ky. Sep. 25, 1979); *W. Ky. Rural Coop. Corp. v. Energy Reg. Comm'n of Ky.*, No. 80-CI-1747 (Franklin Cir. Ct. Nov. 12, 1982); *In re Hickman-Fulton Counties Rural Elec. Coop. Corp.*, Case No. 8858 (Ky. PSC June 27, 1983)).)

For these reasons, the KCTA cannot meet its burden to show that "it would be impossible for [the TVA Cooperatives] to produce evidence at the trial warranting a judgment in [their] favor and against [the KCTA]." *Steelvest*, 807 S.W.2d at 482; CR 56.03. The doctrine of conflict preemption bars Commission jurisdiction over the TVA Cooperatives' pole attachment rates. Accordingly, the KCTA's Motion should be denied.

C. Pole attachment regulation is not a power reserved to the states, and it is therefore not subject to a greater presumption of validity in favor of Commission regulation.

The KCTA incorrectly argues that Commission regulation of pole attachment rates is subject to a higher presumption of validity because utility regulation is a traditional police power reserved to the states. (Motion at 9.) This argument is inapplicable. This case does not involve the general regulation of utility services; rather, it involves the narrow question of pole attachment rate regulation, which is no longer a power reserved to the states.

Congress expressly made pole attachment regulation a federal issue by passing the Pole Attachment Act of 1978, which granted the Federal Communications Commission authority to "regulate the rates, terms, and conditions for pole attachments." *See* 47 U.S.C. § 224(a)(1). The Act permitted state utility commissions to regulate pole attachments only as provided by federal law and only upon certification to the FCC. 47 U.S.C. § 224(c). In 1996, Congress expanded

the definition of pole attachments and thus expanded federal authority over the regulation of such attachments. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

The Commission made the required certification to the FCC in 1981. Initial Order at 2. Furthermore, the Commission has not exercised any jurisdiction – including with respect to pole attachment rates and services – over the TVA Cooperatives since 1979. Initial Order at 2. The Commission is not unique in this regard. No state commission in the TVA's service area regulates the pole attachment rates and services of TVA-member distributors.[18] Consequently, the KCTA is incorrect to suggest that pole attachment regulation is a traditional police power reserved to the states. To the contrary, regulation of pole attachments has been a unique, federal subject matter for more than thirty-five years. This is especially true when the Commission has not exercised any utility regulation jurisdiction over the TVA Cooperatives since at least 1979. Initial Order at 2. Therefore, the KCTA is also incorrect to suggest that the Commission should presume against preemption. In light of the uniquely broad powers reserved by Congress to the TVA, the long lines of case law confirming the TVA's preemptive powers, the TVA's own assertion of oversight responsibility, and the undisputed facts of this matter, it is clear that the regulatory question at issue here is of a federal nature.

II. The KCTA acknowledges that the "TVA's [l]etters [r]aise [p]reemption [i]ssues."

The KCTA is entitled to summary judgment only if "there is no genuine issue as to any material fact" – that is, if "it appears that it would be impossible for the respondent to produce

[18] Of the 21 states that have certified to the FCC that they regulate the rates, terms, and conditions of pole attachments, only Kentucky has TVA distributors. *See* Public Notice, WC Docket No. 10-101 (May 19, 2010), a true and accurate copy of which is attached hereto as Ex. 17 (the following states have certified: Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington); "Frequently Asked Questions About TVA," TVA.com, a true and accurate copy of which is attached hereto as Ex. 18, p. 2 (the TVA serves "almost all of Tennessee and parts of Mississippi, Kentucky, Alabama, Georgia, North Carolina, and Virginia"), *available at* http://www.tva.com/abouttva/keyfacts.htm (accessed on June 11, 2015).

evidence at the trial warranting a judgment in his favor and against the movant." CR 56.03; *Steelvest*, 807 S.W.2d at 482. The KCTA cannot meet that standard because it admits that the "TVA's [l]etters [r]aise [p]reemption [i]ssues." (Motion at 18.) Therefore, the KCTA's Motion should be denied.

The TVA has issued multiple letters to the Commission and/or the TVA Cooperatives representing that: (i) its "oversight extends to the regulation of 'the use of electric system assets [(such as poles)] of the distributors of TVA power'"; (ii) it has "oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA power"; (iii) "it is TVA's position that TVA's oversight over the pole attachment rates of these distributors is sufficient"; and (iv) it regulates the TVA Cooperatives' pole attachments by, in part, requiring "each distributor to charge a pole attachment fee that ensures full cost recovery." (*See* Ltr. from W. Johnson to J. Derouen, Ex. 1; Ltr. from C. Herron to J. Derouen, Ex. 2; Ltrs. from C. Herron to the TVA Cooperatives, Ex. 3.) Such administrative "opinion letters are routinely considered as persuasive authority in cases interpreting agency regulations." *Metzger v. Wells Fargo Bank, N.A.*, Case No. LA CV14-00526 JAK (SSx), 2014 U.S. Dist. LEXIS 59427 (C.D. Cal. April 28, 2014), a true and accurate copy of which is attached hereto as Ex. 19.

As a point of clarification, preemption is "a question of law,"[19] and the Commission should defer to the TVA's legal position on the scope of its own jurisdiction. 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

[19] *See 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).

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." *See, e.g., City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013).[20]

Even if the Commission were to treat the TVA's determinations as mere facts, however, the KCTA defeats its own Motion by conceding that the letters "[r]aise [p]reemption [i]ssues." A court may take notice of facts, such as those contained in administrative opinion letters[21] that are "not subject to reasonable dispute" because they are "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ky. R.

[20] *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); 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). *See also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (holding that the 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").

[21] Numerous courts have taken judicial notice of interpretive letters issued by a regulatory agency. In one case, a trial court requested additional information from the Federal Highway Administration ("FHA") regarding its funding policy. *Sierra Club v. U.S. Army Corps of Engineers*, 732 F.2d 253, 258 (2d Cir. 1984). In response, a "middle-level administrator" at the FHA sent the court a letter explaining how the FHA funding policy would be administered in certain circumstances. *Id.* The Second Circuit held that the trial court's reliance on that letter, when viewed in light of the court's consideration of the overall policy and regulations, was not an abuse of discretion. *Id.* Other courts have reached similar conclusion involving similar documents. *See, e.g., Lewis v. Del. Charter Guar. & Trust Co.*, Case No. 14-CV-1779 (KAM), 2015 U.S. Dist. LEXIS 42521 (E.D.N.Y. March 31, 2015), a true and accurate copy of which is attached hereto as Ex. 20 (taking judicial notice of IRS interpretive letters); *Chenault v. Cobb*, Case No. 13-cv-03828-MEJ, 2014 U.S. Dist. LEXIS 129637 (N.D. Cal. Sep. 15, 2014), a true and accurate copy of which is attached hereto as Ex. 21 (taking judicial notice of letter from U.S. Department of Housing and Urban Development and unsigned letter from Consumer Finance Protection Bureau); *Johnson v. Hologic, Inc.*, Case No. 2:14-cv-0794-LKK-KJN (PS), 2014 U.S. Dist. LEXIS 79665 (E.D. Cal. June 9, 2014), a true and accurate copy of which is attached hereto as Ex. 22 (taking judicial notice of Food and Drug Administration "premarket approval letter" issued to company); *Metzger*, Ex. 19 ("whether or not judicial notice is appropriate, the Court can consider the Opinion Letter as a public record reflecting an interpretation by the OTS of its regulations.") (*citing, e.g., Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005 n.1 (9th Cir. 2008); *McCarthy v. Option One Mortg. Corp.*, 362 F.3d 1008, 1013 (7th Cir. 2004)).

Evid. 201.[22] Here, even after the KCTA has conducted discovery and had an opportunity to challenge the letters, there can be no reasonable dispute: the TVA's President and CEO and its Director of Retail Regulatory Affairs have clearly stated – now multiple times – that pole attachments fall within the scope of the TVA's oversight responsibility. Moreover, there is no legitimate basis to question the accuracy of the TVA's President and CEO or its Director of Retail Regulatory Affairs statements with respect to their views on this matter. Those are their views, and no one can seriously suggest that the TVA has ulterior motives. The TVA has indicated that it has oversight responsibility with respect to pole attachments and the use of electric system assets, and the Commission should defer to the TVA's assertion of jurisdiction.[23]

In its Motion, the KCTA attempts to downplay the importance of these letters, but even if there were some legitimate dispute (which there is not) as to their contents, the KCTA admits that the "TVA's [l]etters [r]aise [p]reemption [i]ssues" and that the letters "raise the questions designated by the Commission for resolution in this case." (Motion at 18.) In other words, even in its own misconception of the issues, the KCTA acknowledges that the TVA's letters support the TVA Cooperatives' arguments. For that reason alone, the KCTA has conceded that the TVA Cooperatives would not find it "impossible . . . to produce evidence at the trial warranting a judgment in [their] favor and against the [KCTA]." *See Steelvest*, 807 S.W.2d at 482.

Ultimately, however, the truth is that the KCTA simply cannot overcome the uniquely broad powers reserved by Congress to the TVA, the long lines of case law confirming the TVA's preemptive powers, the TVA's own assertion of oversight responsibility, and the undisputed

[22] Although "[t]he general rule is that administrative tribunals are not bound by the strict or technical rules of evidence governing jury trials," the process of judicial notice "permits an administrative tribunal to take official notice of the same matters of which a court takes notice." *Louisville & Nashville Railroad Co. v. Kentucky*, 300 S.W.2d 777, 780 (Ky. 1956)

[23] Moreover, and consistent with the great depth of legal authority cited throughout this subsection, reliance upon the TVA's letters in a decision declining jurisdiction over the TVA Cooperatives' pole attachments would not constitute reversible error.

facts of this matter. The KCTA cannot meet its burden, and its Motion should be denied.

III. The Commission should disregard the KCTA's allegations about "belligerent and reckless conduct."

In an apparent effort to distract from the matters at issue and its inability to satisfy the standard for summary judgment, the KCTA falsely accuses the TVA Cooperatives of "belligerent and reckless conduct." (Motion at 6.) The Commission should disregard these baseless allegations.

Throughout this case, the KCTA has continually accused the TVA Cooperatives of a "failure to cooperate in the discovery process." (Motion at 13.) To the contrary, the TVA Cooperatives exerted significant effort to gather and review documents and respond in full and in good faith to the KCTA's data requests. (*See* Glover Depo., Ex. 5, at 17:21-25 ("asked for [Pennyrile employees] to get all the information that we could provide, and provided it"); *id.* at 15:19-16:3 (employees "went through their documents to find out what they needed for the answers"); Smart Depo., Ex. 6, at 13:23-14:2 ("provided responses to the best of our ability to the questions that were asked"); *id.* at 16:1-21 (provided written responses to counsel); *id* at 17:10-21 (reviewed numerous documents, including contracts and historical financial data, to respond to data requests, and provided all requested, responsive documents); Thompson Depo., Ex. 7, at 10:11-11:18 (describing efforts to gather and review documents and prepare responses).)

The KCTA now claims that the TVA Cooperatives' witnesses "refused to make any effort to educate themselves in preparation for their depositions." (Motion at 11-12.) This accusation is false. The record is clear: the TVA Cooperatives' witnesses testified about what they knew in good faith, within the guidelines established by the Commission. Each of the deponents attended a multi-hour meeting with legal counsel to prepare for the depositions. (*See, e.g.*, Glover Depo.,

Ex. 5, at 8:10-22; Ramsey Depo., Ex. 9, at 7:13-25; Thompson Depo., Ex. 7, at 8:5-23; Smart Depo., Ex. 6, at 8:2-15; Weatherford Depo., Ex. 10, at 6:9-24.) In addition, the witnesses reviewed documents, had additional discussions with staff as necessary to prepare for the depositions, and appeared at the depositions able and willing to respond to questions to the best of their abilities. (*See, e.g.*, Smart Depo., Ex. 6, at 7:14-9:1 (over the course of a week, Mr. Smart reviewed data request responses, reviewed contracts, reviewed the revised notice of deposition, met with counsel and the other deponents, and met with West Kentucky employees); *id.* at 7:4-10 (prepared to testify "[t]o the best of my ability"); Glover Depo., Ex. 5, at 8:3-6 (Q: "…[Y]ou're prepared to answer questions covered by the attachments to Exhibit No. 3 [the revised Notice of Deposition]? A: To the best of my ability, yes, sir."); Ramsey Depo., Ex. 9, at 7:19-21 (reviewed all documents submitted by Warren Rural Elec. Coop. Corp.); *id.* at 14:2-19 (each witness had a "book" of documents prepared for their review).)

The KCTA's disapproval of the TVA Cooperatives' conduct appears to be nothing more than disgruntlement with the appropriate limitations on discovery established by the Commission. *See* Discovery Order at 15. Indeed, the KCTA repeatedly pressed witnesses on matters outside the scope of permissible discovery. (*See, e.g.*, Glover Depo., Ex. 5, at 25:14-25 (asking witness about pole attachment cost analysis, in response to which the TVA Cooperatives' counsel objected on the grounds that it was "very clear that cost data is outside the scope of this proceeding"); Smart Depo., Ex. 6, at 14:17-16:4 (objecting on the grounds that "the Commission's Order specifically declined to allow KCTA to get into this line of questioning" regarding rate methodology); Ramsey Depo., Ex. 9, at 19:16-20:6 (objecting to continued repeated questioning regarding cost data outside the scope of discovery); *Id.* at 21:3-22:14 (objecting to line of questioning regarding development of cost methodology and noting that the

same objectionable questions have been raised in three consecutive depositions); Thompson Depo., Ex. 7, at 34:7-13 (objecting to questions regarding “cost formulas and rate analysis”).) In short, the TVA Cooperatives participated fully and in good faith within the discovery guidelines established by the Commission; the KCTA is simply dissatisfied with those guidelines. The KCTA's accusations regarding discovery misconduct are, therefore, completely unfounded and entirely irrelevant.

In support of its accusations of "belligerent and reckless conduct," the KCTA also cites separate litigation between Pennyrile (one of the TVA Cooperatives) and Time Warner Cable (a member of the KCTA) that arose when Time Warner persisted in the long-running “self-help” of continuing to withhold payment of its past due pole attachment bills. (Motion at 6-7.) The KCTA mischaracterizes the ensuing dispute as Pennyrile employing threats and "abusive tactics"; however, the KCTA (who shares the same counsel as Time Warner) failed to mention that Time Warner was unable to satisfy the legal standard to obtain a preliminary injunction and that Time Warner's motion was denied by the United States District Court for the Western District of Kentucky. *See Time Warner Cable Midwest LLC v. Pennyrile*, Case No. 5:15-cv-45-tbr (W.D. Ky. March 20, 2015), a true and accurate copy of which is attached hereto as Ex. 23. Notably, in that case, the United States District Court for the Western District of Kentucky determined that "there is not a 'strong' likelihood that Time Warner" will succeed in its claims that Pennyrile's pole attachment rates are excessive and warrant a refund. *Id.* at 5.

The KCTA's accusations of "belligerent and reckless" and uncooperative conduct are false, unproductive, and immaterial to the matter at hand. The Commission should disregard them.

CONCLUSION

Only one issue is before the Commission on rehearing: "whether or not TVA has or exercises any jurisdiction . . . over the pole attachment rates of the TVA cooperatives." Order Granting Rehearing at 6 (emphasis added). The law and the undisputed facts demonstrate that the TVA has and exercises such oversight responsibility. Any decision the Commission makes regarding the TVA Cooperatives' pole attachment rates or services would trespass upon the field of – and directly conflict with – the TVA's exclusive regulatory authority, and consequently is preempted by federal law.

In its Motion, the KCTA argues only that it disapproves of the TVA's style of regulation. Not once does the KCTA argue that the TVA does not have authority over the TVA Cooperatives' pole attachment rates. Indeed, the KCTA even concedes that the TVA letters "[r]aise [p]reemption [i]ssues," apparently without recognizing that this concession defeats its own Motion.

The KCTA cannot meet its burden. Accordingly, the TVA Cooperatives respectfully request that the Commission deny the KCTA's Motion.

Respectfully submitted,

/s/ Edward T. Depp
John E. Selent
Edward T. Depp
Michelle Tupper Butler
DINSMORE & SHOHL LLP
101 South Fifth Street, Suite 2500
Louisville, Kentucky 40202
Tel.: (502) 540-2300
Fax: (502) 585-2207
John.Selent@dinsmore.com
Tip.Depp@dinsmore.com
Michelle.TupperButler@dinsmore.com

Counsel to the TVA Cooperatives