

**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

RESPONSE TO APPLICATION FOR REHEARING

Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyriple 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, hereby respond as follows to Kentucky Cable Telecommunications Association's ("KCTA")¹ Application for Rehearing (the "Application for Rehearing") filed with the Public Service Commission of the Commonwealth of Kentucky (the "Commission") on Thursday, July 18, 2013 in this matter. The Commission should deny the Application for Rehearing for the following reasons.

¹ KCTA members include Access Cable TV, Armstrong Cable Services, Big Sandy Broadband, C & W Cable, Comcast, Harlan Community TV, Inter Mountain Cable, Irvine Community TV, Reimer Communications, Lycom Communications, Mediacom, Suddenlink, Time Warner Cable, and TVS Cable. *The Kentucky Cable Telecommunications Association Response to the Commission's January 17, 2013 Order Requiring a Listing of the Cable Companies On whose Behalf the KCTA Petition Was Filed*, Response, P.S.C. Case No. 2012-00544 (Jan. 24, 2013). Of those members, Access Cable TV, Time Warner Cable, Comcast, and Mediacom have attachment to poles of the TVA Cooperatives. *Id.*

INTRODUCTION

1. In the eighty years since the passage of the Tennessee Valley Authority Act (the “TVA Act”), the Tennessee Valley Authority (“TVA”), a federal agency, has had complete authority over the rates and services of cooperatives that purchase and resell electricity from the TVA. *See TVA, et al. v. Energy Regulatory Comm’n of Kentucky*, No 79-0009-P, slip op. (W.D. Ky. Sept. 25, 1979).

2. In spite of the settled nature of the law on this point, KCTA recently sought a landmark order from the Commission that would have upended federal precedent and Commission precedent and practice by, for the first time in history, extending the Commission’s jurisdiction to the pole attachment services of the TVA Cooperatives. *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*, Petition, Ky. P.S.C. Case No. 2012-00544 (Dec. 3, 2012).

3. Adhering to established law, the Commission correctly denied KCTA’s petition (the “Petition”) by Order entered June 28, 2013. The Commission decided this question of law on proper grounds after being sufficiently advised by the parties and the TVA. Having received an adverse order, the KCTA seeks to now reframe the matter as a mixed question of law and fact, rather than the pure question of law identified in its Petition. *See generally*, Petition (presenting the issue as a question of the regulatory jurisdiction of the TVA and the Commission). KCTA’s Application for Rehearing has no merit and should be denied.

ARGUMENT AND ANALYSIS

I. KCTA RAISED, AND THE COMMISSION PROPERLY DECIDED, A PURE QUESTION OF LAW THAT REQUIRES NO “EVIDENCE” TO RESOLVE.

4. KCTA’s reply in support of its Petition stated, “This straight-forward case raises an issue of federal preemption and nothing more.” *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*, Reply, Ky. P.S.C. Case No. 2012-00544 (March 1, 2013), p. 2 (the “Reply”).

5. “Whether a federal law preempts a state law or precludes another federal law is a question of law.” *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 429 (6th Cir. 2009). *See also Nye v. CSX Transp., Inc.*, 437 F.3d 556, 563 (6th Cir. 2006), *Ramsey v. Formica Corp.*, 398 F.3d 421, 424 (6th Cir. 2005).

6. A hearing is unnecessary to protect a party’s rights and does not inure to the public interest where the matter before the Commission is a question of law. *See In the Matter of: 271 West Main Street, LLC v. Kentucky Utils. Co.*, Order, P.S.C. Case No. 2005-00389 (Oct. 18, 2006) (denying a request for a hearing where the Commission was presented only with a question of law); *In the Matter of: Ruben Barnett v. South Anderson Water District*, Order, P.S.C. Case No. 95-397 (March 28, 1996) (“As the question before the Commission in this proceeding was a question of law rather than fact, rehearing should be denied.”). For this reason alone, the Commission should deny the Application for Rehearing.

7. Even so, the Commission properly found that “[a]ny changes in pole attachment rates would alter the retail rates.” Order at *8. Relying on precedent and Commission practice, the Commission resolved the KCTA’s legal question by ruling that “Congress has occupied the field of regulating the TVA Cooperatives.” Order at *6. *See also TVA v. Tennessee Electric Power Co.*, 90 F.2d 885, 890 (6th Cir. 1936) (holding that the TVA intended to “supplant state regulation as inadequate and unsatisfactory”); Letter from William M. Sawyer to Senator William L. Quinlan (March 2, 1982) (“[F]ederal rather than state law governs the service as well as rates of all TVA-supplied utilities.”).

8. KCTA now argues that the pole attachment methodology that the Commission employs might possibly provide the same results as those that the TVA requires of the TVA Cooperatives. This is irrelevant. The Commission found that the field of regulated TVA rates and services—and pole attachments are services—is preempted; the TVA has a “comprehensive, top to bottom regulatory scheme” that occupies the entire field. Order at *8. This scheme is “so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it.” *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79.

9. Even if conflict preemption were to apply—and it does not—the Commission notes that “[a]ny tinkering that [it] would do to pole attachment rates would necessarily impact retail rates, a direct conflict between federal and state law.” Order at *9. Consequently, even absent the field preemption the Commission recognized, the principle of conflict preemption would likewise operate to arrest

state regulation of the TVA Cooperatives pole attachment rates. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79.

10. The sole and dispositive question in this case is whether or not the TVA Act and the Supremacy Clause, U.S. Const. Art. IV, Sec. 2, cl. 2, operate to preempt state regulation of the TVA Cooperatives' pole attachment rates. KCTA endorsed that proposition in its Reply. No documentary and testimonial evidence is necessary to resolve that question of law. The Commission properly decided that the field of state regulation of the TVA Cooperatives' pole attachment rates is preempted by federal law. The KCTA's Application for Rehearing should be denied.

II. THE PUBLIC INTEREST DOES NOT NECESSITATE A HEARING ON THIS PURE QUESTION OF LAW.

11. Despite KCTA's previous assertions that this case involved only the issue of preemption—a question of law—KCTA now tries to reframe the issue it raised as a mixed question of law and fact. *Compare* Reply at p. 2 (“This straightforward case raises an issue of federal preemption, and nothing more. Indeed, the sole issue presented by this case is whether the TVA has preempted the pole attachment jurisdiction that is otherwise held by this Commission.”) *and* Application for Rehearing (claiming there are both questions of law and questions of fact for which it seeks resolution by the Commission). KCTA now argues that a hearing is necessary so that “Staff and the Parties have opportunity to adequately explore and develop the relevant evidence.” Application for Rehearing at p. 4.

12. KCTA seeks to call at least six witnesses to explore what it claims are at least ten factual questions that it alleges have some bearing on the issue of

whether or not Congress has occupied the field in this area by granting the TVA the authority to establish the regulatory scheme that it has in place. Application for Rehearing at pp. 5-6. The questions that KCTA identifies bear solely upon the inner-workings of the TVA, and its policies and procedures regarding its regulation of pole attachment rates. *Id.*

13. There are no questions of fact that need to be addressed in order to resolve KCTA's Petition. The sole question presented is a legal one: whether the TVA Act preempts Commission jurisdiction over pole attachment rates and services of the TVA Cooperatives. The construction of state and federal law is properly within the purview of the Commission to determine. *See generally* 2 Am. Jur. 2d Administrative Law § 277 (2002) ("An administrative agency generally may and must determine whether it has jurisdiction in a particular situation.").

14. The parties fully briefed the preemption issue, and the TVA (acting in the role of an *amicus curiae* to this proceeding) provided its interpretation of the law on this issue. *See* Letter from Cynthia L. Herron, Director, Retail Regulatory Affairs, Tennessee Valley Authority to Jeff Derouen, Executive Director, Kentucky Public Service Commission (May 16, 2013) ("Accordingly, as explained above, TVA does have oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA power to ensure consistency with the wholesale power contract[s] [between the TVA and the distributors].").

15. Moreover, state law "constraints on the TVA's authority... [are] preempted by the TVA Act's express grant of discretion and the APA's prohibition

on judicial review.” *McCarthy, et al v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 407 (6th Cir. 2006) (affirming dismissal of claims that TVA practices affected end-user rates in violation of state law).

16. No amount of factual proof would change the conclusion that the TVA Act preempted the field of Commission jurisdiction over the TVA Cooperatives, whose rates and services are regulated by the TVA. Consequently, the KCTA’s Application for Rehearing would only encourage an inefficient use of the parties’ and the Commission’s limited resources to conduct a hearing or permit discovery on these legal issues of jurisdiction.

WHEREFORE, the TVA Cooperatives respectfully request that the Commission enter an order denying KCTA’s Application for Rehearing.

Respectfully submitted,

/s/ Edward T. Depp
John E. Selent
Edward T. Depp
Joseph A. Newberg, II
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
Joe.Newberg@dinsmore.com

Counsel to the TVA Cooperatives