

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF THE KENTUCKY CABLE)	
TELECOMMUNICATIONS ASSOCIATION FOR)	
A DECLARATORY ORDER THAT THE)	
COMMISSION HAS JURISDICTION TO)	CASE NO.
REGULATE THE POLE ATTACHMENT RATES,)	2012-00544
TERMS, AND CONDITIONS OF)	
COOPERATIVES THAT PURCHASE)	
ELECTRICITY FROM THE TENNESSEE)	
VALLEY AUTHORITY)	

ORDER

This issue is before the Commission on Kentucky Cable Telecommunications Association's ("KCTA") petition for a Declaratory Order, which requests that the Commission affirm our jurisdiction to regulate the pole attachment rates, terms, and conditions of the five electric cooperatives¹ in Kentucky that purchase electricity from the Tennessee Valley Authority ("TVA"). As discussed below, we find that our regulation would conflict with Federal law and we do not have jurisdiction over the pole attachment rates of the TVA.

BACKGROUND

On December 3, 2012, the KCTA filed its petition for a Declaratory Order. The KCTA named 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

¹ These cooperatives are: Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyriple Rural Electric Cooperative Cooperation, Tri-County Electric Membership Corporation, Warren Rural Electric Cooperative Corporation, and West Kentucky Rural Electric Cooperative Corporation.

Electric Cooperative Corporation (collectively "TVA Cooperatives") as the five electric cooperatives in Kentucky that purchase power from the TVA.

On January 17, 2013,² the Commission issued an Order which found that KCTA bore a "considerable burden to prove its claim that the Commission does have jurisdiction to regulate pole attachments of the TVA Cooperatives."³ The Order noted that KCTA's petition included "no support for its allegations that the TVA does not regulate the pole attachment rates of the TVA Cooperatives and that Commission regulation of pole attachment rates is not pre-empted by the TVA's rate jurisdiction."⁴ However, the Commission established this case to "review the extent, if any, of our jurisdiction to regulate the pole attachment rates of the TVA Cooperatives."⁵ The TVA Cooperatives were then ordered to file a response to the KCTA's Petition.

On February 15, 2013, the TVA Cooperatives collectively responded to the January 17, 2013 Order. In its response, the TVA Cooperatives requested that the Commission "enter an Order affirming that it lacks the jurisdiction to regulate the pole attachment rates of cooperatives that purchase electricity from the Tennessee Valley Authority."⁶ In support of its motion, the TVA Cooperatives cite five identical letters from Cynthia L. Herron, Director of Retail Regulatory Affairs of the TVA, to representatives of

² Case No. 2012-00544, *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* (Ky. PSC Jan. 17, 2013) ("January 17, 2013 Order").

³ January 17, 2013 Order at 3.

⁴ *Id.*

⁵ *Id.* at 4.

⁶ *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*; The TVA Cooperatives' Response to the January 17, 2013 Order (February 15, 2013).

the TVA Cooperatives. These letters state that the TVA is “the exclusive retail rate regulator for the distributors of TVA power,”⁷ and describes the TVA’s relationship with the distributors. Additionally, the letters address pole attachment rental fees, but simply state that “. . . TVA requires that a distributor recover its full cost associated with the pole attachment and does not place any unfair burdens on the electric ratepayers by ensuring full cost recovery.”⁸ The TVA Cooperatives contend that these letters indicate the TVA agrees that the TVA has exclusive control over pole attachment regulation.

On March 1, 2013, KCTA filed a reply to the TVA Cooperatives’ Response in which it argued that the Commission, not the TVA, has regulatory jurisdiction over the “TVA Coops’ pole attachment rate, terms, and conditions.” The KCTA also argued that the TVA’s letters are “neither an assertion of preemptive jurisdiction by the TVA or an objection to this Commission regulating the Coops’ pole attachment rates”⁹

On April 29, 2013, the Executive Director for the Kentucky Public Service Commission issued a letter to Cynthia Herron.¹⁰ The purpose of the letter was to clarify Ms. Herron’s authority to respond on behalf of the TVA and whether or not the TVA was asserting exclusive jurisdiction over pole attachment rates for the TVA Cooperatives. Ms. Herron responded by letter on May 16, 2013.¹¹ In her letter Ms. Herron stated that

⁷ *Id.*, Exhibits 2 through 6.

⁸ *Id.*

⁹ *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 of the Kentucky Cable Telecommunications Association (March 1, 2013).

¹⁰ Letter from Jeff R. Derouen, Executive Director, Public Service Commission to Cynthia L. Herron, Director Retail Regulatory Affairs, Tennessee Valley Authority (April 29, 2013).

¹¹ Letter from Cynthia L. Herron, Director Retail Regulatory Affairs, Tennessee Valley Authority, to Jeff R. Derouen, Executive Director, Public Service Commission (May 16, 2013) (“May 16th Letter”).

she had the authority to speak on behalf of the TVA. She also stated that the TVA has “oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA Power”¹²

DISCUSSION

As we noted in our January 17, 2013 Order, the Commission has not exercised jurisdiction over the TVA Cooperatives since 1979, when the United States District Court for the Western District of Kentucky found that our regulation of the TVA Cooperatives’ retail electricity rates was pre-empted because it directly conflicted with TVA regulation of those same rates. *TVA v. Energy Regulatory Comm’n of Kentucky*, Civil Action No. 79-0009-P (W.D. Ky. Sept. 25, 1979). In its petition, the KCTA argued that TVA’s regulation of electric rates precluded our regulation only to the extent the two directly conflict and that, because the TVA does not regulate the TVA Cooperatives’ pole attachments, any of our requirements regarding pole attachments would still allow the TVA Cooperatives to comply with the TVA regulation. The KCTA stated that, because there was no conflict between our regulation and the TVA regulation, the Commission had jurisdiction over those pole attachments and should assert jurisdiction.

At the time the District Court issued its decision in 1979 that the Commission was pre-empted from regulating the rates of TVA Cooperatives, we had not yet asserted jurisdiction over the pole attachments of any jurisdictional utility. It was not until 1981 that we first asserted jurisdiction over the pole attachments of utilities, other than the TVA Cooperatives. Since that time, no one has asserted, as KCTA does now, that the Commission has the jurisdiction to regulate the pole attachments of the TVA

¹² May 16th Letter at 1.

Cooperatives. We must now resolve our jurisdiction over pole attachments of the TVA Cooperatives.

The TVA was created in 1933 with the passage of the Tennessee Valley Authority Act ("TVA Act"). 16 U.S.C. § 831 *et seq.* The TVA intended to "supplant state regulation as inadequate and unsatisfactory." *TVA v. Tennessee Electric Power Co.*, 90 F.2d. 885, 890 (6th Cir. 1936.) It appears that the TVA and the Commission did not have any conflict from the TVA's inception until 1979, when the Energy Regulatory Commission ("ERC"), our predecessor agency, ordered four electric cooperatives that purchased power from the TVA, to set their retail rates by referencing a fuel escalation schedule that differed from the TVA's. *TVA v. Energy Regulatory Comm'n of Kentucky*, at 6. The Court in *TVA v. Energy Regulatory Comm'n of Kentucky* found that the ERC was pre-empted from setting the retail rates of those electric cooperatives because it was "impossible for the TVA distributors to comply with the ERC regulation without breaching contracts with the TVA." *Id.* at 7. The Court found that because the state and federal law conflicted, "the Supremacy Clause, demands that the exercise of federal authority supersede the exercise of state authority" and that the Cooperatives must follow the rules the TVA imposed on them. *Id.* at 7-8.

We have subsequently interpreted that pre-emption to apply not only to retail rates but to services as well. "[F]ederal rather than state law governs the service as well as the rates of all TVA-supplied utilities."¹³ However, because we first asserted jurisdiction over pole attachments after the Federal Court's decision, our jurisdiction over pole attachments for TVA cooperatives has not been addressed.

¹³ Letter from William M. Sawyer to Senator William L. Quinlan (March 2, 1982).

KCTA argues that we regulate pole attachments for the TVA cooperatives because the TVA does not regulate those rates. This, however, is contradicted by the statements of Ms. Herron in her letters. In her letter to the TVA Cooperatives she states that the “TVA is the exclusive rate regulator for the distributors of TVA Power. . .” and that, with regard to pole attachments, the TVA “requires that a distributor recover its full costs associated with the pole attachment and not place any unfair burdens on the electric ratepayers by ensuring a full recovery.”¹⁴ The fact that the TVA “requires” the recovery of the full costs associated with a pole attachment indicates that the TVA asserts some sort of regulatory control over pole attachments, which gives us pause to assert jurisdiction.

Ms. Herron, in her May 16, 2013 letter to the Executive Director of the Commission, further elaborates on the TVA’s role regarding pole attachments. She notes that the TVA is the exclusive regulator of retail rates for the TVA Cooperatives and that the TVA’s goal is to “keep the valley’s retail rates as low as feasible” Part of the TVA’s process in regulating the retail rates takes into account the TVA Cooperatives non-electric revenues, including the “revenue received from pole attachment fees.”

Ms. Herron also states that the wholesale contract between the TVA and the TVA Cooperatives prohibits the “subsidization of any non-electric activities because such subsidy ultimately would have to be recovered through the electric consumer’s retail rates.” To avoid this, the TVA “requires each distributor to charge a pole attachment fee that ensures full recovery” Ms. Herron concludes that “the TVA does have

¹⁴ Letter from Cynthia L. Herron, Director, Retail Regulatory Affairs, Tennessee Valley Authority to Gregory Grissom, Manager/President/CEO, Hickman-Fulton Counties Rural Electric Cooperative Corporation (January 24, 2013).

oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA power to ensure consistency with the wholesale power contract.”

The United States Supreme Court has provided the three circumstances by which a federal law will pre-empt a state law. First, if the statutory language is clear to the extent that it pre-empts state law, state law is pre-empted. Known as express pre-emption, it occurs “[w]hen Congress has made its intent known through explicit statutory language” *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Second, in the absence of specific statutory language, the federal law can occupy the entire field so that no room remains for state regulation, otherwise known as “field preemption.”

[I]n the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a “scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “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., quoting, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Last, state law is pre-empted when state law actually conflicts with federal law. Known as “conflict pre-emption,” this occurs when it “is impossible for a private party to comply with both state and federal requirements . . . or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *English v. Gen. Elec. Co.*, 496 U.S. at 79 (citations omitted.)

Traditionally, there is a presumption against federal pre-emption in areas that state has controlled. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). However the

Commission contends that Congress intended, in enacting the TVA Act, to occupy the field of all rate regulation of distributors that purchase wholesale power from the TVA.

As Ms. Herron acknowledged, the TVA's goal is to "keep the valley's retail rates as low as feasible" Part of the TVA's process in regulating the retail rates takes into account the TVA cooperatives' non-electric revenues, including the "revenue received from pole attachment fees." Not only does the TVA take into account revenue received from pole attachment fees, it explicitly establishes requirements for how the pole attachment fees are calculated to avoid having to raise retail rates. This is a comprehensive, top to bottom, regulatory scheme where the TVA looks at every aspect of the TVA cooperatives' revenues and establishes requirements for those revenues. It is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *English v. Gen. Elec. Co.*, 496 U.S. at 79. Pole attachment rates are a component in establishing retail rates, and the Commission is pre-empted from regulating retail rates. Any changes in pole attachment rates would alter the retail rates. Thus, we find that we are pre-empted from exercising any jurisdiction over the pole attachment rates for electric utilities that purchase wholesale power from the TVA.

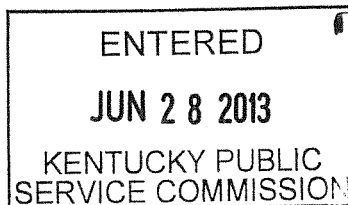
Because we find that Congress has occupied the field of regulating the TVA Cooperatives, we do not have to reach the question as to whether conflict pre-emption would prevent us from exercising jurisdiction over the pole attachments of TVA cooperatives. However, we find that the TVA regulates the pole attachment fees for TVA cooperatives. It is possible, as KCTA argues, that the methodology that we employ would provide the same results as those that TVA requires of the TVA cooperatives. It is just as possible that our methodology might yield a different result, at

which point our calculation would yield to the TVA's requirements. However, as discussed above, pole attachment rates are a component of the retail rates the TVA Cooperatives charge. Any tinkering that we would do to pole attachment rates would necessarily impact retail rates, a direct conflict between federal and state law. Under the Supremacy Clause of the Constitution of the United States, any state law that conflicts with federal law is pre-empted. U.S. Const. art. IV, § 2, cl. 2, and our regulation must give.¹⁵

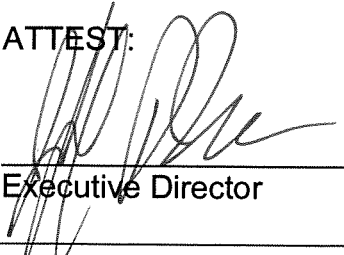
CONCLUSION

We noted from the outset of this case that KCTA bore a "considerable burden to prove its claim that the Commission does have jurisdiction to regulate pole attachments of the TVA Cooperatives." KCTA has failed to meet its burden. Federal law pre-empts the Commission from regulating the rates of pole attachments for TVA Cooperatives. Accordingly, KCTA's petition is denied and this case is removed from the Commission's docket.

By the Commission



ATTEST:



Executive Director

¹⁵ Express pre-emption is inapplicable to the matter at hand because the TVA's enacting statutes do not expressly pre-empt states from regulating pole attachments of distributors that purchase power from the TVA.

Alton K Burton, Jr.
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DISTRICT OF COLUMBIA 20004

David E Smart
West Kentucky Rural Electric Cooperative
1218 W. Broadway
P.O. Box 589
Mayfield, KENTUCKY 42066

Keith M Carwell
Warren Rural Electric Cooperative
1101 College Street, P.O. Box 770
Bowling Green, KENTUCKY 42102

Janice Theriot
Zielke Law Firm PLLC
1250 Meidinger Tower
462 South Fourth Avenue
Louisville, KENTUCKY 40202-3465

Edward T Depp
Dinsmore & Shohl, LLP
101 South Fifth Street
Suite 2500
Louisville, KENTUCKY 40202

Laurence J Zielke
Zielke Law Firm PLLC
1250 Meidinger Tower
462 South Fourth Avenue
Louisville, KENTUCKY 40202-3465

Gardener F Gillespie
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DISTRICT OF COLUMBIA 20004

Eston W Glover, Jr.
Pennyrile RECC
2000 Harrison Street
Hopkinsville, KENTUCKY 42241

Gregory H Grissom
Hickman-Fulton Counties RECC
PO Box 190, Hwy. 94
Hickman, KENTUCKY 42050

Veachel Harlan
Tri County Electric Membership Corp
221 7th Street
Tompkinsville, KENTUCKY 42167