

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,	)	CASE NO.
TERMS, AND CONDITIONS OF	)	2012-00544
COOPERATIVES THAT PURCHASE	)	
ELECTRICITY FROM THE TENNESSEE	)	
VALLEY AUTHORITY	)	

ORDER

On November 20, 2013, the Kentucky Cable Telecommunications Association ("KCTA") filed a motion seeking to compel the production of cost data from 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 "TVA Cooperatives" or "Cooperatives"). On January 2, 2014, KCTA filed a second motion to compel the TVA Cooperatives to produce documents withheld based on attorney-client privilege and attorney-client work product, as well as documents pertaining to all pole attachment agreements, joint use agreements, and pole license agreements between the TVA Cooperatives and pole users. On January 15, 2014, KCTA filed notice that it would be issuing a subpoena *duces tecum* to the

Tennessee Valley Public Power Association ("TVPPA")<sup>1</sup> compelling testimony and the production of documents. Also on January 15, 2014, KCTA filed notices of depositions for each of the TVA Cooperatives. Finally, on February 14, 2014, the TVA Cooperatives filed a motion for a protective order either to cancel the depositions noticed by KCTA on January 15, 2014, and limit the discovery permitted or to stay the depositions until the Commission issued a ruling on the KCTA's motions to compel. We address each in turn below.

KCTA's November 20, 2013 Motion to Compel

KCTA's November 20, 2013 Motion to Compel requests that the TVA Cooperatives respond to KCTA's First Request for Information, Item 20, which requests investment information, the number of poles, depreciation information, and expenses for specific accounts during the years of 2010, 2011, and 2012.<sup>2</sup>

KCTA argues that the TVA Cooperatives' cost data is relevant because it "is necessary to rebut the Cooperatives' argument that Commission regulation would interfere or conflict with the Cooperatives' mandate to recover all their costs and prevent consumer subsidization of attaching entities."<sup>3</sup> KCTA contends that it is entitled to the cost data to establish that the Commission's methodology allows full cost recovery.<sup>4</sup>

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<sup>1</sup> The TVPPA is a nonprofit, regional service organization that represents the interests of consumer-owned electric utilities that operate within the Tennessee Valley Authority's ("TVA") service area. The TVA Cooperatives are members of the TVPPA.

<sup>2</sup> KCTA's First Request for Information to West Kentucky Rural Electric Cooperative Corporation, Item 20, is set forth in Appendix A to this Order. The same request for information was submitted to each of the TVA Cooperatives.

<sup>3</sup> KCTA's Motion to Compel the TVA Cooperatives to Provide Cost Data in Response to KCTA's First Request for Information ("KCTA's Motion to Compel"), filed Nov. 20, 2013, p. 5.

<sup>4</sup> *Id.*

Additionally, KCTA asserts that because the cost data is routinely maintained by the TVA Cooperatives, its request is not overly broad, and it would not burden the TVA Cooperatives to produce the requested information.<sup>5</sup>

On November 27, 2013, the TVA Cooperatives filed a response to KCTA's Motion to Compel, arguing that the information KCTA seeks to be produced is irrelevant and overly broad and unduly burdensome.<sup>6</sup> The TVA Cooperatives point out that, in the Commission's Order on KCTA's application for rehearing, we determined that the question before the Commission is "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."<sup>7</sup> The TVA Cooperatives contend that the information KCTA seeks is irrelevant to this issue. They assert that, regardless of the methodology by which the rates are set, this issue is irrelevant to the question before the Commission as to whether or not the TVA has or exercises any jurisdiction over the pole attachment rates of the TVA Cooperatives.

Additionally, the TVA Cooperatives argue that KCTA's request is overly broad and unduly burdensome because responding to this item will be time consuming and increase legal expenses to provide information that the TVA Cooperatives contend is irrelevant to the issue before the Commission. The TVA Cooperatives also assert that their position has been mischaracterized in this matter. The TVA Cooperatives state

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<sup>5</sup> *Id.* at p. 6.

<sup>6</sup> The TVA Cooperatives' Response to KCTA's Motion to Compel, filed Nov. 27, 2013, p. 1.

<sup>7</sup> *Id.* at p. 2.

that, although there is evidence to support a finding of conflict preemption, it has also presented evidence in its filings to support a finding of field preemption. The TVA Cooperatives reiterate that, under both theories of preemption, the cost data information KCTA is requesting is not probative of any question at issue in this case.

Moreover, the TVA Cooperatives contend that the issue before the Commission is solely a legal question, not a question of fact. Specifically, the TVA Cooperatives state that, although KCTA "argues that there is a material question of fact as to whether the TVA engages in some positive, direct action to regulate the pole attachment rates of the TVA Cooperatives," this argument is erroneous for two reasons: (1) the "Schedule of Terms and Conditions" in each of the TVA Cooperatives' member's wholesale power contract with the TVA<sup>8</sup> demonstrate that the TVA regulates the pole attachments of the TVA Cooperatives, and (2) because the United States Congress, not the Commission, is the only body empowered to oversee the TVA's rates and contracts.<sup>9</sup> Therefore, the TVA Cooperatives contend that only a legal question of jurisdiction remains. The TVA Cooperatives assert that because the question of jurisdiction is the only question before

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<sup>8</sup> Response to KCTA's First Requests for Information by Hickman-Fulton Counties Rural Electric Cooperative Corporation, Attachment for Response 1-17, filed Nov. 14, 2013; Response to KCTA's First Requests for Information by Tri-County Electric Membership Corporation, Attachment for Response 1-17, filed Nov. 14, 2013; Response to KCTA's First Requests for Information by Pennyrite Rural Electric Cooperative Corporation, Attachment for Response 1-17, filed Nov. 14, 2013. West Kentucky Rural Electric Cooperative Corporation filed its power contract between the TVA and West Kentucky Rural Electric Cooperative Corporation (Response to KCTA's First Requests for Information by West Kentucky Rural Electric Cooperative Corporation, Attachment for Response 1-17, filed Nov. 14, 2013), but this document does not contain the language cited by the TVA Cooperatives. Similarly, Warren Rural Electric Cooperative Corporation filed a power contract between the TVA and Warren Rural Electric Cooperative Corporation (Response to KCTA's First Requests for Information by Warren Rural Electric Cooperative Corporation, Attachment for Response 1-17, filed Nov. 14, 2013), but this document does not contain the language cited by the TVA Cooperatives.

<sup>9</sup> *Id.* at pp. 7-8.

the Commission, the cost data sought by KCTA is irrelevant, broad and unduly burdensome.

In its reply to the TVA Cooperatives' response, KCTA asserts that the TVA Cooperatives have abandoned their prior argument that Commission regulation is barred by conflict preemption and now relies on the theory of field preemption. KCTA argues that the cost data it seeks has a direct bearing on the TVA Cooperatives' position that Commission regulation of their pole attachment rates would not allow them full cost recovery and this impermissibly conflicts with the TVA's edict to provide low retail electric rates to end users.<sup>10</sup> KCTA argues that the "presumption against preemption" provides that federal preemption of state law should not be presumed unless there is a "clear manifestation of intention to do so."<sup>11</sup> KCTA contends that no such manifestation of intention exists regarding the TVA Act, and that the TVA Cooperatives' position should be disregarded. However, KCTA asserts that because the TVA Cooperatives previously set forth an argument based on conflict preemption, KCTA is entitled to the cost data to rebut the TVA Cooperatives' contention. KCTA also notes that this request would not place an undue burden on the TVA Cooperatives, because this information is routinely maintained by the TVA Cooperatives and would be easily accessible.

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<sup>10</sup> KCTA's Reply in Support of Its Motion to Compel the TVA Cooperatives to Produce Cost Data, filed Dec. 3, 2013, p. 2.

<sup>11</sup> *Id.* at 3.

### KCTA's January 2, 2014 Motion to Compel

In its second motion, KCTA requests that the TVA Cooperatives be compelled to respond to KCTA's First Request for Information, Items 1-2, 1-3, 1-5, and 1-8.<sup>12</sup> In addition, KCTA asks that the TVA Cooperatives be compelled to submit all pole attachment agreements, joint use agreements, and pole license agreements between the TVA Cooperatives and all pole users.<sup>13</sup>

Specifically, KCTA requests the TVA Cooperatives be compelled to respond to the following items:

1-2. If [you contend that the TVA regulates your pole rates in any way], please explain fully, making reference to all facts known to you supporting that answer.

1-3. Provide the legal and factual basis for the statement of the TVA Cooperatives' Response to the January 17 Order, filed with the Commission on February 15, 2013, that states: "The cost-based rates the TVA Cooperatives collect in connection with the pole attachment services they provide directly impact the end-users' retail rates which are set by the TVA."

1-5. [If you contend that regulation of your pole attachment rates according to the cost-based methodology by the Commission would conflict with the TVA's regulation of their electric rates], please explain fully, making reference to all facts known to you supporting that answer.

1-8. [If you contend that the TVA has statutory jurisdiction to regulate pole attachment rates of its member cooperatives],

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<sup>12</sup> KCTA's Motion to Compel the TVA Cooperatives to Produce Documents Withheld on the Basis of the Attorney-Client Privilege and Documents Responsive to KCTA's Supplemental Request for Information, filed Jan. 2, 2014, p. 1.

<sup>13</sup> *Id.* at 9.

please explain fully, giving all statutory references and case citations in support of your answer.<sup>14</sup>

Additionally, KCTA requests that the TVA Cooperatives be compelled to produce all pole attachment agreements between the TVA Cooperatives and all pole users dating back to 1937.<sup>15</sup>

In support of its Motion, KCTA notes that, although the TVA Cooperatives claimed that the requested information was protected by attorney-client and attorney-work-product privileges, the TVA Cooperatives did not tender a privilege log. KCTA cites Kentucky Rule of Civil Procedure 26.02(1), which states that “[p]arties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action.” KCTA also references case law indicating that parties asserting attorney-client and attorney-work-product must justify their claim to the privilege. Additionally, KCTA points to Kentucky Rule of Evidence 503, which defines confidential communication in the context of attorney-client privilege. KCTA asserts that the TVA Cooperatives have not provided any basis for their claim of privilege, and contends that without such a basis, KCTA is entitled to examine a privilege log to explore whether attorney-client privilege and attorney-client-work product shield the TVA Cooperatives from having to provide the requested information. KCTA states it is entitled to this material because these questions would offer insight into the TVA Cooperatives’ preemption argument.

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<sup>14</sup> KCTA's First Requests for Information to West Kentucky Rural Electric Cooperative Corporation, filed Oct. 25, 2013.

<sup>15</sup> KICTA's Motion to Compel the TVA Cooperatives to Produce Documents Withheld on the Basis of the Attorney-Client Privilege and Documents Responsive to KCTA's Supplemental Request for Information, filed Jan. 2, 2014, p. 9.

KCTA also requests all pole attachment agreements between the TVA Cooperatives and all pole users dating from 1937. KCTA contends it is "entitled to review all terms, rates, and conditions contained in the agreements between the Cooperatives and each pole user to determine whether the agreements provide for rates that ensure full cost recovery and to compare pole rates and track changes in rates among the different agreements."<sup>16</sup> It asserts that whether the TVA Cooperatives entered the agreements without the TVA's knowledge and approval is relevant, as it would rebut the TVA Cooperatives' contention that the TVA regulates the TVA Cooperatives' pole attachments.

Additionally, KCTA seeks: (1) the pole attachment rates that each of the TVA Cooperatives charged to Incumbent Local Exchange Carriers and cable companies for the last ten years; (2) the invoices the TVA Cooperatives issued to pole attachers for pole attachment fees for the last three years; (3) the pole attachment revenue the TVA Cooperatives receive from its licensed attachers dating from 2008; (4) the "surplus revenues" as defined in Paragraph 6(b) of each of the TVA Cooperatives' contracts with the TVA for each of the last five years; and (5) whether the TVA Cooperatives or their representative have discussed with the TVA whether a TVA representative will testify on the TVA Cooperatives' behalf and the identity or identities of those individuals. KCTA avers that these requests are not overly broad or unduly burdensome, and are relevant.

On January 9, 2014, the TVA Cooperatives filed a response to KCTA's motion to compel. The TVA Cooperatives state that they are not required to tender a privilege log

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<sup>16</sup> *Id.*

to KCTA because KCTA does not request documents. The TVA Cooperatives argue they cannot produce the “explanation” requested in KCTA 1-2 and 1-5, or the “legal and factual basis for the statement” asked for in KCTA 1-3.<sup>17</sup> The TVA Cooperatives contend that they provided responses or objected to these requests as appropriate, but otherwise invoked “the attorney work product privilege to protect their attorneys’ research, mental impressions, and theories of the case.”<sup>18</sup> Regarding KCTA 1-8, the TVA Cooperatives similarly contend that the information sought was not tangible, but instead KCTA requested statutory references and case citations, which precluded the TVA Cooperatives from producing a privilege log.<sup>19</sup> Moreover, the TVA Cooperatives assert that KCTA’s requests are overly broad and unduly burdensome, and are not reasonably calculated to lead to the discovery of relevant and admissible evidence.

KCTA replied to the TVA Cooperatives’ response on January 16, 2014. KCTA asserts that the TVA Cooperatives’ reading of its Requests for Information is “too narrow,” and instead explains that it is specifically asking for documents responsive to its requests. It further contends that the requested documents are relevant “because they will show the extent to which, if any, the TVA regulates the Cooperatives’ pole attachment rates and whether application of the Commission’s pole rate methodology would interfere with TVA’s regulation of consumer electric rates.”<sup>20</sup>

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<sup>17</sup> The TVA Cooperatives’ Response to KCTA’s Motion to Compel, filed Jan. 9, 2014, pp. 2-3.

<sup>18</sup> *Id.*, p. 3.

<sup>19</sup> *Id.*

<sup>20</sup> KCTA’s Reply in Support of Its Second Motion to Compel, filed Jan. 16, 2014, p. 3.

KCTA's January 15, 2014 Motion for Issuance of Subpoena *Duces Tecum*

On January 15, 2014, KCTA filed a motion with the Commission for the issuance of a subpoena *duces tecum* to the TVPPA to compel production of testimony and documents.<sup>21</sup> KCTA contends that this information is necessary to establish the basis of "the extent of the TVA's involvement, if any, with TVPPA when it negotiates the TVA Cooperatives' pole agreements."<sup>22</sup> KCTA also states that its requests are neither overly broad nor unduly burdensome because its requests are not oppressive or harassing, and are narrowly drawn. Finally, KCTA contends it is entitled to the identities of any witnesses from TVA who may testify on behalf of the TVA Cooperatives. It states that the TVA Cooperatives refused to provide this information because KCTA had not identified its witnesses. KCTA asserts that ". . . all of the relevant facts lie with the Cooperatives. Indeed, the Cooperatives' theory for preemption is based on their contention that the TVA regulates their pole attachment rates. Thus, KCTA is entitled to depose any witnesses from TVA upon whom the Cooperatives may rely."<sup>23</sup>

The TVA Cooperatives filed a response in opposition to KCTA's motion on January 22, 2014. The TVA Cooperatives assert that KCTA's motion should be denied because the discovery sought is irrelevant to the issue defined by the Commission in this case.<sup>24</sup> The TVA Cooperatives specifically point to KCTA's request for: 1) the testimony and documents regarding pole attachment rates under the Commission's

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<sup>21</sup> Motion for Issuance of Subpoena *Duces Tecum*, filed Jan. 15, 2014, p. 1.

<sup>22</sup> *Id.* at p. 2.

<sup>23</sup> KCTA's Reply in Support of Its Second Motion to Compel, filed Jan. 16, 2014, p. 6.

<sup>24</sup> The TVA Cooperatives' Response in Opposition to KCTA's Motion for Issuance of a Subpoena *Duces Tecum*, filed Jan. 22, 2014, p. 2.

methodology, as set out in Administrative Case No. 251; 2) the TVA Cooperatives' pole attachment rates under 47 U.S.C. § 224(d);<sup>25</sup> and 3) the TVPPA's communications with the TVA Cooperatives. They contend that information regarding these topics is irrelevant to the jurisdictional question defined by the Commission in its Order on Rehearing. Similarly, the TVA Cooperatives assert that material requested by KCTA about TVPPA's communications with the TVA Cooperatives has no bearing on whether the TVA has or exercises jurisdiction over the TVA Cooperatives' pole attachment rates.

Additionally, the TVA Cooperatives state that the Commission should deny KCTA's motion because the Commission lacks the jurisdiction to issue the requested subpoena *duces tecum*, since the party KCTA seeks to subpoena is in Chattanooga, Tennessee, and the Commission's subpoena power only extends to Kentucky's borders. The TVA Cooperatives cite KRS 278.320, which states, in relevant part:

The commission ... may issue subpoenas, subpoenas duces tecum, and all necessary process in proceedings brought before or initiated by the commission, and such process shall extend to all parts of the state.

The TVA Cooperatives assert that the Commission is prohibited from issuing subpoenas to parties outside of the Commonwealth pursuant to the Uniform Interstate Depositions and Discovery Act ("UIDDA"), codified in Kentucky and Tennessee, because this Act defines the term "subpoena" as "a document, however denominated, issued under authority of a court of record requiring a person to" attend a deposition or produce documents.<sup>26</sup> The TVA Cooperatives aver that the Commission is not a "court

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<sup>25</sup> 47 U.S.C. § 224(d) sets forth the determination of just and reasonable rates for pole attachment used by a cable television system solely to provide cable service and defines "usable space."

<sup>26</sup> The TVA Cooperatives' Response in Opposition to KCTA's Motion for Issuance of a Subpoena *Duces Tecum*, filed Jan. 22, 2014, p. 4.

of record” under UIDDA, and thus KCTA cannot rely on the UIDDA in asking the Commission to issue a subpoena *duces tecum* to TVPPA in Tennessee.

KCTA filed a reply in support of its motion on January 29, 2014. KCTA reiterates that the Commission found “that the question of whether we are preempted from exercising jurisdiction over the TVA Cooperatives’ pole attachment rates is a mixed question of fact and law.”<sup>27</sup> Therefore, KCTA asserts it is entitled to the discovery it is seeking, specifically information bearing on the TVA Cooperatives’ argument that the TVA regulates the TVA Cooperatives’ pole attachment rates. KCTA believes deposing a representative from TVPPA and reviewing the requested documents will offer insight into “the TVA’s role – or lack thereof – in overseeing or setting the Cooperative’s pole attachment rates” and whether TVPPA and the TVA develop pole attachment rates together on behalf of the TVA Cooperatives.<sup>28</sup>

KCTA also contends that the Commission has jurisdiction to issue a subpoena to TVPPA under the UIDDA. KCTA notes that the UIDDA was codified in Kentucky and Tennessee in 2008, and points out the dearth of law regarding the UIDDA’s application to administrative agencies. KCTA cites law holding that that state public utility commissions have been considered “courts of record” for subpoena power and deposition purposes. KCTA cites to Kentucky Rule of Civil Procedure 28.02, which states, in relevant part:

Depositions may be taken out of this state before a commissioner appointed by the governor of the state where taken; or before any person empowered by a commission directed to him by consent of the parties or by order of the

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<sup>27</sup> KCTA’s Reply in Support of Its Motion for Issuance of a *Subpoena Duces Tecum* to the TVPPA, filed Jan. 29, 2014, p. 2, citing Order for Rehearing, p. 3.

<sup>28</sup> *Id.*

court; or before a judge of a court, a justice of the peace, mayor of a city, or notary public; or before such persons and under such other circumstances as shall be authorized by the law of this state or the place where the deposition is taken.

Based upon this rule or the UIDDA, KCTA states that the Commission possesses jurisdiction to issue a subpoena to the TVPPA, although it is located outside of Kentucky.

#### KCTA NOTICE OF DEPOSITIONS TO THE TVA COOPERATIVES

On January 15, 2014, KCTA also filed with the Commission a notice of depositions seeking to depose representatives of each of the TVA Cooperatives. KCTA listed 34 topics for the deposition. A generic list of topics is attached as Appendix B to this Order.

#### TVA COOPERATIVES' MOTION FOR A PROTECTIVE ORDER

On February 14, 2014, the TVA Cooperatives filed a motion for a protective order requesting that the Commission cancel the depositions noticed by the KCTA or, in the alternative, limit the areas of discovery permitted in the depositions. The TVA Cooperatives assert that entry of such an order is necessary to prevent KCTA from seeking overly broad and unduly burdensome deposition testimony that is irrelevant to the proceeding. The TVA Cooperatives request that the Commission grant the motion in order to focus the discovery on the single jurisdictional question before the Commission. The TVA Cooperatives also requested that the Commission stay the depositions noticed for February 24, 2014, pending the Commission ruling on the outstanding motions to compel discussed *supra*.

The TVA Cooperatives state that when the Commission granted rehearing to KCTA, the Commission limited the issue to whether or not the TVA exercised any jurisdiction over the pole attachment formulas of the TVA Cooperatives. The TVA Cooperatives argue that KCTA's multiple requests for information and notices of depositions go beyond the scope of the Commission's case and harass the TVA Cooperatives by seeking information not reasonably calculated to lead to discovery of admissible evidence. The TVA Cooperatives assert that KCTA has no need for any deposition testimony regarding how the TVA Cooperatives set their rates because the actual amounts of pole attachment rates, or how the rates are calculated, have no bearing on the jurisdictional question regarding authority over pole attachments.

The Commission issued an Order on February 19, 2014, in which it stayed the depositions noticed by KCTA pending a Commission decision on the merits of the TVA Cooperatives' motion to cancel or limit the depositions as well as KCTA's outstanding Motions to Compel.

#### FINDINGS AND CONCLUSIONS

Having reviewed the pleadings and being otherwise sufficiently advised, the Commission finds that the cost data KCTA requests from the TVA Cooperatives is outside the scope of issues defined by the Commission in its August 6, 2013 Order on Rehearing. In that Order, we limited the scope of this case to "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."<sup>29</sup> Although KCTA argues that it is entitled to

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<sup>29</sup> Order on Rehearing, p. 4.

the cost data to establish that the Commission's methodology allows full cost recovery, we 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 . . . ."<sup>30</sup> Therefore, such information is irrelevant to any issues in this case, does not appear to be reasonably calculated to lead to the discovery of relevant information, and is not subject to discovery in this case.

The Commission finds that KCTA's motion to compel responses to the First Request for Information Numbers 1-2, 1-3, 1-5, and 1-8 should be denied. The Commission agrees with the TVA Cooperatives that the responses sought in these requests are protected by the attorney-client privilege. KCTA does not seek any documents or facts in these requests: it seeks legal research and conclusions which are the product of the TVA Cooperatives. The requested information is covered by the attorney-client privilege and is not subject to discovery.

The Commission finds that KCTA's motion to compel the production of: (1) the pole attachment rates each of the TVA Cooperatives charged to Incumbent Local Exchange Carriers and cable companies for the last ten years; (2) the invoices the TVA Cooperatives issued to pole users for pole attachment fees for the last three years; (3) the pole attachment revenue the TVA Cooperatives receive from its licensed users dating from 2008; and (4) the "surplus revenues" of the TVA Cooperatives' contracts with the TVA should be denied. By asking these questions, KCTA is asking questions relating to ratemaking for pole attachments. The issue before the Commission is one of jurisdiction "be it through the establishment of a ratemaking formula, review, or simply

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<sup>30</sup> *Id.*

oversight responsibility in connection with ratemaking, over the pole attachment rates of the TV Cooperatives."<sup>31</sup> The invoices, revenue data, and other information that KCTA seeks have no bearing on the Commission's determination of jurisdiction over the TVA Cooperatives' pole attachments. The requested information is not relevant to this proceeding and is not subject to discovery in determining the pending jurisdictional issue.

The Commission finds that KCTA's motion to compel the answer to whether the TVA Cooperatives or their representative have discussed with the TVA whether a representative from the TVA will testify on the TVA Cooperatives' behalf and the identity or identities of those individuals, should be denied. The Commission's Order establishing a procedural schedule in this case did not require the filing of a witness list, nor did it schedule a hearing at which KCTA's or the TVA Cooperatives' witnesses would have to be present. Additionally, the Commission's Order establishing a procedural schedule in this case only required that the parties identify the witnesses responsible for responding to requests for production and both parties complied with this directive. However, there is no harm in the production of a witness list if the TVA Cooperatives have determined which witnesses they would call at a formal hearing. Therefore, KCTA's request for a witness list should be granted to the extent that the TVA Cooperatives should state whether they have determined which witnesses they would present at a formal hearing, and, if so, the names of these witnesses.

The Commission finds that KCTA's request to compel production of all pole attachment agreements, joint use agreements and pole license agreements between

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<sup>31</sup> Order on Rehearing at 4.

the TVA Cooperatives and pole users should be denied. Those agreements contain financial information relating to the charges for pole attachments, and that financial information is not relevant to the issue of the Commission's jurisdiction over the TVA Cooperatives' pole attachments.

The Commission finds that the TVA Cooperatives' motion to cancel the depositions should be denied and its motion to limit deposition testimony should be granted. KCTA lists several topics in its notices of deposition, and many of those topics range far beyond the scope of this proceeding. Many of KCTA's topics concern, *inter alia*, how the TVA Cooperatives establish pole attachment rates, the number of poles, and revenues and costs associated with the poles. The topics also focus on the TVA Cooperatives' reporting of this information to the TVA and TVPPA.

Indeed, the majority of the topics listed in the notice of depositions do not pertain to the jurisdictional question that the Commission identified in granting rehearing. Therefore, the Commission finds that the depositions should be limited to the following topics:

1. The TVA Cooperative designee's position, duties, knowledge of and involvement in this matter.
2. All contracts between the TVA Cooperative and the TVA relevant to poles and pole attachment rates.
3. All orders, directives, and communications from TVA regarding pole attachment rates.
4. The method, if any, by which TVA regulates, controls and/or reviews the TVA Cooperatives' pole attachment rates.
5. Any approval or consideration by TVA of any pole attachment agreements, joint use agreements, and pole license agreements between the TVA Cooperative and all pole users, including but not limited to the TVA

Cooperative's Joint Use Agreements with BellSouth Telecommunications, LLC and Windstream Kentucky East, LLC.

6. The TVA Cooperatives' communications with TVA regarding any pole attachment agreements, joint use agreements, and pole license agreements between the TVA Cooperative and all pole users, including but not limited to the TVA Cooperative's Joint Use Agreements with BellSouth Telecommunications, LLC and Windstream Kentucky East, LLC.

7. The TVA Cooperatives' communications with TVPPA at any time during the past five years regarding TVA's jurisdiction over pole attachment rates.

8. The basis of the TVA Cooperatives' claim that the Commission's regulation of its pole attachments rates would conflict with the TVA's regulation of its electric rates to the extent the basis is not subject to attorney-client privilege

9. The TVA Cooperatives' responses to KCTA's First Request for Information.

10. The TVA Cooperatives' responses to the KCTA's Supplemental Request for Information.

11. Efforts made by the TVA Cooperatives' designee(s) to learn as necessary the information in the above listed 10 topics designated by the Commission.

Regarding KCTA's request for the issuance of *subpoenas* and *subpoenas duces tecum* to the TVPPA, the Commission finds that the TVPPA is not a party to this proceeding and KCTA has not shown that the information that it seeks from TVPPA cannot be obtained directly from the TVA Cooperatives. Therefore, the Commission finds that KCTA's motion for the issuance of *subpoenas* and *subpoenas duces tecum* should be denied.

IT IS THEREFORE ORDERED that:

1. KCTA's motion to compel answers to Item 20 of its First Request for Information to the TVA Cooperatives as set forth in Appendix A to this Order is denied.

2. KCTA's motion to compel answers to Item's 1-2, 1-3, 1-5 and 1-8 of its First Request for Information to the TVA Cooperatives is denied.

3. KCTA's motion to compel the production of: (1) the pole attachment rates each of the TVA Cooperatives charged to Incumbent Local Exchange Carriers and cable companies for the last ten years; (2) the invoices the TVA Cooperatives issued to pole users for pole attachment fees for the last three years; (3) the pole attachment revenue the TVA Cooperatives receive from its licensed users dating from 2008; and, (4) the "surplus revenues" of the TVA Cooperatives' contracts with the TVA is denied.

4. KCTA's motion to compel the answer as to whether the TVA Cooperatives or their representative have discussed with the TVA whether a representative from the TVA will testify on the TVA Cooperatives' behalf and the identity or identities of those individuals is granted to the limited extent that the TVA Cooperatives should state whether they have determined which witnesses they would present at a formal hearing, and, if so, the names of these witnesses.

5. KCTA's request to compel production of all pole attachment agreements, joint use agreements and pole license agreements between the TVA Cooperatives and pole users is denied.

6. The TVA Cooperatives' motion to cancel the depositions is denied.

7. The TVA Cooperatives' motion to limit deposition testimony is granted and limited to the 11 items discussed at pages 17-18 above.

8. KCTA's motion for issuance of *subpoenas* and *subpoenas duces tecum* to the TVPPA is denied.

By the Commission

ENTERED  
JAN 08 2015  
KENTUCKY PUBLIC  
SERVICE COMMISSION

ATTEST:

  
\_\_\_\_\_  
Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2012-00544 DATED **JAN 08 2015**

KCTA's First Request for Information<sup>32</sup>

20. Provide the following information for each of the years 2010, 2011 and 2012. Use either the data for the entire year or the information as of the yearend, as appropriate. If you do not keep any data requested according to the RUS accounting system contained in 7 C.F.R. Ch. 17, provide the equivalent number.

- a. Gross investment in RUS Account 364;
- b. The number of poles in RUS Account 364;
- c. Gross investment in 35 foot poles in RUS Account 64;
- d. The number of 35 foot poles in RUS Account 364;
- e. Gross investment in 40 foot poles in RUS Account 64;
- f. The number of 40 foot poles in RUS Account 364;
- g. Gross investment in 45 foot poles in RUS Account 64;
- h. The number of 45 foot poles in RUS Account 364;
- i. Accumulated depreciation reserve related to the total investment in the RUS Account 364;
- j. Gross investment in any grounds included in the RUS account 364;
- k. Gross investment in the RUS Account 365;
- l. Accumulated depreciation related to RUS Account 65;
- m. Gross investment in RUS Account 369;

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<sup>32</sup> Kentucky Cable Telecommunications Association's First Requests for Information to West Kentucky Rural Electric Cooperative Corporation, filed Oct. 25, 2013.

- n. Accumulated depreciation related to RUS Account 69;
- o. Gross investment in total utility plant;
- p. Accumulated depreciation related to total utility plant;
- q. Gross investment in Distribution Plant;
- r. Accumulated depreciation related to Distribution plant;
- s. Annual depreciation rate for RUS Account 364;
- t. Expenses in RUS Account 593;
- u. Any tax expenses (please describe and detail);
- v. Expenses in RUS Accounts 920-931 (General and Admin.);
- w. Cost of money;
- x. The number of poles with attachments owned only by the pole owner and a cable company (two-party poles as described in Administrative Order 251);
- y. The number of poles with attachments owned by the pole owner, a cable company, and another entity (three-party poles as described in Administrative Order 251).

APPENDIX B

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE  
COMMISSION IN CASE NO. 2012-00544 DATED **JAN 08 2015**

Requested Topics of Kentucky Cable Telecommunications Association  
for Deposition of the TVA Cooperatives

Topics

1. The TVA Cooperatives' designee's position, duties, knowledge of and involvement in this matter.
2. Efforts made by the TVA Cooperatives' designee(s) to learn as necessary the information requested in the list of topics.
3. All contracts between the TVA Cooperatives and the TVA relevant to poles and pole attachment rates.
4. All orders, directives, and communications from TVA regarding pole attachment rates.
5. All pole attachment agreements, joint use agreement, and pole license agreements between the TVA Cooperatives and any pole users.
6. The method, if any, by which TVA regulates, controls and/or reviews the TVA Cooperatives' pole attachment rates.
7. Any approval or consideration by TVA of any pole attachment agreements, joint use agreements, and pole license agreements between the TVA Cooperatives and all pole users, including but not limited to the TVA Cooperatives' Joint Use Agreements with BellSouth Telecommunications, LLC and Windstream Kentucky East, LLC.

8. The TVA Cooperatives' communications with TVA regarding any pole attachment agreements, joint use agreements, and pole license agreements between the TVA Cooperatives and all pole users, including but not limited to the TVA Cooperatives' Joint Use Agreements with BellSouth Telecommunications, LLC and Windstream Kentucky East, LLC.

9. The TVA Cooperatives' communications with TVPPA at any time during the past five years regarding poles and pole attachment rates, including but not limited to communications regarding poles and pole attachment rates, including but not limited to communications regarding the negotiation of the March 2010 Joint Use Agreement with BellSouth Telecommunications, LLC and regarding KCTA's assertions of Commission jurisdiction over pole rates.

10. The TVA Cooperatives' annual reports to TVA for each of the years 2010, 2011, 2012 and 2013.

11. The TVA Cooperatives' communications with TVA regarding pole attachment rates and/or revenues.

12. The TVA Cooperatives' accounting of and use of its pole attachment revenues.

13. TVA's requirements, if any, regarding the TVA Cooperatives' reporting of their pole attachment revenues.

14. The method, if any, by which the TVA Cooperatives' report their pole attachment revenues to the TVA.

15. The TVA Cooperative's pole-related costs for each of the years 2010, 2011, 2012 and 2013.

16. TVA's requirements, if any, regarding the TVA Cooperatives' reporting of their pole-related costs.

17. The method, if any, by which the TVA Cooperatives report their pole-related costs to TVA.

18. Financial accounting for the TVA Cooperatives for each of the years 2000 to present, including margins, assets, revenues, and expenses.

19. The pole attachment rates the TVA Cooperatives charged incumbent local exchange carriers and cable companies for each of the last ten years.

20. Any formulas and/or calculations used by, or considered by, the TVA Cooperatives in determining pole attachment rates since 2000.

21. The TVA Cooperatives' analysis, if any, of their pole attachment rates under the Commission's cost-based pole attachment rate methodology as set forth in the September 17, 1982 Order by the Commission in Administrative Case No. 251.

22. The TVA Cooperatives' analysis, if any, of its pole attachment rates under Federal Communication Commission's pole attachment methodology used to determine the maximum just and reasonable rate under 47 U.S.C. § 224(d).

23. The method by which the TVA Cooperatives ensure that their pole attachment rates provide sufficient revenue to cover the costs of providing for the attachments.

24. The TVA Cooperatives' analysis of whether their pole attachment rates provide a subsidy to KCTA members.

25. Pole attachment revenue the TVA Cooperatives received from licensee attachers (i.e., non-joint users) for each of the years from 2008 to the present.

26. How the TVA Cooperatives' pole attachment revenues affect their electric rates as set by the TVA.

27. Any increase or decrease in the TVA Cooperatives' electric rates that have resulted from a change in pole attachment revenues within the last ten years.

28. The relationship between changes in the TVA Cooperatives' revenue requirement generally and revision to the TVA Cooperatives' electric rates as regulated by the TVA.

29. The basis of the TVA Cooperatives' claim that the Commission's regulation of their pole attachments rates would conflict with the TVA's regulation of their electric rates.

30. Any non-privileged communications between the TVA Cooperatives and the TVA regarding this case.

31. Any non-privileged communications between the TVA Cooperatives and any other party, including but not limited to, the TVPPA regarding this case.

32. The TVA Cooperatives' responses to KCTA's First Request for Information.

33. The TVA Cooperatives' responses to the KCTA's Supplemental Request for Information.

34. As of the end of each year 2010, 2011 and 2012:

- i. Gross investment in FERC Account 364;
- ii. The number of poles in FERC Account 364;
- iii. Gross investment in 35 foot poles in FERC Account 364;
- iv. The number of 35 foot poles in FERC Account 364;

- v. Gross investment in 40 foot poles in FERC Account 364;
- vi. The number of 40 foot poles in in FERC Account 364;
- vii. Gross investment in 45 foot poles in FERC Account 364;
- viii. The number of 45 foot poles in FERC Account 364;
- ix. Accumulated depreciation reserve related to the total investment in

FERC Account 364;

- x. Gross investment in any grounds included in FERC Account 364;
- xi. Gross investment in FERC Account 365;
- xii. Accumulated depreciation related to FERC Account 365;
- xiii. Gross investment in FERC Account 369;
- xiv. Accumulated depreciation related to FERC Account 369;
- xv. Gross investment in total utility plant;
- xvi. Accumulated depreciation related to total utility plant;
- xvii. Gross investment in Distribution Plant;
- xviii. Accumulated depreciation related to Distribution Plant;
- xix. Annual depreciation rate for FERC Account 364;
- xx. Expenses in FERC Account 593;
- xxi. Any tax expenses (described in detail);
- xxii. Expenses in FERC Accounts 920-931 (General and

Administrative):

- xxiii. Cost of money;

xxiv. The number of poles with attachments owned only by the pole owner and a cable company (two-party poles as described in Administrative Order 251); and

xxv. The number of poles with attachments owned by the pole owner, a cable company and another entity.

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