

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

On December 3, 2012, the Kentucky Cable Telecommunications Association (“KCTA”) filed with the Commission a petition for a Declaratory Order¹ requesting the Commission affirm its jurisdiction to regulate the pole attachment rates, terms, and conditions of the five electric cooperatives in Kentucky that purchase electricity from the Tennessee Valley Authority (“TVA”).² The KCTA names 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”) as the five electric cooperatives in Kentucky that purchase power from the TVA.

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

¹ Attached as the Appendix.

² The KCTA also requests a waiver from the paper filing requirements of 807 KAR 5:001 to permit use of electronic case filing procedures.

that Commission 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 argues that TVA's regulation of electric rates only precludes Commission regulation to the extent the two directly conflict and that, because the TVA does not regulate the TVA Cooperatives' pole attachments, any Commission requirements regarding pole attachments would still allow the TVA Cooperatives to comply with the TVA regulation. The KCTA states that, because there is no conflict between Commission regulation and the TVA regulation, the Commission has jurisdiction over those pole attachments and should assert its jurisdiction.

At the time the District Court decided in 1979 that the Commission was pre-empted from regulating the rates of TVA Cooperatives, the Commission had not yet asserted jurisdiction over the pole attachments of any jurisdictional utility. It was not until 1981 that the Commission 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 jurisdiction to regulate the pole attachments of the TVA Cooperatives.

Based on KCTA's petition and being otherwise sufficiently advised, the Commission finds that due to the decision in *TVA v. Energy Regulatory Comm'n of Kentucky*, KCTA bears a considerable burden to prove its claim that the Commission does have jurisdiction to regulate pole attachments of the TVA Cooperatives. KCTA's petition includes 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 preempted by the TVA's rate jurisdiction. We will, therefore, establish this case to review the extent, if any, of our jurisdiction to regulate the pole attachment rates of the TVA Cooperatives. The five TVA electric cooperatives named in KCTA's petition should be given an opportunity to file, individually or jointly, a formal response to the jurisdictional issue raised by the KCTA, after which the Commission will re-evaluate the merits of KCTA's petition.

The Commission further finds that while KCTA's petition asserts that its members provide state-of-the-art high-speed communication services to Kentucky residents, the petition does not name the specific KCTA members with pole attachments on TVA Cooperatives on whose behalf this petition has been filed. Consequently, the KCTA should supplement its petition by filing the names of the Kentucky cable companies who have authorized the KCTA to file this petition on their behalf.

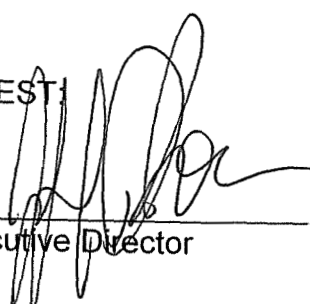
IT IS THEREFORE ORDERED that:

1. This case is established to review KCTA's petition for a Declaratory Order.
2. A copy of this Order and KCTA's petition shall be served on the five TVA Cooperatives named in the KCTA petition.
3. The five TVA Cooperatives shall have 30 days from the date of this Order to individually or jointly file a response to the jurisdictional issues set forth in KCTA's petition.
4. KCTA shall file within 10 days of the date of this Order a list of the cable companies on whose behalf the KCTA petition was filed.
5. KCTA's motion for election of electronic filing is granted. All participants shall follow the electronic filing procedures found in 807 KAR 5:001, Section 8.

By the Commission

ENTERED
JAN 17 2013
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:



Executive Director

Case No. 2012-00544

APPENDIX

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2012-00544 DATED JAN 17 2013



Zielke Law Firm PLLC

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RECEIVED

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PUBLIC SERVICE
COMMISSION

November 30, 2012

OVERNIGHT DELIVERY

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

Re: 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-_____

Dear Mr. DeRouen:

Please accept for filing the attached Petition, the original and ten copies of which are provided. A copy is also included for return to me in the self addressed stamped envelope after file stamping.

With this letter, the Kentucky Cable Telecommunications Association ("KCTA") hereby requests a waiver from the paper-filing requirements of 807 KAR 5:001 to permit the use of electronic case-filing procedures concerning the attached Petition. KCTA requests a deviation from the regulation and asks the Commission to accept this case in electronic form only for both filing and service purposes.

Persons who should receive notice of all orders, pleadings, and other communications in this proceeding and their email addresses are Laurence J. Zielke (lzielke@zielkefirm.com), Janice Theriot (jtheriot@zielkefirm.com), Gardner Gillespie (gardner.gillespie@hoganlovells.com) and Alton K. Burton, Jr. (alton.burton@hoganlovells.com).

ZIELKE LAW FIRM PLLC

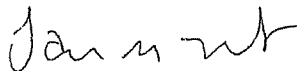
Jeff DeRouen

November 30, 2012

Page 2

KCTA respectfully requests that the Commission accept this Petition for filing and issue, at its earliest convenience, an order approving the requested waiver and assigning an electronic-case number to permit electronic filing in the case.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janice M. Theriot".

Janice M. Theriot

Encl.

Original

BEFORE THE
KENTUCKY PUBLIC SERVICE COMMISSION

RECEIVED

DEC 03 2012

PUBLIC SERVICE
COMMISSION

In The Matter of:

The Petition of the Kentucky Cable)
 Telecommunications Association for a) Case No. 2012-_____
 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 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

1. The Kentucky Cable Telecommunications Association (“Association”) respectfully requests the Kentucky Public Service Commission (“Commission”) to issue a declaratory order affirming its jurisdiction to regulate the pole attachment rates, terms, and conditions of cooperatives that purchase electricity from the Tennessee Valley Authority (“TVA”).

Commission Pole Attachment Regulation Promotes Broadband Deployment and Encourages Economic Growth in Kentucky

2. The Association’s members provide state-of-the-art high-speed communications services to Kentucky residents. These services fuel economic growth in Kentucky.

3. Unreasonable pole attachment rates, terms, and conditions, however, burden Association members in providing their services and slows their ability to deploy in new areas. This hurdle hampers economic growth.
4. Reasonable pole attachment rates, terms, and conditions are particularly important for residents of rural areas, where communications companies must attach to more utility poles (and thus pay more pole attachment fees) in order to provide service.
5. Without regulation, many utilities do not offer reasonable rates, terms and conditions of attachment. Rather, as found by the United States Supreme Court, utilities “have found it convenient to charge monopoly rents” for attachments. *Nat’l Cable & Telecom. Ass’n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002). Commission jurisdiction prevents such monopoly practices and helps to remove this hurdle to rural broadband deployment and economic development.
6. To illustrate the importance of regulation, the average pole attachment rate in 2011 for utilities under Commission jurisdiction was about one-third the amount of the average rate of utilities that were not regulated. Kentucky Cable Telecommunications Association, *Fair and Reasonable Pole Attachment Rates for Unregulated Utilities Would Benefit Kentucky* (Jan. 3, 2011) (available at <http://www.kycable.com/blog/>).¹

The Commission Regulates Pole Attachments

¹ The data from 2010 on the KCTA website are outdated. At least one of the TVA-supplied cooperatives is currently charging more than \$29 a pole, compared to the average rate for regulated utilities in Kentucky in 2010 of \$4.87. The situation is becoming increasingly dire for cable operators and their customers.

7. The Commission has exclusive jurisdiction over the pole attachment rates, terms and conditions of regulated utilities. *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393, 396 (Ky. App. Ct. 1983).
8. Ky. Rev. Stat. § 278.040 gives the Commission “exclusive jurisdiction over the rates and services of the regulated utilities of the state.” *Kentucky CATV Ass'n*, 675 S.W.2d at 396. As to pole attachments, “the pole attachment itself is a ‘service,’” and the rates charged for pole attachments are ‘rates’ within the meaning of the statute. *Id.*
9. Cooperatives are not exempt from the Commission’s pole attachment jurisdiction. *See, e.g., In re. Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space*, Case No. 8040 (Ky PSC Aug. 26, 1981) (*attached as Exhibit 1 hereto*), *aff'd*, *Kentucky CATV Ass'n, supra*; *Ballard Rural Tel. Coop. Corp., Inc. v. Jackson Purchase Energy Corp*, 2005 WL 858940 (Ky. PSC 2005).

The TVA Has Never Regulated Pole Attachments

10. The TVA generates and sells electricity, and in doing so, it gives preference to non-profit entities, such as cooperatives. 16 U.S.C. § 831i. In Kentucky, the TVA provides electricity to five cooperatives.²
11. The TVA is specifically authorized under federal law to set the electric rates of the utilities to which it supplies power.

² Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyrite Electric Cooperative Corporation, Tri-County Electric Membership Corporation, Warren Rural Electric Cooperative Corporation, and West Kentucky Rural Electric Cooperative Corporation.

12. Under 16 U.S.C. § 831i the TVA can “include in any contract for the sale of power such terms and conditions, including resale rate schedules, and [can] provide for such rules and regulations as in its judgment may be necessary or desirable.”
13. Through its contracts, the TVA regulates the maximum rate for electric service that TVA-supplied utilities can charge their customers. *See, e.g., TVA v. Energy Regulatory Comm’n of Kentucky*, Civ. Action no. 79-0009-P (W.D. Ky. Sept. 25, 1979) (explaining that the “TVA, in exercising the power delegated to it by Congress, has set resale rates to be followed by its distributors”) (attached as Exhibit 2).
14. Although the TVA regulates electric rates, it has never regulated pole attachment rates of the Kentucky cooperatives it supplies.

Commission Regulation of TVA-Supplied Cooperative Pole Attachment Rates, Terms, and Conditions

15. The Commission does not currently regulate the pole attachment rates, terms, and conditions of utilities whose power is supplied by the TVA.
16. The Commission, however, has never issued a decision addressing whether it has jurisdiction to regulate pole attachment rates of cooperatives supplied by the TVA.³

³ Although the Franklin Circuit Court and the Commission have both ruled that the Commission does not have jurisdiction over borrowing by TVA cooperatives, *see, e.g., West Ky Rural Coop. Corp. v. Energy Reg. Comm’n*, No. 80-CI-1747 (Franklin Cir. Ct. Nov. 12, 1982) (attached as Exhibit 3), and *Hickman-Fulton Counties Rural Elec. Coop. Corp.*, Ky PSC No. 8858 (June 27, 1983) (attached as Exhibit 4), we have found no cases addressing the Commission’s pole attachment jurisdiction over cooperatives served by the TVA. In March 1983 the Commission’s then-General Counsel wrote a letter to the Kentucky Joint Interim Committee on Energy stating that, in light of the 1979 District Court decision in *TVA v. Energy Regulatory Comm’n of Kentucky*, Civ. Action no. 79-0009-P (W.D. Ky. Sept. 25, 1979), the Commission would no longer regulate the “rates, service, or construction” of utilities taking power from the TVA. *Letter from William M. Sawyer to Senator William L. Quinlan*, March 2, 1983. (attached as Exhibit 5).

17. Nothing precludes Commission jurisdiction over the pole attachment rates charged by these cooperatives. Again, the TVA itself does not regulate the pole attachment rates charged by the cooperatives it supplies.
18. Federal TVA regulation only precludes Commission regulation to the extent the two directly conflict. For example, the U.S. District Court in *TVA v. Energy Regulatory Comm'n of Kentucky*, Civ. Action no. 79-0009-P (W.D. Ky. Sept. 25, 1979), found that Commission regulation of TVA-supplied utilities' electric rates was preempted because it directly conflicted with TVA regulation of those same electric rates.
19. The court never suggested that the Commission is preempted from regulating activities if the TVA-supplied utilities can nevertheless "comply with the legitimate conditions imposed upon them by TVA." *Id.* at 7.
20. Commission regulation of TVA-supplied cooperative pole attachments would still allow these utilities to comply with all conditions imposed upon them by the TVA.
21. In fact, because the TVA does not regulate these pole attachments, the Commission itself has a responsibility to do so.
22. As the Kentucky Supreme Court has explained, the Commission's "plenary ratemaking authority . . . essentially require[s] the [Commission] act to ensure that rates are 'fair, just and reasonable.'" *Kentucky Pub. Serv. Comm'n v. Commonwealth ex rel. Conway*, 324 S.W.3d 373, 380 (Ky. 2010).

But that letter did not address pole attachments specifically, either. As noted in the text below, the District Court's decision was based on directly conflicting exercises of jurisdiction by the TVA and the PSC, and the Commission's exercising pole attachment jurisdiction would not conflict with any regulation by the TVA. Of course, the PSC General Counsel cannot make policy for the Commission, in any case.

23. Declaring its jurisdiction will satisfy that requirement.
24. That the Commission has not been regulating the pole attachment rates, terms and conditions of cooperatives that purchase electricity from the TVA is no bar to its assertion of jurisdiction at this time. *See, e.g. Kentucky CATV Ass'n, 675 S.W.2d at 397; Ballard Rural Tel. Coop. Corp., Inc. v. Jackson Purchase Energy Corp, 2005 WL 858940 (Ky. PSC 2005).*

Requested Relief

25. The Kentucky Cable Telecommunications Association respectfully requests that the Commission issue a declaratory order recognizing that it has jurisdiction to regulate the pole attachment rates of cooperatives that purchase electricity from the Tennessee Valley Authority.

Respectfully Submitted,



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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of

THE REGULATION OF RATES, TERMS)
AND CONDITIONS FOR THE PROVISION)
OF POLE ATTACHMENT SPACE TO CABLE) CASE NO. 8040
TELEVISION SYSTEMS BY TELEPHONE)
COMPANIES)

and

In the Matter of

THE REGULATION OF RATES, TERMS)
AND CONDITIONS FOR THE PROVISION)
OF POLE ATTACHMENT SPACE TO CABLE) CASE NO. 8090
TELEVISION SYSTEMS BY ELECTRIC)
UTILITIES)

ORDER

On November 20, 1980, General Telephone Company of Kentucky ("General") and South Central Bell Telephone Company ("Bell") filed with the Commission a petition requesting that the Commission assert that it has jurisdiction to regulate the rates, terms, and conditions applicable to the provision of pole attachment space to cable television system operators by telephone utilities. Additionally, the petition requests that the Commission certify to the Federal Communications Commission ("FCC") that it does assert such jurisdiction and that the certification be in the form of the statutory language required by Section 224 of Title 47, United States Code.

On December 8, 1980, Kentucky Utilities Company and Louisville Gas and Electric Company ("LG&E") filed with the Commission a similar petition, requesting essentially the same relief. The petitions were consolidated for all purposes by the Commission, and a hearing was held on April 21, 1981. Kentucky Power Company intervened to join in the Petition of the other electric utilities, and American Television and Communications Corporation, Consolidated Cable Television Services, Inc., Kentucky CATV Association, National Cable Television Association, Inc., ("NCTA") and the Attorney General's Division of Consumer Intervention intervened in opposition to both Petitions.

Kentucky Power Company and LG&E have filed parallel motions to strike the brief of the National Cable Television Association, Inc., on the ground that it was mailed on May 19, 1981, rather than filed (i.e., received by the Commission's Secretary) on or before May 18, 1981, as ordered by the Commission. LG&E further asserts that a copy of said brief was mailed directly to an official of LG&E, in violation of Kentucky Disciplinary Rule 7-104(A)(1), when an attorney of record is involved in the case.

The Commission reminds NCTA of the necessity of compliance with all orders of the Commission. However, because the late filing may have been inadvertent (one day late), and because the Commission must consider all ramifications of

this matter of considerable public importance, the motions are overruled.

BACKGROUND

There are more than 100 cable television systems in Kentucky whose cables linking subscribers are attached, for convenience, economy and aesthetic reasons, to existing utility poles in the areas served by the systems. The terms, conditions and rates for use of this space on utility poles have been the subject of private negotiation and written agreements between the affected utilities and the cable systems. Neither has heretofore asserted or invoked the jurisdiction of this Commission for permission or approval of the terms of these arrangements.

After extensive hearings, by Public Law 95-234, 92 Stat. 33, 47 U.S.C. § 224, Congress amended the Federal Communications Act so as to grant regulatory jurisdiction over cable television pole attachments to the Federal Communications Commission in those states which did not exercise such regulation, for a five year period beginning February 21, 1978.

Pole attachments on facilities of cooperative electric and telephone corporations, of which there are 40 regulated by this Commission, are specifically exempted from the federal regulation, and unless this Commission asserts jurisdiction,

would remain unregulated while other electric and telephone utilities would be regulated.

The federal act invites those states which have and will assert jurisdiction to regulate utility pole attachments to do so, and uses the language of "pre-emption" to indicate that when a state has affirmatively asserted to the FCC that such state regulation is active and on-going, the FCC will not assert jurisdiction. The legislative history of the federal enactment indicates that it is Congress' preference that regulation be done by the states.

The petitioning utilities have indicated their preference for state regulation, and the cable system operators, by opposing the petitions, have opted for federal regulation. The decision of this Commission turns upon the construction of our statutes.

DISCUSSION

The utilities argue that utility poles are an essential part of the facilities of the regulated utilities, that the amount paid for the use of space on the poles is a "...charge, rental or other compensation for service rendered..." [KRS 278.010(12)], and that this Commission can certify that it considers the interests of cable television ("CATV") consumers, as well as utility customers, in the ordinary course of deciding whether rates are "fair, just and reasonable" under the statutory mandate of KRS 278.190(3).

The intervening CATV operators contend that the pole attachment arrangement is not within the statutory scheme of regulating utility rates and services; that contemporaneous construction by the Commission, the cable operators, and the regulated utilities over the last 25 years has been that the PSC has no jurisdiction over the subject; and that the matter should remain open at least until the General Assembly meets next year. They point out that nowhere in the statute is there any mention of CATV or pole rentals. Moreover, they rely heavily on Benzinger et al. v. Union Light, Heat & Power Co., 293 Ky. 747, 170 S.W.2d 38 (1943), which upheld the police power of a city to require utility wires to be buried by putting a restrictive interpretation on the statutory language empowering the Commission to regulate the "service" of a utility.

KRS 278.040 states that the Public Service Commission has jurisdiction over all the utilities in this state, and that the Commission shall have exclusive jurisdiction over the rates and service of those utilities. The petitioning utilities unquestionably are "utilities" within the meaning of KRS 278.010, and therefore, the question before us is whether the service of providing space on existing utility poles (and the rates charged therefor) are "rates" and "services" within the purview of this Commission under KRS 278.040.

The term "rate" is defined in Chapter 278, as follows:

(12) "Rate" means any individual or joint fare, toll, charge, rental or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement or privilege in any way relating to such fare, toll, charge, rental or other compensation, and any schedule or tariff or part of a schedule or tariff thereof. [KRS 278.010(12)].

The term "service" is even broader, being couched in non-exclusive language:

(13) "Service" includes any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat units and pressure of gas, the purity, pressure and quantity of water, and in general the quality, quantity and pressure of any commodity or product used or to be used for or in connection with the business of any utility...[KRS 278.010(13)] (Emphasis supplied).

The term "utility service" or "utility services" is not defined in the statutes at all.

Whether or not it was contemplated at the time of the original enactment of this statute, the petitioning utilities are clearly providing a "service" when they allow CATV operators, for a fee, to attach their cables to unused space on existing utility poles. The availability of this unused space on the poles (and the arrangements that have been made between the utilities and the cable operators) has greatly contributed to the development of the cable television industry in recent years.

The Commission concludes that the term "service" as used in KRS 278.040 has two levels. First, there is the primary meaning: that service to the public of the type for which the utility business was formed, thereby subjecting it to the jurisdiction of the PSC. Second, there is a service which arises out of the presence of or the use of the utility facilities. While this is not contemplated in considering whether the business of the utility is regulable, it still is a source of revenue to the utility which ultimately results in lower basic "rates" to the ultimate consumers of utility services. For this reason, Benzinger must be read as deciding only what was before the Court: that the PSC was not granted jurisdiction over those parts of the utility's operations which come within the "police powers" of a municipality. The Court's attempted definition and distinction between "essential utility functions" and "other functions" is awkward and difficult to apply. Since such distinction was not necessary to the court's decision, it should be considered dictum only. Neither petitioners nor intervenors contend that the regulation of rates, terms and conditions of pole attachments comes within the police powers of municipalities.

Therefore, the PSC may regulate these services without determining whether the activity is a "utility" function. The jurisdiction of the PSC over the affected

utility companies has been established. That jurisdiction also extends to their poles, which are an integral part of their facilities. In the instant case, the Commission is called upon to approve the "rate" the utilities are charging for the use of a previously unused part of these facilities. While this may not be one of the "services" contemplated when the statutory definition was created in 1934, nor even a "public utility" activity generally, it is clearly a "service" within the broad definition set forth in KRS 278.010. Because of their monopoly status, such services should be regulated in the public interest.

Intervenors argued at the hearing that revenues from pole attachment charges are like "money from the wife's folks," i.e., that since the utility already has the pole in place and there is unused space on the pole, any charge therefor is "reasonable." However, this Commission is of the opinion that all utility facilities should be operated to produce the optimal results; that if a utility facility can produce revenue from other uses without interference with essential utility operations, it must do so, and for a fair, just and reasonable rate. In turn, the revenue from such "other uses" reduces, pro tanto, the revenue that must be earned from conventional utility services rendered by the utility, thereby lowering the utility consumers' overall rate.

Both the petitioning utilities and intervening cable operators should be proud of a record of 25 years of increasingly heavy usage of utility pole space without a serious safety question having been presented to this Commission for its adjudication. This speaks well for the negotiation and drafting of the agreements whereunder the attachments are permitted, as well as the operations of the personnel of both groups in the field. However, if there were serious questions as to the safety practices of any utility allowing the use of its poles by another entity, this Commission has little doubt that it would invoke its jurisdiction to correct it.

KRS 278.260 expressly empowers the Commission to investigate "any rate," pursuant to complaint or upon its own motion, which may be "unreasonable or unjustly discriminatory," or "any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith" which may be "unreasonable, unsafe, insufficient or unjustly discriminatory...." (Emphasis supplied). Thus, viewed as whole, it is clear that the statutory scheme set forth in KRS Chapter 278, except as limited by the police power of municipalities, confers plenary jurisdiction over all "utilities" and their "facilities."

As to certification to the FCC required by the federal statute that this agency "...does consider the interest of the subscribers of the cable television services as well as the interests of the consumers of the utility services," this Commission adopts the view expressed in a recent opinion of the Appellate Court of Illinois:

Since we have concluded that the Commission has the power to regulate leasing activities it follows that it is under the mandate to assure that the charges are "just and reasonable". Fulfilling that mandate necessarily entails balancing the interests of Cable TV subscribers with the other interests at stake; such balancing is all that the federal statute can reasonably be read to require. (Emphasis supplied). Cable Television Company of Illinois v. Illinois Commerce Commission, 82 Ill. App.3d 814, 403 N.E.2d 287, 290 (1980).

Thus, in exercising our jurisdiction over pole attachment rates, this Commission will consider the interests of the subscribers of cable television services as well as the interests of the consumers of utility services.

The electric utilities petition the Commission to allow them to file pole attachment agreements as "Special Contracts," under 807 KAR 50:025(11), while the telephone utilities have proposed that they file tariffs for this service. For the present, it seems preferable that the rates to be charged for CATV pole attachments, and the terms and conditions upon which the use is accomplished, be as

uniform as possible throughout each utility's service area. Hence it is preferable that all regulated utilities providing such pole space file tariffs for this service. In the event there are, or may later be, special circumstances calling for different rates, terms or conditions in a particular situation, then such arrangements may be handled under the "Special Contracts" provision of the regulations.

The Commission, having considered this matter, including the testimony at the public hearing and all briefs and correspondence of record, and being advised, is of the opinion and finds that:

1. Providing space on utility poles by utilities regulated by this Commission for cable television pole attachments is a "service" within the meaning of the definition of KRS 278.010(13);

2. The rates, terms and conditions for providing such pole attachment space are within the jurisdiction of the Commission under KRS 278.010(12) and KRS 278.040; and

3. Under KRS 278.030 and KRS 278.040, this Commission has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services, in the exercise of its jurisdiction over utility rates and utility services.

IT IS THEREFORE ORDERED that all utilities regulated by this Commission which provide pole attachment space for cable television systems shall file tariffs within 45 days of the date of this Order, setting forth the rates, terms and conditions therefor in the manner prescribed by the Regulations of this Commission.

IT IS FURTHER ORDERED that the Secretary shall certify to the Federal Communications Commission that this Commission regulates pole attachment rates, terms and conditions, and that this Commission has the authority to consider, and does consider, the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services, as provided in 47 U.S.C. § 224(c)(2).

Done at Frankfort, Kentucky this 26th day of August, 1981.

PUBLIC SERVICE COMMISSION

Martin M. Tohy
Chairman

Katharine Landall
Vice Chairman

James H. Hargan
Commissioner



ATTEST:



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

TENNESSEE VALLEY AUTHORITY,
ET AL.,
PLAINTIFFS,

v. CIVIL ACTION
NO. 79-0009-P

ENERGY REGULATORY COMMISSION
OF KENTUCKY (FORMERLY
PUBLIC SERVICE COMMISSION
OF KENTUCKY),
DEFENDANTS.

SUMMARY JUDGMENT

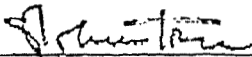
For the reasons stated in the Memorandum Opinion
this day entered,

IT IS ORDERED AND ADJUDGED that the plaintiffs'
motion for Summary Judgment be, and hereby is, SUSTAINED.

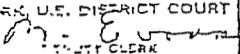
This is a final and appealable judgment and there is
no just cause for delay.

IT IS FURTHER ORDERED that enforcement of plaintiffs'
injunction be STAYED during the time in which any notice
of appeal may be filed.

DATED: September 25, 1979.



Edward H. Johnstone
Judge, United States District Court

ENTERED
SEP 27 1979
CLERK, U.S. DISTRICT COURT

COURT CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

TENNESSEE VALLEY AUTHORITY,
ET AL.,
PLAINTIFFS,

v. CIVIL ACTION
NO. 79-0009-P

ENERGY REGULATORY COMMISSION
OF KENTUCKY (FORMERLY
PUBLIC SERVICE COMMISSION
OF KENTUCKY),
DEFENDANTS.

MEMORANDUM OPINION

Plaintiffs, Tennessee Valley Authority (TVA) and various distributors of TVA electric power in Kentucky brought suit under 28 U.S.C. §§1331, 1337, 1345 and 2201-2202 asking for declaratory and injunctive relief preventing the Energy Regulatory Commission of Kentucky (ERC) from exercising any authority over the rates charged by the TVA distributors. Plaintiffs have moved for summary judgment. The Court is of the opinion that this motion should be granted.

The TVA, a United States Government corporation, was created by the Tennessee Valley Authority Act of 1933. The act authorizes the TVA to generate and sell electric power under contracts for terms of up to twenty years. In 1935 Section 10 of the Tennessee Valley Authority Act was amended to provide that:

. . . the [TVA] Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act. . . .

49 Stat. 1076 (1935), 16 U.S.C. §831i (1976).

Pursuant to this congressional grant of authority, the TVA contracted to sell electrical power to plaintiff TVA distributors. These distributors then resell the power to consumers in Kentucky.

One purpose of Congress in creating the TVA was to establish a "yardstick" with which to measure utility rates around the country. That is, by charging TVA with the duty to supply electrical power at the lowest possible cost, a national standard of fairness was established with regard to utility rates. In describing the TVA yardstick, the 1938-1939 Joint Congressional Committee report placed special emphasis on the retail rates charged by TVA distributors:

(B) The Yardstick

The resolution in subsection (g) directs the committee to investigate "Whether by accounting methods and cost charges applicable to private industry, the electric rates of the Authority provide a legitimate, honest 'yardstick' of equitable rates of private industry.

Regardless of the numerous and conflicting descriptions of the yardstick, it can be defined as follows: The yardstick is not in the Authority's wholesale rates, but in the retail rates of the various municipalities and other local organizations that have purchased Authority power and distributed it at unusually low rates. If their operations are shown to be of a kind that may be substantially duplicated in other parts of the country, their rates may be considered a Nationwide yardstick, or measure of results to be expected.

Report of the Joint Comm. on the Investigation of the Tennessee Valley Authority, S. Doc. No. 56, 76th Cong., 1st Sess., pt. 1, at 179, 190, 197-98 (1939).

On the other hand, four of the plaintiff distributors are Kentucky rural electric cooperatives. These four cooperatives were created pursuant to the provisions of an Act of the General Assembly of Kentucky incorporated into K.R.S. Chapter 279. The other named plaintiff distributors

are a Tennessee rural electric cooperative and a Tennessee municipality that sell electric power in Kentucky. The same legislative act enables these non-resident entities to distribute power to a distance of not more than three miles from the state boundary.

The Kentucky laws, in addition to providing for the creation of these resident cooperatives, also impose limitations and obligations with regard to their operations. Specifically the state law provides that these and all other distributors so created or doing business under the Act are subject to the general supervision of the Public Service Commission (now ERC).¹

For the purpose of this action the intention of the Kentucky General Assembly was twofold: (1) To permit the creation or operation of the plaintiff distributors or their like; and (2) to subject those distributors to ERC supervision.

¹ K.R.S. 279.210 provides in part:

(1) Every corporation formed under KRS 279.010 to 279.220 shall be subject to the general supervision of the Public Service Commission, and shall be subject to all the provisions of KRS 278.010 to 278.450 inclusive, and KRS 278.990.

K.R.S. 279.220 provides in part:

(1) Any rural electric cooperative corporation organized under a law of any state contiguous to this state, which law is substantially similar to the law under which such corporations may be organized in this state, may extend its operations into this state for a distance not exceeding three miles from the boundary between that state and this state, . . .

(2) The operations of such corporation within this state shall be subject to the supervision of the Public Service Commission, and the commission may take the necessary action to require the corporation to furnish adequate service at reasonable rates. If the corporation fails to comply with the regulations and requirements of the commission it shall forfeit the privilege granted by this section.

The TVA and the ERC have each sought to fulfill their legislative mandates. On the federal side, TVA, in exercising the power delegated to it by Congress, has set resale rates to be followed by its distributors by including the following language in the TVA and distributors contracts:

5. Resale Rates. In order to assure a wide and ample distribution of electric energy in the area served by [the TVA distributor], the parties agree as follows:

(a) [The TVA distributor] agrees that the power purchased hereunder shall be sold and distributed to the ultimate consumer without discrimination among consumers of the same class, and that no discriminatory rate, rebate, or other special concession will be made or given to any consumer, directly or indirectly.

(b) [The TVA distributor] agrees to serve consumers . . . at and in accordance with the rates, charges, and provisions set forth . . . and not to depart therefrom. . . .

The contracts with the TVA distributors contain provisions which allow resale rates to increase as the cost of fuel used by the distributors increases.

Over on the state side, the ERC, in responding to the obligation delegated to it by the General Assembly of Kentucky, ordered the named TVA distributors to set retail rates by reference to fuel escalation schedules differing from the fuel escalation provisions imposed by the TVA contract.

ERC argues that no actual conflict exists between the regulation undertaken by it and the fuel escalation provisions in the contracts between TVA and the TVA distributors. The ERC points out that the statutory mandate imposed on it by the Kentucky Revised Statutes -- to see that utility rates are fair, just, and reasonable -- does not conflict with TVA's mission to make low-cost power available to domestic and rural consumers.

This contention ignores the fact that it is impossible for the TVA distributors to comply with the ERC regulation without breaching contracts with the TVA. This Court finds direct conflict exists between an exercise of federal authority granted TVA by Congress and an exercise of state authority granted ERC by the General Assembly of Kentucky.

When compliance with the legitimate directions of a state government is impossible without violating the legitimate directions of the federal government, Article IV §2 of the United States Constitution, the Supremacy Clause, demands that the exercise of federal authority supersede the exercise of state authority. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), United States v. Georgia Public Service Commission, 371 U.S. 285 (1963), McDermott v. Wisconsin, 228 U.S. 115 (1912).

The United States Congress and the General Assembly of Kentucky each have the ultimate power over the entities they create. Congress can curtail the authority of TVA⁽²⁾ The General Assembly can alter the authority of electrical cooperatives established under its acts.

⁽¹⁾ Mr. Justice Burger observed in Tennessee Valley v. Hill, 437 U.S. 153, 98 S.Ct. 2279 (1978),

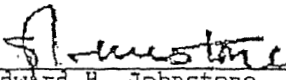
Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . .

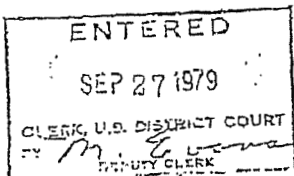
. . . . in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'commonsense and the public weal'.

But so long as plaintiff cooperatives distribute power purchased from TVA they must comply with the legitimate conditions imposed upon them by TVA.

An appropriate order is this day entered.

DATED: September 25, 1979.


Edward H. Johnstone
Judge, United States District Court



FRANKLIN CIRCUIT COURT
NO. 80-CI-1747

WEST KENTUCKY RURAL ELECTRIC
COOPERATIVE CORPORATION
Mayfield, Kentucky

FILED
PLAINTIFF

VS.

ORDER

NOV 10 1982

Clerk Franklin Circuit Court

ENERGY REGULATORY COMMISSION
COMMONWEALTH OF KENTUCKY

DEFENDANT

* * * * *

On this appeal the only question is whether KRS 278.300(10) exempts the plaintiff from seeking authorization of the defendant to borrow funds through the R.E.A. It is established that the plaintiff is under the supervision and control of the R.E.A. as regards the feasibility of loan approval, as well as the TVA as regards rates adequate to assure financial soundness.

KRS 278.300 prohibits a utility from issuing securities or other liability without approval of the appropriate commission. KRS 278.300(10) reads as follows:

"This section does not apply in any instance where the issuance of securities or evidences of indebtedness is subject to the supervision or control of the federal government or any agency thereof,

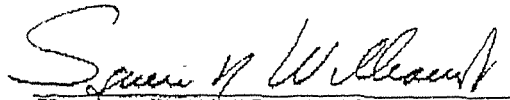
but the appropriate commission may appear as a party to any proceeding filed or pending before any federal agency if the issuance of the securities or evidences of indebtedness will materially affect any utility over which the commission has jurisdiction."

The R.E.A. and the TVA fall within the general classification of "federal government or any agency thereof." The action proposed by this plaintiff is subject to the supervision or control of those agencies. The language of the statute is clear and unequivocal. However desirable it may be to protect the interest of the consumer the exemption applies in this case.

The order of the Energy Regulatory Commission appealed from is reversed and set aside insofar as it declares the plaintiff is not exempt from the provisions of KRS 278.300 by KRS 278.300(10).

It is so Ordered.

This the 12 day of November, 1982.



JUDGE, FRANKLIN CIRCUIT COURT
DIVISION II

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of

THE APPLICATION OF HICKMAN-FULTON)
COUNTIES RURAL ELECTRIC COOPERATIVE)
CORPORATION FOR AN ORDER AUTHORIZING)
SAID CORPORATION TO BORROW ONE HUNDRED)
EIGHTY-NINE THOUSAND DOLLARS (\$189,000.00))
FROM THE NATIONAL RURAL UTILITIES COOPERA-)
TIVE FINANCE CORPORATION FOR THE PURPOSE)
OF CONSTRUCTION, IMPROVEMENT AND OPERATION)
OF ELECTRIC DISTRIBUTION AND SERVICE)
FACILITIES IN HICKMAN, FULTON, GRAVES AND)
CARLISLE COUNTIES, KENTUCKY)

CASE NO.
8858

O R D E R

On September 27, 1979, the United States District Court for the Western District of Kentucky ruled that the Commission has no authority to regulate the rates of electric utilities in Kentucky that buy their power from the Tennessee Valley Authority ("TVA"), Tennessee Valley Authority, et al. v. Energy Regulatory Commission of Ky., Civil Action No. 79-0009-P, W.D. Ky., September 27, 1979, unpublished opinion. In January 1983, the Commission received correspondence from TVA stating that in its opinion the principle enunciated in the 1979 federal court decision would apply to service as well as rates. The Commission agreed with this interpretation and has returned all tariffs to the TVA-supplied cooperatives.

On November 12, 1982, the Franklin Circuit Court issued its opinion in West Kentucky RECC v. Energy Regulatory Commission, Civil Action No. 80-CI-1747, to the effect that the Rural Electrification Administration ("REA") falls within the classification of the "federal


government or any agency thereof" and, accordingly, borrowings from REA are exempt from Commission scrutiny under the provisions of KRS 278.300(10).

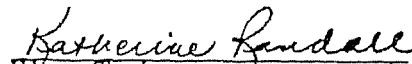
The Commission, having considered the decisions of the United States District Court, the Franklin Circuit Court and being advised, is of the opinion and finds that, absent jurisdiction over rates, service and borrowings from REA, any attempt to exercise jurisdiction over other borrowings by TVA-supplied rural electric cooperatives including the National Rural Utilities Cooperative Finance Corporation, the lender herein, would be ineffectual.

IT IS THEREFORE ORDERED That this case be and it hereby is dismissed.

Done at Frankfort, Kentucky, this 27th day of June, 1983.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:

Secretary

West Adzgo



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

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March 2, 1983

Senator William L. Quinlan
Chairman
Joint Interim Committee on Energy
Room 21 - Capitol Annex
Frankfort, Kentucky 40601

Dear Senator Quinlan:

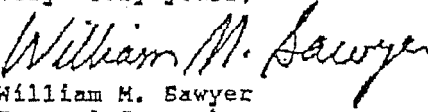
On September 25, 1979, the United States District Court for the western district of Kentucky ruled that the Kentucky Public Service Commission had no authority to regulate the rates of electric utilities in Kentucky that buy their power from the Tennessee Valley Authority. The court's ruling was based upon the fact that Congress gave TVA the power to set the retail rate for all customers who purchase electricity from TVA under a wholesale contract. The power of the federal government to set the retail rate for these utilities takes precedence over the power of the state to likewise set the rate. Accordingly, since 1979 the PSC has not exercised any jurisdiction over the retail rates of the following utilities operating in Kentucky: Hickman-Fulton RECC, Pennyrile RECC, Warren RECC, West Kentucky RECC, Tri-County Electric Membership Corporation, and Jellico Electric Company.

In January of this year, the PSC received correspondence from TVA stating that it was TVA's belief that the principle enunciated in the 1979 federal court decision would apply to service as well as rates. TVA thus contends that none of its wholesale customers operating in Kentucky are subject to any of the PSC's regulations governing the provision of electrical service to customers. The PSC has considered this matter and it is our conclusion that TVA is right on this point and that federal rather than state law governs the service as well as the rates of all TVA-supplied utilities. Since construction projects by utilities are also related to the rates and service of the utilities, the PSC believes it cannot legally certificate construction projects for these utilities. Accordingly, the PSC wishes to inform your committee that our agency will no longer regulate the rates, service, or construction of the aforementioned six utilities operating in Kentucky which purchase their electricity from the TVA.

Senator William L. Quinlan
March 2, 1983
Page Two

If you or any member of your committee have questions regarding this matter, please feel free to contact our agency at anytime.

Very truly yours,



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