COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

On August 6, 2013, the Commission granted the Kentucky Cable Telecommunications Association's ("KCTA") application for rehearing of our June 28, 2013 Order which stated that federal law pre-empts the Commission from asserting 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"). The five electric cooperatives are: Hickman-Fulton Counties Rural Electric Cooperative Corporation, Pennyrile Rural Electric Cooperative Cooperation, Tri-County Electric Membership Corporation, Warren Rural Electric Cooperative Corporation, and West Kentucky Rural Electric Cooperative Corporation (collectively, "TVA Cooperatives").

Both KCTA and the TVA Cooperatives have filed motions for summary judgment, and each party filed a response, which we will now address. As discussed below, we reaffirm the conclusion in our June 28, 2013 Order that we do not have jurisdiction over

the pole attachment rates, terms, or conditions of the TVA Cooperatives; deny KCTA's motion for summary judgment; grant the TVA Cooperatives' motion for summary judgment; and affirm our denial of KCTA's petition for a declaratory Order.

BACKGROUND

On December 3, 2012, KCTA filed its petition asserting that TVA's regulation of electric rates precluded Commission regulation of the TVA Cooperatives only to the extent the two directly conflict, and that because the TVA does not regulate the TVA Cooperatives' pole attachments, any of the Commission's requirements regarding pole attachments would still allow the TVA Cooperatives to comply with the TVA regulation. KCTA asserted that, because there was no conflict between our regulation and the TVA regulation, we had jurisdiction over those pole attachments and should assert jurisdiction.

On January 17, 2013,[1] we issued an Order in which we found that KCTA bore a "considerable burden to prove its claim that the Commission does have jurisdiction to regulate pole attachments of the TVA Cooperatives."[2] We also noted that KCTA's petition included "no support for its allegations that the TVA does not regulate the pole attachment rates of the TVA Cooperatives and that Commission regulation of pole attachment rates is not preempted by the TVA's rate jurisdiction."[3] However, we established this case to "review the extent, if any, of our jurisdiction to regulate the pole

[1] Order (Ky. PSC Jan. 17, 2013) ("Jan. 17, 2013 Order").

[2] Jan. 17, 2013 Order at 2.

[3] *Id.*

attachment rates of the TVA Cooperatives."[4] We then ordered the TVA Cooperatives to individually or jointly file a response to the KCTA's Petition.

On February 15, 2013, the TVA Cooperatives jointly filed a response requesting that we "enter an Order affirming that it [the Commission] lacks the jurisdiction to regulate the pole attachment rates of cooperatives that purchase electricity from the Tennessee Valley Authority."[5] In support of their motion, the TVA Cooperatives cite five identical letters from Cynthia L. Herron, Director of Retail Regulatory Affairs of the TVA, to representatives of each of the TVA Cooperatives. These letters state that the TVA is the "the exclusive retail rate regulator for the distributors of TVA power,"[6] and describe the TVA's relationship with the distributors. Regarding pole attachment rental fees, the letters simply state that "TVA requires that a distributor recover its full cost associated with the pole attachment and does not place any unfair burdens on the electric ratepayers by ensuring full cost recovery."[7] The TVA Cooperatives contended that these letters indicate that TVA agrees that the TVA has exclusive control over pole attachment regulation.

On March 1, 2013, KCTA filed a reply to the TVA Cooperatives' Response in which it argued that the Commission, not the TVA, had regulatory jurisdiction over the "TVA Coops' pole attachment rates, terms, and conditions."[8] The KCTA also argued

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[4] *Id.* at 3.

[5] TVA Cooperatives' Response to the Jan. 17 Order (filed Feb. 15, 2013).

[6] *Id.* Exhibits 2–6.

[7] *Id.*

[8] Reply of the Kentucky Cable Telecommunications Association (filed Mar. 1, 2013).

that the TVA's letters are "neither an assertion of preemptive jurisdiction by the TVA or an objection to this Commission regulating the Coops' pole attachment rates . . . ."[9]

On April 29, 2013, the Executive Director for the Kentucky Public Service Commission issued a letter to Cynthia Herron.[10] The purpose of the letter was to clarify her authority to respond on behalf of the TVA and whether the TVA was asserting exclusive jurisdiction over pole attachment rates for the TVA Cooperatives. Ms. Herron responded by letter on May 16, 2013, stating that she had the authority to speak on behalf of the TVA.[11] She also stated that the TVA has "oversight responsibility for the pole attachment fees of the Kentucky distributors of TVA Power . . . ."[12]

On June, 28, 2013, we entered an Order denying KCTA's Petition based on a finding that federal law preempted us from exercising authority over the pole attachment rates of the TV Cooperatives. The June 28, 2013 Order relied, in large part, on the statements Ms. Herron made in her two letters. We held, *inter alia*, that:

> As Ms. Herron acknowledged, the TVA's goal is to "keep the valley's retail rates as low as feasible . . . ." Part of the TVA's process in regulating the retail rates takes into account the TVA cooperatives' non-electric revenues, including the "revenue received from pole attachment fees." Not only does the TVA take into account revenue received from pole attachment fees, it explicitly establishes requirements for how the pole attachment fees are calculated to avoid having to raise retail rates. This is a comprehensive, top to bottom, regulatory scheme where the TVA looks at every aspect of the TVA cooperatives'

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[9] *Id.* at 2.

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

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

[12] May 16 Letter at 1.

> revenues and establishes requirements for those revenues. . . . Pole attachment rates are a component in establishing retail rates, and the Commission is pre-empted from regulating retail rates. Any changes in pole attachment rates would alter the retail rates. Thus, we find that we are pre-empted from exercising any jurisdiction over the pole attachment rates for electric utilities that purchase wholesale power from the TVA.[13]

On July 18, 2013, KCTA filed an application for rehearing of the June 28, 2013 Order, arguing that there was an insufficient factual record to deny its petition. In addition to requesting rehearing, KCTA requested that an evidentiary hearing be scheduled to "explore and ultimately answer the fundamental factual question [of] whether the [TVA] regulates pole attachments and pole attachment rates" of the TVA Cooperatives.[14] KCTA argued that the Commission's conclusion that its jurisdiction is preempted by the TVA is not supported by substantial evidence due to the Commission's reliance on the unsworn and unverified comments in two TVA letters describing TVA's review of pole attachment rates. Further, KCTA claimed that the TVA letters provided no "evidence that TVA does in fact regulate pole rates." KCTA stated that an evidentiary hearing is needed to determine, at a minimum, whether TVA has a pole-rate formula and if the TVA Cooperatives have to follow it, the process and methodology of pole attachment rates, and other aspects of the relationship between communication attachers and the TVA Cooperatives, including the procedure for filing complaints.

[13] Order (Ky. PSC June 28, 2013) at 8.

[14] Application for Rehearing of the Kentucky Cable Telecommunications Association (filed July 18, 2013) at 1.

On July 24, 2013, the TVA Cooperatives filed their response to the Application for Rehearing asserting that there were only issues of law presented and that the June 28, 2013 Order properly concluded that the Commission was preempted by federal law from asserting jurisdiction over the pole attachment rates of the TVA Cooperatives. The TVA Cooperatives argued that there were no issues of fact to be determined, and that the only issue that was to be determined was "whether or not the TVA Act and the Supremacy Clause, U.S. Const. Art. IV, Sec. 2, cl. 2, operate to preempt state regulation of the TVA Cooperative's pole attachment rates."[15] The TVA Cooperatives claimed that no "documentary or testimonial evidence" is necessary to resolve the issue of the Commission's jurisdiction.[16]

On August 6, 2013, we granted KCTA's request for rehearing, finding that the question of whether the Commission was preempted from exercising jurisdiction over the TVA Cooperatives' pole attachment rates was a mixed question of fact and law. We concluded that, to the extent that the June 28, 2013 Order relied upon two letters from TVA, which KCTA did not have an opportunity to challenge, the decision was not supported by substantial evidence.

In granting rehearing, we rejected KCTA's assertion that TVA's jurisdiction over pole attachment rates can be determined only by the testimony at an evidentiary hearing of a TVA representative and the TVA Cooperatives, noting that there may well be other ways to show the extent of TVA's jurisdiction. We further rejected KCTA's assertion that it is relevant and necessary for the Commission to determine whether

[15] TVA Cooperatives' Response to Application for Rehearing (filed July 25, 2013 in the Post Case Referenced Correspondence) at 5.

[16] *Id.*

TVA regulates pole attachment rates using the same or a similar rate methodology as the Commission, and whether TVA has a procedure for KCTA to file a complaint or otherwise challenge the TVA Cooperatives' pole attachment rates. We concluded that the question before us was "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."[17]

After granting KCTA's application for rehearing, an informal conference ("IC") was held at the Commission on October 3, 2013, for the purpose of discussing a procedural schedule. The parties agreed to procedural dates for discovery, and those dates were set forth in an Order entered on October 10, 2013. Several disputes arose out of the discovery, delaying resolution of this case. KCTA issued numerous data requests, and deposed several TVA Cooperative employees. After conducting the depositions, KCTA filed a motion for summary judgment. A subsequent IC was held to discuss dates for the TVA Cooperatives to file summary judgement and for both parties to file responses, and those dates were set forth in an Order entered on May 6, 2015.

SUMMARY JUDGMENT MOTIONS

In its motion for summary judgment, KCTA argues that the Commission has jurisdiction over the pole attachment rates of the TVA Cooperatives because the record demonstrates that "TVA plays no role in connection with" the TVA Cooperatives' pole attachment rates, terms or conditions.[18] KCTA argues that there are no genuine issues

[17] Order (Ky. PSC Aug. 6, 2013) ("August 6, 2013 Order") at 4.

[18] KCTA's Motion for Summary Judgment (filed Apr. 13, 2015) at 13.

of material fact and that "[p]ole attachment revenues and expenses are simply inputs over which the TVA exercise no more control than it does over other revenues or expenses of the Cooperatives."[19]

KCTA, after discovery and depositions, claims that the record establishes that the TVA has no involvement whatsoever in the TVA Cooperatives' pole attachments. KCTA argues that the record specifically shows that: 1) the TVA Cooperatives do not communicate their rates to the TVA; 2) the TVA Cooperatives have never consulted with the TVA regarding pole attachment rates; 3) the TVA Cooperatives charge widely varying pole attachment rates, without any input from the TVA; 4) the agreements between the TVA and the TVA Cooperatives do not address pole attachment rates; 5) the rates the TVA Cooperatives pay other utilities to use their poles is not approved by the TVA; 6) the TVA Cooperatives are unaware of any TVA Order or directive with regard to pole attachments; 7) the TVA Cooperatives do not report pole attachment expenses to the TVA; and, 8) the only information regarding pole attachment rates submitted to the TVA is a net of pole attachment revenues and pole attachment expenses included in monthly and annual reports submitted to the TVA.[20]

KCTA argues that this uncontroverted evidence leads to the conclusion that the pole attachment rates, terms and conditions of the TVA Cooperatives are not regulated by any entity and that "[a]t the end of the day, TVA simply treats pole attachment

[19] *Id.* at 2.

[20] *Id. at 5–6.*

revenues like it treats all other inputs to the Cooperatives' electric rate revenue requirement."[21] Based upon this, KCTA argues that it is entitled to summary judgment.

The TVA Cooperatives argue that the only 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."[22] The TVA Cooperatives argue that the undisputed facts show that the TVA: 1) possesses exclusive oversight responsibility for the TVA Cooperatives' electricity rates, including pole attachment rates; and 2) any change to the TVA Cooperatives' pole attachment rates would necessarily impact their electric service rates. The TVA Cooperatives assert that any attempt by the Commission to regulate pole attachment rates would unavoidably conflict with the TVA's exclusive jurisdiction.

The TVA Cooperatives note that Kentucky courts have recognized that pole attachment revenue "is a part of the income of the regulated utilities" and is a natural consideration when setting rates and services for the utilities' customers.[23] The TVA Cooperatives argue that because they report the pole attachment revenues to the TVA, and the TVA uses this, among other revenues, to calculate wholesale rates, the Commission is preempted from authorizing jurisdiction over pole attachment rates because it would conflict with the TVA's authority.

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[21] *Id.* at 17.

[22] TVA Cooperatives' Motion for Summary Judgment (Apr. 13, 2015) at 1–2, *quoting* Aug. 6, 2013 Order at 3.

[23] *Id.* at 12, *citing Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393, 396 (Ky. 1983).

The TVA Cooperatives also argue that: 1) the Commission should defer to the TVA's determination of its own jurisdiction, as stated in Cynthia Herron's letters; and 2) the doctrine of field preemption precludes the Commission from exercising jurisdiction over pole attachment rates.

The evidence filed in this case, as well as the motions for summary judgment, provide a sufficient record upon which we can base a decision. Accordingly, we find that a hearing is not necessary in the public interest or for the protection of substantial rights.

DISCUSSION

The analysis of this case must begin with a brief discussion of the relationship between the Commission and the TVA. We have not exercised jurisdiction over the TVA Cooperatives' rates or services since 1979, when the United States District Court for the Western District of Kentucky found that our regulation of the TVA Cooperatives' retail electricity rates was pre-empted because it directly conflicted with TVA regulation of those same rates.[24]

At the time the District Court issued its 1979 decision that the Commission was pre-empted from regulating the rates of TVA Cooperatives, we had not yet asserted jurisdiction over the pole attachments of any jurisdictional utility. It was not until 1981 that we first asserted jurisdiction, under federal law, over the pole attachments of utilities other than the TVA Cooperatives.[25] Since that time, no one has asserted, as KCTA

[24] *TVA v. Energy Regulatory Comm'n of Kentucky*, Civil Action No. 79-0009-P (W.D. Ky. Sept. 25, 1979).

[25] *See* Case No. 8040, *The Regulation of Rates, Terms and Conditions for the Provision of Pole Attachment Space to Cable Television Systems by Telephone Companies* (Ky. PSC Aug 26, 1981).

does now, that the Commission has jurisdiction to regulate the pole attachments of the TVA Cooperatives.

The TVA was created in 1933 with the passage of the Tennessee Valley Authority Act ("TVA Act").[26] The TVA intended to "supplant state regulation as inadequate and unsatisfactory."[27] It appears that the TVA and the Commission had no jurisdictional conflict from the TVA's inception until 1979, when the Energy Regulatory Commission ("ERC"), our predecessor agency, ordered four electric cooperatives that purchased power from the TVA to set their retail rates by referencing a fuel escalation schedule that differed from the TVA's.[28] The Court in *TVA v. Energy Regulatory Comm'n of Kentucky* found that the Commission was pre-empted from setting the retail rates of those electric cooperatives because it was "impossible for the TVA distributors to comply with the [Commission] regulation without breaching contracts with the TVA."[29] The Court found that because the state and federal law conflicted, "the Supremacy Clause, demands that the exercise of federal authority supersede the exercise of state authority" and that the TVA Cooperatives must follow the rules the TVA imposed on them.[30]

We have subsequently interpreted that pre-emption to apply not only to retail electricity rates, but to services as well. "[F]ederal rather than state law governs the

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[26] 16 U.S.C. § 831 *et seq.*

[27] *TVA v. Tennessee Electric Power Co.*, 90 F.2d. 885, 890 (6th Cir. 1936.)

[28] *TVA v. Energy Regulatory Comm'n of Kentucky* at 6.

[29] *Id.* at 7.

[30] *Id.* at 7–8.

service as well as the rates of all TVA-supplied utilities."[31] However, because we first asserted jurisdiction over pole attachments after the Federal Court's decision, the issue of our jurisdiction over pole attachments for the TVA Cooperatives has not been addressed until now.

We are faced with a situation unique to Kentucky. The TVA provides wholesale power to utilities in seven states in the southeastern United States.[32] Of these states, only Kentucky has opted to regulate pole attachment rates pursuant to 42 U.S.C. § 224.[33] Thus, this jurisdictional issue has not been addressed in any other state, and we are without direct precedent on this issue.

The key to addressing this dispute centers on federal preemption of Commission regulation. If we are preempted, then we cannot exercise control of the TVA Cooperatives' pole attachment rates. If, however, we are not preempted we, presumably, may set rates for the pole attachments.

The United States Supreme Court has provided the three circumstances by which a federal law will pre-empt a state law. First, if the statutory language is clear to the extent that it pre-empts state law, state law is pre-empted. Known as express pre-

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[31] Letter from William M. Sawyer to Senator William L. Quinlan (Mar. 2, 1982), TVA Cooperatives' Response to the Jan. 17 Order, Exhibit 9 (Feb. 15, 2013).

[32] "The area in which TVA supplies power covers about 80,000 square miles, which includes most of Tennessee, northern Alabama, northeastern Mississippi, southwestern Kentucky and parts of Georgia, North Carolina and Virginia, and has a population of over 8,000,000."

4-County Elec. Power Ass'n v. Tennessee Valley Authority, 930 F. Supp. 1132, 1135 (S.D. Miss. 1996).

[33] *See States that have Certified that They Regulate Pole Attachments*, 25 F.C.C. Rcd. 5541, 5541 (F.C.C. 2010), for a list of states that have certified to the Federal Communications Commission that they regulate pole attachments.

emption, it occurs "[w]hen Congress has made its intent known through explicit statutory language . . . ."[34]

Second, in the absence of specific statutory language, the federal law can occupy the entire field so that no room remains for state regulation, otherwise known as "field preemption."

> [I]n the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[35]

Last, state law is pre-empted when state law actually conflicts with federal law. Known as "conflict pre-emption," this occurs when it "is impossible for a private party to comply with both state and federal requirements . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[36] This is the basis upon which the District Court in 1979 found that the Commission was pre-empted from regulating the retail rates of the TVA Cooperatives.

The TVA sets the retail electricity rates for the TVA Cooperatives through the wholesale contracts that the TVA has with the TVA Cooperatives. The TVA may

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[34] *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

[35] *Id.*, *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[36] *English v. Gen. Elec. Co.*, 496 U.S. at 79 (citations omitted.)

include in these contracts any "rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable . . . ."[37]

It is undisputed that the TVA has not included in its wholesale contracts any specific requirements with regard to how pole attachments are to be set or conditions that are to be imposed on the attachers. The TVA Cooperatives also do not report their specific pole attachment rates to the TVA, or ask for approval of the rates charged to each individual pole attacher. The TVA Cooperatives do, however, report their net pole attachment revenue (revenue received from pole attachments minus what they pay to attach on other utilities' poles.)

The TVA's decisions regarding revenues of its member cooperatives are part of the TVA's ratemaking authority, which is placed beyond review by a state commission.

> [W]here there exists a rational connection between TVA's need for revenue sufficient to fulfill the purposes of the TVA Act on the one hand, and the charges or conditions imposed, on the other, then TVA's decision with respect to such charges or conditions is unreviewable. . . . In the court's opinion, however, determinations about the level of rates necessary to recover the various costs of operating TVA's power system . . . are part of TVA's unreviewable rate-making responsibilities.[38]

The TVA requires that the TVA Cooperatives report their revenues and expenses in order for the TVA to establish the TVA Cooperatives' respective revenue requirements.[39] These revenue requirements are part of the components that the TVA

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[37] 16 U.S.C.A. § 831i.

[38] *4-County Elec. Power Ass'n v. Tennessee Valley Authority*, 930 F. Supp. 1132, 1137-1138 (S.D. Miss. 1996).

[39] *See*, e.g., the TVA Cooperatives Motion for Summary Judgment; Exhibit 15, The Annual Report of Pennyrile Rural Electric Cooperative Corp.; Exhibit 8, the Mar. 13, 2015 Deposition of Paul Thompson at 43; Exhibit 16, the Mar. 13, 2015 Deposition of Warren Ramsey at 46; and Exhibit 7, the Mar. 12, 2015 Deposition of David Smart at 17.

uses to calculate the rates that the TVA Cooperatives are authorized to charge their customers.[40] Thus, a change in the level of pole attachment revenues could lead to a change in the TVA Cooperatives' respective revenue requirements, which, in turn, would lead to a change in the respective retail rates that the TVA Cooperatives must charge. The input of the pole attachment revenues is directly connected to the TVA's ratemaking authority, which is beyond not only the Commission's review, but any judicial review.

No party disputes that the TVA has the jurisdiction to establish standards and/or rates for pole attachments, and may do so pursuant to 16 U.S.C.A. § 831i.[41] KCTA's contention is just that TVA has not exercised its jurisdiction. We conclude that TVA's position on this matter is a determination by TVA that the level of regulation it now asserts is sufficient and that no additional regulation by TVA or us is necessary. If tomorrow the TVA were to issue guidelines pertaining to pole attachment rates, no party would disagree that we would clearly be preempted from asserting jurisdiction over these rates.

The fact that the TVA does require the reporting of the pole attachment revenues, even if the TVA Cooperatives report only the net of pole attachment revenues less expenses, is sufficient to us to conclude that: 1) TVA has oversight of the pole attachment rates; and 2) TVA implicitly has concluded that a greater level of regulation

[40] KCTA concedes this point: "TVA simply treats pole attachment revenues like it treats all other inputs to the Cooperatives' electric rate revenue requirement." KCTA Motion for Summary Judgment at 17.

[41] The TVA may include in these contracts any "rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable . . . ."

of pole attachment rates, whether by us or the TVA, is not necessary at this time. As the Supreme Court has noted:

> [W]here failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation.[42]

Here the TVA has chosen to not establish a greater level of requirements regarding pole attachment rates or revenues for its TVA cooperatives. This conscious abstention from establishing such regulation, despite having the undisputed authority to do so is, essentially a "ruling that no such regulation is appropriate . . . ." Our assertion of jurisdiction over pole attachment rates would conflict with this "ruling" of the TVA and would necessarily give way under the doctrine of conflict preemption.

Our issuing of a declaratory Order finding that TVA does assert some level of jurisdiction over pole attachment rates is consistent with the 1983 Kentucky Court of Appeals decision affirming our jurisdiction over pole attachments of jurisdictional utilities. In *Kentucky CATV Ass'n v. Volz*, 675 S.W.2d 393, 396 (Ky. App. 1983), the Court declared that:

> Revenue from pole attachment agreements is a part of the income of the regulated utilities, and it is a natural activity for the Commission to consider these pole rental rates when it considers the overall fairness of rates and services for the consumers.
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> . . .
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> Although cable television was not contemplated at the time the statutes were originally enacted, the utilities are clearly providing a "service" to cable TV when they allow CATV

[42] *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 177-78, (1978) (Citations omitted.)

> operators to attach their cables to unused space on an existing utility pole. The term "service" not only includes the basic services for which a utility is created, but it also includes any service which arises from the use of a utility's facilities, such as its poles. Such use provides additional revenue to the utility which must be considered in determining the "rates" it charges its customers for its basic utility services.

While the Court's declaration of our jurisdiction over pole attachments is certainly true for jurisdictional utilities, i.e., utilities whose rates and service are subject to our exclusive jurisdiction under KRS 278.040, the Court's declaration is not true for the TVA Cooperatives, since we have no jurisdiction to consider either the overall fairness of the TVA Cooperatives' rates and service or the TVA Cooperatives' rates for basic utility service. Rather, it is the TVA that considers the revenue from pole attachments as part of the TVA's consideration of the overall fairness of the TVA Cooperatives' rates, including rates for basic utility service. The TVA utilizes the pole attachment revenues to determine the TVA Cooperatives' respective revenue requirements, and those revenues are used by the TVA to calculate resale rates and "[d]eterminations about the level of rates necessary to recover the various costs of operating TVA's power system . . . are part of TVA's unreviewable rate-making responsibilities."[43]

The Commission has not established a rule that explicitly governs summary judgment; therefore, in determining whether to summarily dispose of this proceeding, we are guided by Civil Rule 56 and the principles established by the courts resolving motions for summary judgment. Civil Rule 56 provides that a party seeking to recover

[43] *4 County Elec. Ass'n.*, 930 F.Supp. at 1138.

upon a claim may move for summary judgment and that the judgment sought shall be entered if:

> [T]he pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Kentucky courts have consistently held that this rule should be cautiously applied and that the record should be reviewed in a light most favorable to the party opposing the motion with all doubts resolved in the non-moving party's favor.[44] Summary judgment is proper "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence that a trial warranting a judgment in his favor and against the movant."[45]

Applying the rule and the substantive law to the record in this proceeding, we find that summary judgment should be granted for the TVA Cooperatives and denied for KCTA. As discussed, *supra*, it is uncontested that the TVA *could* establish specific requirements for pole attachment rates for the TVA Cooperatives, but has elected not to do so. It is further uncontested that the TVA Cooperatives are required to report their pole attachment revenue and that those revenues are a component the TVA considers in establishing the rates for the TVA Cooperatives. The reporting of the revenues, and the establishing of the rates based upon those revenues, are functions of the TVA's ratemaking authority, functions over which we, undisputedly, have no authority.

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[44] *See Steelvest, Inc. v. Scansteel Service*, Ky., 807 S.W.2d 476 (1991).

[45] *Steelvest*, 807 S.W.2d at 482.

Consequently, as a matter of law, we are unable to grant KCTA's motion for summary judgment.

CONCLUSION

Based on the above, we find we are preempted from asserting jurisdiction over the TVA Cooperatives' pole attachment rates.

IT IS THEREFORE ORDERED that:

1. KCTA's petition for a declaratory order is denied

2. KCTA's motion for summary judgment is denied

3. The TVA Cooperatives motion for summary judgment is granted based upon the TVA's preemption of Commission authority over the pole attachment rates of the TVA Cooperatives.

By the Commission

ENTERED
OCT 30 2015
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SERVICE COMMISSION

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