STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

February 19, 2014

Opinion No. 14-20

State Regulation of Pole Attachment Rates of TVA-Supplied Electric Cooperatives

QUESTION

What, if any, jurisdiction does the State of Tennessee have to regulate the pole attachment rates, terms, and conditions of electric distribution utilities in Tennessee that purchase electricity from the Tennessee Valley Authority ("TVA") in light of the TVA's position, based on the TVA Act, 16 U.S.C. §§ 831 *et seq*., that it is the "exclusive retail rate regulator for the distributors of TVA power" and that its "oversight over the pole attachment rates of these distributors is sufficient"?

OPINION

Regulation by the State of the rates, terms, and conditions of pole attachments of the TVA's distributors is not, currently, clearly preempted by the TVA Act, provided that State regulation does not affect either those distributors' rates for electric power or their ability to comply with their agreements with the TVA. If the TVA were to assert its discretionary control over the rates and revenues of its distributors in a manner that directly affected pole attachments, regulation by the State would likely be preempted.

ANALYSIS

Tennessee is unique in that almost all electric power consumed in this state is generated by the TVA, an agency and instrumentality of the United States, and is either sold directly by the TVA or distributed through a number of municipal and cooperative utilities. Because these utilities purchase from the TVA all of the electric power that they distribute, they are subject to the TVA's regulatory authority. Pole attachment fees are those fees charged by utilities for the right to attach wires and other equipment directly to the electric poles that the utilities own and maintain.

The question whether the State of Tennessee may regulate the rates, terms, and conditions of these pole attachment fees in the face of the TVA's regulatory authority is a question of preemption. The TVA, for its part, has asserted that it "is the exclusive retail rate regulator for the distributors of TVA power," that "the TVA does have oversight responsibility for the pole attachment fees of . . . distributors of TVA power to ensure consistency with the wholesale power contract," and that the

TVA "requires that a distributor recover its full costs associated with the pole attachment and not place any unfair burdens on the electric ratepayers by ensuring a full recovery."[1]

Preemption under the Supremacy Clause, U.S. Const., art. VI, cl. 2, takes one of three well-identified forms. Congress may preempt state law expressly or by implication. Express preemption occurs when a federal law includes a preemption clause that clearly withdraws specified powers from the states. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). There are two types of implied preemption, field preemption and conflict preemption. Field preemption occurs when a federal statutory scheme is so extensive and detailed that it leaves no room for supplementary state regulation. *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985). Conflict preemption may occur when it is impossible to comply with both the federal law and the state law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143(1963), or when state law stands as an obstacle to the accomplishment and execution of the federal law's purpose. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The TVA Act, 16 U.S.C. §§ 831 to 831ee, does not expressly preempt state regulation, and it contains nothing that specifically addresses pole attachments. Implied preemption, however, may be another matter, as the TVA Act does confer broad discretion on the TVA Board of Directors in the exercise of their authority to sell surplus power in accordance with the Act's established policies. *See* 16 U.S.C. § 831i.

> [T]he 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 chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contracts may provide that it shall be voidable at the election of the Board.

Id. (emphasis added). The purposes of TVA's power sales are set forth as follows:

> It is declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals[, Alabama] equitably among the States, counties, and municipalities

[1] *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*, No. 2012-00544, Order, at 6, 7-8, (Ky. Pub. Serv. Comm'n, June 28, 2013) (quoting Jan. 24, 2013 letter from Cynthia L. Herron, Dir. of Retail Regulatory Affairs for TVA) The Commission relied on these statements to rule that it lacked jurisdiction over pole attachment rates, but on August 6, 2013, the Commission granted rehearing of that decision, and the case is currently pending.

> within transmission distance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. . . .

16 U.S.C. § 831j.

"[T]he setting of 'resale rate schedules' [in § 831i], limited only by the provision that they not violate the 'purposes of this Act,' is a clear and broad grant of discretion to the TVA Board to set power rates at the consumer level." *Ferguson v. Elec. Power Bd. of Chattanooga,* 378 F.Supp. 787, 789-90 (E.D. Tenn. 1974); *see also 4-County Elec. Power Ass'n v. Tennessee Valley Auth.*, 930 F.Supp. 1132, 1137 (S.D. Miss. 1996) (recognizing "TVA's having been granted by Congress full discretionary authority with respect to setting rates"). The ample authority cited in these cases demonstrates Congress's intent to grant the TVA broad authority with respect to its power sales. *See McCarthy v. Middle Tenn. Elec. Membership Corp*., 466 F.3d 399, 406 (6th Cir. 2006) ("Courts have acknowledged that the TVA Act accords the TVA a great amount of discretion in its contractual relations with municipalities.") (internal quotation marks omitted).

The TVA Board exercises its discretion primarily through its contracts with distributors for the sale of power, and the TVA Act has been held to preempt state law where the state law conflicts with the TVA contracts. In *McCarthy*, for example, the United States Court of Appeals for the Sixth Circuit considered whether the TVA Act preempted a Tennessee statute, Tenn. Code Ann. § 65-25-212, that required electric cooperatives to refund excess revenues by making patronage refunds or reducing electric rates. The Court noted first that courts are barred from reviewing the terms of TVA's contracts with its distributors, 466 F.3d at 405-06; it then concluded that state-law provisions like Tenn. Code Ann. § 65-25-212 are preempted because they invade the area of control over distributors granted to the TVA.

> The contractual provisions that prevent the Cooperatives from distributing patronage refunds were created within the TVA's authority to set "resale rate schedules" pursuant to § 831i, because "determinations about the level of rates necessary to recover the various costs of operating TVA's power system, as well as the terms and conditions of TVA's power contracts, . . . are part of TVA's unreviewable rate-making responsibilities." *4–County,* 930 F.Supp. at

> 1138; . . . . To the extent that Tennessee law imposes additional constraints on the TVA's authority, it is preempted by the TVA Act's express grant of discretion . . . .

Id. at 407. The court further concluded that its preemption holding extended to the cooperatives' enforcement of the terms of the TVA contract. *See id.* (quoting *Millsaps v. Thompson*, 259 F.3d 535, 538 (6th Cir. 2001)) ("federal law preempts state law 'when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'").

On the other hand, there is a general presumption against preemption, particularly in areas traditionally subject to state authority. "In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Arizona v. United States*, 132 S.Ct. 2492, 2501 (2012) (internal quotation marks omitted). "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Ser. Comm'n*, 461 U.S. 375, 377 (1983).

In addition, Congress has expressly preserved the states' authority to regulate pole attachments. In 1978, Congress enacted the Pole Attachment Act, 17 U.S.C. § 224. "In that act, Congress empowered the Federal Communications Commission ("FCC"), in those states in which access rates were not already regulated, to determine 'just and reasonable' rates a utility could charge cable companies for access to its poles, ducts, conduits, and rights-of-way." *Gulf Power Co. v. United States*, 187 F.3d 1324, 1326 (11th Cir. 1999). A state may regulate pole attachments in the place of the FCC as long as it certifies to the FCC "that . . . it regulates such rates, terms, and conditions; and . . . in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility service." 47 U.S.C. § 224(c)(2).

The Pole Attachment Act does not apply to "any person who is cooperatively organized," 47 U.S.C. § 224, "[b]ecause the pole rates charges by municipally owned and cooperative utilities are already subject to a decision making process based upon constituent needs and interests." S. Rep. No. 95-580, at 18 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 126. Nothing in the Pole Attachment Act, however, precludes state regulation of the pole attachment rates charged by electric cooperatives. As Tennessee's electric cooperatives are themselves creatures of state law, the State has the inherent authority to regulate their pole attachment rates.

Resolution of the preemption question, therefore, turns on whether the TVA has exercised its broad authority over the rates and revenues of its distributors so as to foreclose regulation of pole attachment rules by the State of Tennessee. The

TVA contracts that this Office has had the opportunity to review do not contain any language that directly addresses pole attachment rates.[2] The TVA has asserted that it does have oversight responsibility for pole attachment fees, and based on the authorities discussed above, any provision in a TVA contract expressly addressing pole attachment rates would preempt state law.[3]

It could also be argued that state regulation of TVA distributors' pole attachment rates is preempted even in the absence of express language addressing pole attachments or other direct involvement by the TVA in pole attachment rates. The TVA's broad authority extends as far "as in [the TVA Board's] judgment may be necessary or desirable for carrying out the purpose of [the TVA Act]," 16 U.S.C. § 831i, and it must be acknowledged that the setting of pole attachment rates is at least to some extent related to the setting of rates for the sale of electric power. Utility poles themselves "clearly are an essential part of providing utility service. Because cable television operators use the same poles that are used to deliver electric and telephone service, abuses by cable television operators potentially could disrupt such service." *Louisiana Cablevision v. Louisiana Public Service Comm'n*, 493 So.2d. 555, 558 (La. 1986). As to rates, "[t]he primary purpose of a pole attachment tariff rate is to provide an appropriate level of revenue contribution towards the total electric revenue requirement, for which the municipality's electric ratepayers would otherwise be completely responsible." *In re Determine Pole Attachment Rates for Municipal-Owned Poles*, No. 06-E-1427, 2007 WL 1387930, at *3 (N.Y. Pub. Serv. Comm'n. May 9, 2007); *see also In re Meade County Rural Electric Cooperative Corp.*, No. 2010-00222, 2011 WL 585043, at *3 (Ky. Pub .Serv. Comm'n. Feb. 17, 2011).

Nevertheless, effect must be given to the general presumption against preemption of state regulation, particularly in this area of utility regulation and particularly where Congress has recognized, in the Pole Attachment Act, the states' traditional authority. In the absence of direct regulation by the TVA Board of pole attachment rates, therefore, regulation by the State of Tennessee of the rates, terms, and conditions of pole attachments would not be clearly preempted by the TVA Act, provided that the specific form of regulation adopted by the State does not

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[2] This Office has viewed contracts produced in the proceeding before the Kentucky Public Service Commission, *see, e.g.*, Power Contract Between Tennessee Valley Authority and Pennyrile Rural Electric Cooperative Corporation, Apr. 7, 1982, produced in Ky. Pub. Serv. Comm'n. Case No. 2012-00544, Nov. 14, 2013. The Office has not viewed any of the contracts between the TVA and its Tennessee cooperatives and recognizes that the contracts produced in the Kentucky proceeding may not be identical in all respects to the contracts in effect in Tennessee.

[3] In the pending Kentucky proceedings, the Public Service Commission granted rehearing "on the issue of whether TVA has, or does exercise, jurisdiction over the pole attachment rates of the TVA Cooperatives." *Petition of the Kentucky Cable Telecommunications Association for a Declaratory Order That the Commission Has Jurisdiction to Regulate the Pole Attachment Rates, Terms, and Conditions of Cooperatives That Purchase Electricity from the Tennessee Valley Authority*, No. 2012-00544, Order, at 3 (Ky. Pub. Serv. Comm'n, Aug. 6, 2013).

affect either the distributors' rates for electric power or their ability to comply with their agreements with the TVA. If the TVA were to assert its discretionary control over the rates and revenues of its distributors in a manner that directly affects pole attachments, regulation by the State would likely be preempted.

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