# POWER AND POLITICS IN THE TENNESSEE VALLEY

*Rachel Neuburger*[*]

**Synopsis:** When President Roosevelt signed the Tennessee Valley Authority Act of 1933 into law, he envisioned a public power institution that would electrify the Southeast and serve as a model for countering the "power trust" that dominated electric service across the country. In the mid-twentieth century, the Tennessee Valley Authority ("TVA") supplanted privately-owned utilities in the Tennessee Valley, brought affordable electricity to farms, and invested in infrastructure and industry in the region. But in doing so, and unguided by the private profit motive, TVA evolved into a monopoly utility whose scale and power relative to potential competitors and customers rivals any of its investor-owned peers. TVA's position of dominance has come into question as Congress and federal and state regulators opened the United States electric sector to competition and customers clamor for affordable, clean energy resources.

In 2019, TVA imposed uniquely onerous power supply contracts upon its distribution utility customers. The contracts' twenty-year terms, annual one-year term extensions, and twenty-year termination notice requirements distinguish them from previous all-requirements contracts in the Tennessee Valley and elsewhere in the country and gave rise to political contestation and legal challenges.

This article analyzes TVA's 2019 all-requirements contracts in context, making sense of them in light of TVA's history, modern electric sector conditions, and economic and political pressures. I argue that TVA's unique role and legal status, developed in the first half of the twentieth century, made it particularly vulnerable to the political and economic threats that emerged in the latter half of the twentieth century. I explain how this vulnerability led TVA to develop the 2019 all-requirements contracts and discuss two cases that arose to challenge them. Finally, I examine what this litigation has to say about TVA's past and future in a changing electric sector.



[*] Attorney-Advisor, Federal Energy Regulatory Commission; J.D. Harvard Law School, 2023. My sincere thanks to Ari Peskoe for his guidance during the development of this article and to Katie Southworth, Nathan Lobel, Nick Soyer, Emma Leibowitz, and many others for their feedback and support. The views expressed herein do not necessarily represent the views of the Commission. All errors are my own.

## I. INTRODUCTION

*The power trust has done more to sap the vitality of the Nation than the hookworm. And I would rather be the most humble worker for the T.V.A. and do all I could for humanity for a few short years and die than to be the whole power trust and wiggle in its hookworm slime for a million years.*

Letter from Tennessee physician R. L. Montgomery to TVA Director David E. Lilienthal, June 1936[1]

*We have a hard time understanding why TVA can't operate more like a true public power provider.*

Athens Utilities Board Assistant General Manager Wayne Scarbrough, Athens, Tennessee, February 2023[2]

When President Roosevelt signed the Tennessee Valley Authority Act into law in 1933, he envisioned an endeavor that would "accomplish a great purpose for the people of many States and, indeed, for the whole Union." The new federal project in the Tennessee Valley would "set[] an example of planning, . . . tying in industry and agriculture and forestry and flood prevention, tying them all into a unified whole over a distance of a thousand miles so that we can afford better opportunities and better places for living for millions of yet unborn in the days to

1. THOMAS K. MCCRAW, TVA AND THE POWER FIGHT: 1933–1939, at 125 (1971) [hereinafter TVA AND THE POWER FIGHT].

2. Press Release, Athens Utils. Bd., As "Winter" Continues, TVA Raises AUB's Power Rate (Jan. 2023), https://perma.cc/Y5UJ-VT4T [hereinafter Press Release, Athens Utils. Bd.].

come."[3] The Tennessee Valley Authority went on to take on the powerful, interstate monopolies that dominated electric service in the Tennessee Valley, bring affordable electricity to farms, and introduce infrastructure, industry, and sounder agricultural practices to the Tennessee River watershed. But notwithstanding its broad statutory mandate to promote economic development and environmental stewardship in the Tennessee Valley region, TVA today is primarily an electric utility. It owns the bulk power infrastructure[4] that 153 locally-owned distribution utilities rely on.[5] These utilities together cover a territory of 80,000 square miles, including virtually all of Tennessee and parts of Alabama, Georgia, Kentucky, Mississippi, North Carolina, and Virginia.[6] In 2023, TVA generated or purchased 9% of its electricity from hydroelectric plants, 15% from coal, 30% from gas and oil, 42% from nuclear, and 4% from wind and solar.[7]

Moreover, over the course of the twentieth century and into the twenty-first, TVA evolved into a monopoly utility itself—one whose scale, power relative to customers and competitors, and resistance to competition rivals its privately owned peers.

In the face of TVA's growing monopoly and monopsony power, customers and potential competitors have called for reform, with proposals ranging from increasing transparency to introducing open transmission access to TVA territory to outright privatization. In August 2019, TVA sought to secure its future by asking its customers—municipal and cooperatively-owned electric utilities that distribute electricity supplied and transmitted by TVA to end-use consumers—to enter into new, twenty-year all-requirements contracts. These contracts require each distribution utility to purchase all of its electricity from TVA and in turn obligate TVA to supply the utility's required power. The contracts' terms extend by one year annually (making them "evergreen"). Cancellation requires twenty years' notice, and upon giving such notice, the distribution utility loses a discounted rate and other contractual protections. For the small utilities located deep within TVA's service area, insulated from the open access and non-discrimination rules governing transmission service in the rest of the country, there looked to be little choice but to sign.

Or sue. In 2021, four of TVA's utility customers asked the Federal Energy Regulatory Commission ("FERC") to enable them to purchase power from non-TVA suppliers, to be transmitted along TVA power lines, thus allowing them to

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3. TVA AND THE POWER FIGHT, *supra* note 1, at 35.

4. The "bulk power system" refers to the infrastructure used to generate electricity and transmit it at high voltages from power plants to local substations. Once power has been transmitted to a substation, it is stepped down to a lower voltage and distributed to end-use consumers. One or several utilities can perform different functions in this supply chain.

5. *Public Power for the Valley*, TVA, https://www.tva.com/energy/public-power-partnerships. Specifically, TVA serves 118 municipal utilities and thirty-five rural electric cooperatives, as well as fifty-eight industrial customer and seven federal government installations. *Id.*

6. TVA, 2019 INTEGRATED RESOURCE PLAN: VOL. I – FINAL RESOURCE PLAN 1-3, https://www.tva.com/environment/integrated-resource-plan/2019-integrated-resource-plan.

7. *Energy*, TVA, https://www.tva.com/about-tva/learn-about-tva/energy; Kristi E. Swartz, *TVA plans major increase in carbon-free power*, E&E NEWS (July 13, 2022), https://www.eenews.net/articles/tva-plans-major-increase-in-carbon-free-power/.

avoid signing TVA's rigid new supply contracts. The utilities lost their case at FERC but brought new attention to the all-requirements contracts under which customers in the Tennessee Valley and other pockets of the country buy power.

The question this article seeks to answer is why, unguided by the private shareholder's profit motive, TVA systematically amassed increasing levels of monopoly and monopsony power over the course of the twentieth and early twenty-first century to become a dominant power broker of the Southeast by 2019. To answer that question, this article describes TVA's ascendance, its ever-increasing accumulation of power, and the threats to that power that emerged in the late twentieth and early twenty-first century with electric sector restructuring and the clean energy transition.[8]

Perhaps because TVA is unlike any other electric utility in the United States, this story has received relatively little coverage in recent legal literature.[9] But TVA's singular combination of features—its set of "internal and external institutional incentives"[10]—is worthy of study to better understand dynamics in the Tennessee Valley and, potentially, to instruct modern public power movements.

Part II of this article discusses TVA's twentieth-century history: how and why it started using all-requirements contracts in its early years; legislative changes throughout the latter half of the century that increased its need for control over its customers; and the evolution of its contract terms during that period. The twentieth-century saw the development of features that today make TVA unique among actors in the electric power generation and transmission business in the United States: its self-regulation, its reliance on debt financing, and its immunity from open-access transmission policy.

Part III details events that began in 2019, when TVA amended its all-requirements contracts such that they effectively never end, analyzing the motivations for that model in light of TVA's historical development and customers' responses. Part IV and V discuss recent legal conflicts arising out of those contracts and what they have to say about TVA's past and future in a changing electric sector.

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8. This methodology is inspired, in part, by Professors Klass and Chan's study of rural electric cooperatives' adoption of clean energy. *See* Alexandra B. Klass & Gabriel Chan, *Cooperative Clean Energy*, 100 N.C. L. REV. 1, 38-40 (2021). Professors Klass and Chan analyze the historical development of rural electric cooperatives to identify features that help to explain their behavior with respect to adoption of clean energy. *See id.* at 6-7.

9. Legal observers paid a great deal of attention to TVA's electric power program in its early years, when its constitutionality was still in question. Scholarship focused in later decades on TVA v. Hill, 437 U.S. 153 (1978), and on TVA's environmental compliance record. Recent scholarship discussing TVA's power program, at least briefly, includes Arjuna Dibley, *When Does "Leviathan" Innovate? A Legal Theory of Clean Technological Change at Government-Owned Electric Utilities*, 47 HARV. ENV'T L. REV. 135 (2023); Ryan Thomas Trahan, *Counting Carbon: Forward-Looking Analysis of Decarbonization*, 27 HASTINGS ENV'T L. J. 110 (2021); Michael P. Vandenbergh, Jim Rossi, & Ian Faucher, *The Gap-Filling Role of Private Environmental Governance*, 38 VA. ENV'T L. J. 1 (2020); Barry Cushman, *The Judicial Reforms of 1937*, 61 WM. & MARY L. REV. 995 (2020); Mary Kathryn Nagle, *Environmental Justice and Tribal Sovereignty: Lessons from Standing Rock*, 127 YALE L.J. F. 667 (2018); Shelly Welton, *Clean Electrification*, 88 U. COLO. L. REV. 571 (2017); Richard Schmalensee, *Socialism for Red States in the Electric Utility Industry*, 12 J. COMP. L. & ECON. 477 (2016); Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 551-53 (2003). *See also* Conor Harrison & Shelly Welton, *The states that opted out: Politics, power, and exceptionalism in the quest for electricity deregulation in the United States South*, 79 ENERGY RSCH. & SOC. SCI. 1, 3 (2021) (assessing effects of electricity restructuring in the South but leaving the unique cases of Tennessee and Virginia to future researchers).

10. Klass & Chan, *supra* note 8, at 40.

## II. TWENTIETH CENTURY HISTORY OF TVA

A large body of scholarship discusses TVA's rich history, particularly from its founding years to the mid-to-late twentieth century. That history helps to explain the development and continued utility of the all-requirements contract in TVA's power supply regime. Throughout its history, TVA faced threats to its legitimacy and continuity from competitors, customers, and lawmakers. Each time, it responded to these threats by bolstering its economic dominance in the region. Increasingly restrictive all-requirements contracts bound the Tennessee Valley to TVA and vice-versa, allowing TVA to retain power notwithstanding mounting debt, rate increases, customer discontent, and political pressures in the latter half of the century.

### *A. 1933: The Founding*

TVA was founded to address a practical problem. During World War I, the federal government needed a source of nitrates, an essential ingredient for explosives. Acting under the authority of the National Defense Act of 1916, the Wilson administration set out to build two nitrate plants and an associated hydroelectric power project, later called the Wilson Dam, in Muscle Shoals, a section of the Tennessee River in Alabama known for its hydropower potential. In total, the Wilson administration spent approximately $129 million in public funds building the nitrate and power facilities.[11]

After the war, Congress and the executive branch spent more than a decade debating the fate of the Muscle Shoals facilities: should they be owned and operated by private or public actors, and for what purpose? It was largely thanks to the efforts of Nebraskan Senator George Norris, notwithstanding fervent opposition by investor-owned utilities ("IOUs") in the region and vetoes by Presidents Harding, Coolidge, and Hoover, that TVA as a public power institution was born. Over this period, Senator Norris both attempted to enact legislation creating a public administrator for Muscle Shoals and managed to combat legislation privatizing it, until President Roosevelt took office in 1932 and embraced his vision.[12]

#### 1. The 1933 Act

The Tennessee Valley Authority Act,[13] signed into law by President Roosevelt on May 18, 1993, created a federally-chartered corporation to "maintain[] and operat[e] the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River

11. C. HERMAN PRITCHETT, THE TENNESSEE VALLEY AUTHORITY: A STUDY IN PUBLIC ADMINISTRATION 5-7 (1943).

12. For a more detailed account of this origin story, *see id.* at 5-30.

13. Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58 (codified as amended at 16 U.S.C. § 831–831ee) [hereinafter TVA Act of 1933].

Basins."[14] It vested TVA's authority in a three-member Board of Directors, appointed by the President with the advice and consent of the Senate.[15]

Most of the original TVA Act focuses on TVA's non-power missions: river development, regional economic development, and nitrogen operations. Power was addressed in a few provisions as a somewhat supplementary component of the original TVA project.[16]

Specifically, section 5(*l*) authorizes the TVA Board to "produce, distribute, and sell electric power, as herein particularly specified."[17] Sections 10 through 12 provide those specifics. TVA is "empowered and authorized to sell the surplus power not used in its operations."[18] While it can sell that power to "States, counties, municipalities, corporations, or individuals," it is required to "give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members."[19] Sales to industrial customers are a "secondary purpose," intended to "secure a sufficiently high load factor" and subsidize "domestic and rural usage."[20] Importantly, TVA's power contracts can last "a term not exceeding twenty years."[21]

Section 12 defined TVA's original electric service area: "In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power," TVA was authorized "to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated."[22] This "transmission distance" was understood to be 200 to 300 miles.[23] TVA was authorized to acquire real estate and use it to "construct dams, reservoirs, power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries,

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14. TVA Act of 1933 § 1 (codified as amended at 16 U.S.C. § 831). For discussion of the decision to create TVA as a corporation, see PRITCHETT, *supra* note 11, at 22-27, 29.

15. TVA Act of 1933 § 2(a), (g) (codified as amended at 16 U.S.C. § 831a).

16. ERWIN C. HARGROVE, PRISONERS OF MYTH: THE LEADERSHIP OF THE TENNESSEE VALLEY AUTHORITY, 1933-1990, at 123-24 (1994); TWENTIETH CENTURY FUND, THE POWER INDUSTRY AND THE PUBLIC INTEREST 175 (Edward Eyre Hunt ed., 1944) ("The Act clearly makes the generation of power a secondary purpose of the TVA."). Section 5 is the main provision of the 1933 Act enumerating TVA's substantive powers. Subsections 5(a)–(k) and 5(m)–n) generally relate to TVA's nitrogen manufacturing and river navigation mandates. *See, e.g.*, TVA Act of 1933 § 5(j) ("The board is hereby authorized . . . [u]pon the requisition of the Secretary of War or the Secretary of Navy to manufacture for and sell at cost to the United States explosives or their nitrogenous content."). Only subsection 5(*l*) relates to power.

17. TVA Act of 1933 § 5(*l*) (codified as amended at 16 U.S.C. § 831d(*l*)).

18. *Id.* § 10 (codified as amended at 16 U.S.C. § 831i).

19. *Id.*

20. *Id.* § 11 (codified as amended at 16 U.S.C. § 831j). Load factor is the ratio between a utility's peak and average demand. A high load factor is economically desirable for a utility because most of the time, the utility only needs to generate enough power to meet its average demand, but it must still have enough generating capacity on hand for its peak demand. ALEXANDRA VON MEIER, ELECTRIC POWER SYSTEMS: A CONCEPTUAL INTRODUCTION 140 (2006).

21. TVA Act of 1933 § 10.

22. *Id.* § 12.

23. *See* TVA AND THE POWER FIGHT, *supra* note 1, at 53.

and to unite the various power installations into one or more systems by transmission lines."[24]

Section 10 provided: in areas "within reasonable distance of any of its transmission lines," TVA is authorized to "construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable."[25] Buyers from TVA are required to agree "that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class."[26] Finally, TVA was directed to set "reasonable, just, and fair" rates for retail sales of TVA power by for-profit customers.[27]

The non-discrimination and "just and reasonable" principles incorporated into the 1933 law had been part of state and federal public utility law for decades. They delegate broad discretion to regulators to ensure that utilities provide fair service to captive customers.[28] FERC and state public utility commissions enforce these standards with respect to investor-owned utilities and some cooperate and municipal utilities. But because TVA regulates itself—with no formal federal or state oversight over its rates and terms of service, except when its actions spark interest in Congress—TVA determines for itself whether its practices are in the public interest.[29]

2. 1935 Amendments

In August 1935, as TVA set about expanding its power generation and transmission operations,[30] Congress amended the TVA Act to bolster the legal authority for its activities.[31] In the 1930s, rival investor-owned utilities and the newly-

24. TVA Act of 1933 §§ 4(i)-(j) (codified as amended at 16 U.S.C. §831c).

25. *Id.* § 10.

26. *Id.* § 12 (codified as amended at 16 U.S.C. § 831k).

27. *Id.* TVA was also permitted to interconnect with neighboring transmission systems "for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief." *Id.*

28. *See* William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. REGUL. 721, 755–57 (2018).

29. By contrast, other federal power marketing agencies set their rates in the first instance, subject to FERC review under a set of statutory criteria. *See Bonneville Power Admin.*, 186 FERC ¶ 61,171, at P 10 (2024) (explaining that FERC reviews whether Bonneville's power and transmission rates: (1) are "sufficient to assure repayment of the federal investment in the Federal Columbia River Power System over a reasonable number years after meeting Bonneville's other costs"; (2) are based on total system costs; and (3) equitably allocate transmission costs between federal and non-federal power); DEP'T OF ENERGY, DELEGATION ORDER NO. S1-DEL-RATES-2016 § 1 (2013) ("Commission review [of Southwestern Power Administration, Southeastern Power Administration, and Western Area Power Administration power and transmission rates] will be limited to: (a) whether the rates are the lowest possible to customers consistent with sound business principles, (b) whether the revenue levels generated by the rates are sufficient to recover the costs of producing and transmitting electric energy including the repayment, within the period of cost recovery permitted by law, of the capital investment allocated to power and costs assigned by Acts of Congress to power for repayment; and (c) the assumptions and projections used in developing the rate components that are subject to Commission review.").

30. *See infra* Part II.B.2.

31. *Norris TVA Bill Voted by Senate*, N.Y. TIMES (May 15, 1935), https://nyti.ms/3YVVaG8.

formed Edison Electric Institute[32] countered the political salience and success of public power, a fundamental threat to their existence, by attacking TVA's power program in the courts.[33] In *Ashwander v. TVA*,[34] decided in February 1935, Judge Grubb of the Northern District of Alabama had held TVA's power program *ultra vires* and unconstitutional, finding no "substantial relation" between TVA's burgeoning power utility program and sales of incidental surplus power generated in bona fide pursuit of a permissible constitutional function, such as "regulation of navigation or national defense."[35] Responding to this decision, the new section 9a specified:

> The Board is hereby directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and . . . whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this act provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority.[36]

The 1935 law also amended an existing provision of the Act to expressly authorize TVA to "construct such dams . . . in the Tennessee River and its tributaries, as in conjunction with [its existing dam projects] will . . . promote navigation on the Tennessee River and its tributaries and control destructive flood waters."[37] In characterizing the construction of hydroelectric dams and the generation and sale of power as incidental to and supportive of the projects of navigation and flood control, these amendments sought to firmly cement TVA's power program within the federal government's enumerated constitutional powers.

Regarding wholesale rates for this newly strengthened power program, the amendments directed that it was the policy of the Act to set rates at levels which "when applied to the normal capacity of the Authority's power facilities, will produce gross revenues in excess of the cost of production of said power," in order to

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32. The Edison Electric Institute ("EEI") was founded in 1933 out of the ashes of the National Electric Light Association ("NELA"). In the 1920s, the private utility sector waged a campaign against public power. A Federal Trade Commission report "disclosed that individually and through [NELA], the power companies had for years engaged in every conceivable medium of publicity and propaganda. [M]uch of the publicity concerned politics as well as kilowatts – the horrors of government ownership, which the NELA characterized as Bolshevistic, socialistic, inefficient, and generally odious; and the contrasting accomplishments of private enterprise. . . . As a final insult the public paid for its own indoctrination. Utility accountants normally charged off propaganda costs as operating expenses, in the same manner as salaries or fuel." The report "brought the NELA into such disrepute that the industry gave up altogether and dissolved the association," replacing it with EEI. "The founders of the EEI declared that the new association would 'divest itself of all semblance of propaganda activities' and 'assume an attitude of frankness and ready cooperation in its dealings with the public.'" TVA AND THE POWER FIGHT, *supra* note 1, at 21-23. *See also* RICHARD F. HIRSCH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 41 (1999).

33. *See* HIRSCH, *supra* note 32, at 108, 112-19.

34. 9 F. Supp. 965 (N.D. Ala. 1935), *rev'd*, 78 F.2d 578 (5th Cir. 1935), *aff'd*, 297 U.S. 288 (1936).

35. *Id.* at 966-67.

36. Pub. L. No. 74-412 § 5, 49 Stat. 1075, 1076 (codified at 16 U.S.C. § 831h-1).

37. *Id.* § 2 (codified at 16 U.S.C. § 831c(j)).

"as soon as practicable . . . make the power projects self-supporting and self-liquidating."[38]

Congress also bolstered TVA's ability to transact with distribution utilities in two critical respects. First, it authorized TVA "to include in any contract for the sale of power such terms and conditions, including resale rate schedules," and to issue "rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act."[39] TVA would proceed to exercise this authority to the utmost, resulting in friction in the latter half of the twentieth century and continuing into the modern day.

Second, Congress authorized TVA to "acquire existing electric facilities used in serving farms and small villages,"[40] and to extend credit to municipal and cooperative utilities seeking to acquire private power lines.[41] These authorities enabled TVA to embark on its strategy of power program expansion in the later 1930s and 1940s, described below.

3. TVA's Place in the New Deal Regime

Though its footprint and functions have always been circumscribed, TVA has an outsized role in American history and society as a hallmark of President Roosevelt's New Deal legacy and a rare triumph for large-scale public power in a sector otherwise dominated by private corporations.

TVA played a part in three major projects of American governance. The first, of which TVA was only one component, is what Jason Scott Smith describes as the New Deal's "public works revolution," in which federally funded infrastructure "remade the built environment that managed the movement of people, goods, electricity, water, and waste," thereby "justify[ing] the new role of the state in American life."[42] Thus, President Roosevelt imagined TVA as being "charged with the broadest duty of planning for the proper use, conservation and development of the natural resources of the Tennessee River drainage basin and its adjoining territory for the general social and economic welfare of the Nation."[43] Through TVA's activities across the fields of power generation and transmission, flood control and navigation, fertilizer manufacturing, agriculture, conservation, and scientific and economic research, the federal government expanded its influence in

38. *Id.* § 8 (codified at 16 U.S.C. § 831m).

39. *Id.* § 6 (codified at 16 U.S.C. § 831i).

40. Pub. L. No. 74-412 § 6, 49 Stat. 1075, 1076 (codified at 16 U.S.C. § 831i).

41. *Id.* § 7 (codified at 16 U.S.C. § 831k-1).

42. JASON SCOTT SMITH, BUILDING NEW DEAL LIBERALISM: THE POLITICAL ECONOMY OF PUBLIC WORKS, 1933–1956, at 2-3, 255, 262 (2006); *see also* Jason Scott Smith, *Why Privatizing the TVA Would Be a Dam Shame*, BLOOMBERG (Apr. 19, 2013), http://www.bloomberg.com/news/2013-04-19/why-privatizing-the-tva-would-be-a-dam-shame.html.

43. THOMAS K. MCCRAW, MORGAN VS. LILIENTHAL: THE FEUD WITHIN THE TVA 4 (1970) (citing House Doc. 15, 73d Cong., 1st Sess. (1933)) [hereinafter MORGAN VS. LILIENTHAL]. *See also* PRITCHETT, *supra* note 11, at 18-22, 27-30; TWENTIETH CENTURY FUND, *supra* note 16, at 173 ("The Tennessee Valley Authority is the culmination of a gradual extension of federal responsibility to embrace not only navigation, flood control and strategic materials for national defense, but electric power, relief of unemployment and improvement of living conditions in backward areas. The TVA represents a unification of all these objectives in a single regional program."); Charles McCarthy, *TVA and the Tennessee Valley*, 21 TOWN PLAN. REV. 116, 117 (1950).

the Tennessee Valley—and achieved policy goals in the region—using infrastructure development, education, and demonstration.[44] As the New Deal consensus came under attack at the end of the twentieth century, so too did TVA's public works mission.

The second project was rural electrification. Though IOUs grew at rapid speed and scale and access to electric service spread across the United States in the late nineteenth and early twentieth century, farms and rural communities were left behind. By 1930, 10.4% of American farms had access to electric service. By contrast, 84.8% of urban and rural non-farm residences were electrified—including almost every city or town in the country with a population above 250 people.[45] Advocates for rural electrification envisioned bold plans that would combine electrification with rural development. Morris L. Cooke, the most prominent early proponent of federal intervention in rural electrification and first head of the Rural Electrification Administration ("REA"), saw federally planned rural electrification as promising "a revived agriculture and reinspiration in small town life," one element of a larger plan to "build[] the Great State" and "plac[e] the government of our individual states on a plane of effective social purpose."[46] As governor of New York, Franklin Roosevelt supported rural electrification as a first step in his objective of "the great fundamental of making country life in every way as desirable as city life."[47] Notwithstanding some early ad hoc efforts,[48] it took the large-scale intervention of the federal government alongside concerted efforts of farmer-owned cooperative associations to bring electricity to rural America. TVA and the REA were the New Deal entities tasked with leading the federal charge.

Finally, TVA (again along with the REA) was a key actor in "the struggle to free the consumer from the monopoly of holding company control."[49] In the early twentieth century, as utilities slow-walked or outright refused to extend electric service to rural areas, they also engaged in abusive practices, amassed monopoly

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44. *See* McCarthy, *supra* note 43, at 117-24, 125-28.

45. U.S. CENSUS BUREAU, *Chapter S: Energy*, *in* BICENTENNIAL EDITION: HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, 811, 827 (1975), https://www.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970.html; *see* Carl Kitchens & Price Fishback, *Flip the Switch: The Impact of the Rural Electrification Administration 1935–1940*, 75 J. ECON. HIS. 1161, 1163 (2015).

46. PHILIP J. FUNIGIELLO, TOWARD A NATIONAL POWER POLICY: THE NEW DEAL AND THE ELECTRIC UTILITY INDUSTRY, 1933-1941, at 127 (1973); *see also* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, at 63 (1999) ("[Senator] Norris . . . remembered the inky black nights of his frugal rural childhood and saw in government hydroelectric projects the means to shed light over the darkened countryside.").

47. FUNIGIELLO, *supra* note 46, at 128-29 (quoting an address delivered by Franklin D. Roosevelt at the State College of Agriculture, Cornell University, on February 14, 1930).

48. Approximately fifty rural electric cooperatives operated in the United States by 1935 but struggled to secure a wholesale power supply. TWENTIETH CENTURY FUND, *supra* note 16, at 122; *see* D. CLAYTON BROWN, ELECTRICITY FOR RURAL AMERICA: THE FIGHT FOR THE REA 13-15 (1980). Rural electric cooperatives were widespread and successful in Europe and Canada. *Id.* at 16-17.

49. FUNIGIELLO, *supra* note 46, at 122. Even within the New Deal coalition, there was a divide between "those who viewed the power question as a death struggle between the public and private traditions, and those who wanted to bring cheap electricity to as many citizens as possible, irrespective of public or private ownership." TVA AND THE POWER FIGHT, *supra* note 1, at 105. Within the first TVA Board of Directors, Chairman Arthur E. Morgan held the latter point of view, and David. E. Lilienthal the former. Lilienthal's vision won out after protracted battle. *Id.* at 54.

status in the territories they did serve, and used that monopoly status to charge inflated rates.[50] Public power proponents convinced Congress and President Roosevelt that TVA could address these problems: monopoly abuses, by generating franchise competition—"competition between public and private entities for the right to serve,"[51] which would pressure investor-owned utilities to improve service and decrease prices;[52] and exorbitant prices, by serving as a "yardstick." TVA would be required to set "the lowest possible rates,"[53] making it a point of comparison with other utilities, shaming those engaging in price-gouging into lowering their rates, and perhaps even generating momentum for the public power movement.[54] Thus, TVA was established as a vehicle both for expanding access to electricity for rural residents of the Tennessee Valley and for mitigating the harmful effects of monopoly more generally in the electric sector.

### *B. 1933–1941: The TVA Power Program Takes Shape*

In its first decades, TVA became the dominant power utility in the Tennessee Valley. Its tool of choice for achieving dominance (over its competitors and its customers) was the all-requirements contract.[55] Three factors explain why TVA aggressively expanded from the start. First, the rural Tennessee Valley was sparsely electrified, and TVA's leaders believed that public power was best suited to bring electricity to the farm. Second, TVA economists believed that high power demand was required to achieve low rates, a touchstone principle of the public power project. Third, TVA needed customers for its rapidly-expanding power supply. Importantly, for municipalities and especially rural electric cooperatives, the all-requirements contract evolved (both inside and outside of TVA territory)

50. *See* MORGAN VS. LILIENTHAL, *supra* note 43, at 3 ("Roosevelt believed that the public was being systematically milked by private utilities, which set their rates artificially high in order to pay for dividends on watered stock. At the same time, the private companies had often showed extreme reluctance to extend their transmission lines into low-usage, low-profit rural areas, and Roosevelt intended that electricity should be made widely available to farmers. [T]wo of the goals of TVA's power operations would be to establish a yardstick in the Southeast, and to promote rural electrification.").

51. Harvey L. Reiter, *Competition Between Public and Private Distributors in a Restructured Power Industry*, 19 ENERGY L.J. 333, 337 (1998).

52. *Id.* at 339-41, 348. *See also* Tenn. v. FCC, 832 F.3d 597, 603 (6th Cir. 2016) (describing benefits of franchise competition in the telecommunications industry).

53. TVA Act of 1933 § 11 (codified at 16 U.S.C. § 831j).

54. *See* TVA AND THE POWER FIGHT, *supra* note 1, at 30, 61, 70-73; *see also* PRITCHETT, *supra* note 11, at 17-18, 27 (quoting a 1932 campaign speech in which Roosevelt asserted that public power could "be forever national yardstick to prevent extortion against the public and to encourage the wider use of that servant of the people—electric power."); *see also* Power Auth. of N.Y. v. FERC, 743 F.2d 93, 105 (2d Cir. 1984) (The yardstick idea is regarded as somewhat of a failure because of theoretical and pragmatic difficulties in comparing rates between utilities).

55. *See* HARGROVE, *supra* note 16, at 54-55 (explaining that TVA's relationship with its customers was one of "domination rather than democracy"; TVA determined the wholesale and retail rates in its all-requirements contracts, resisted state regulation, and prohibited appointment of local elected officials to distribution utility boards); *see also* PRITCHETT, *supra* note 11, at 110-11 (describing friction in TVA's relationship with and management of its customers).

as a solution to the inverse problem: insufficient power supply for an eager base of would-be electricity consumers.[56]

That utilities in TVA territory would procure all their electric needs from TVA seems mundane today, with TVA's monopoly in the Tennessee Valley secure. But in the 1930s, TVA's fledgling power program was threatened by powerful competitors seeking to retain their effective monopolies in sections of the region. Its financial and political stability depended upon securing an outlet for its power.[57] While rural, unserved customers had little choice but to buy power from TVA, and were eager to do so, larger municipalities had previously been served by private companies and posed a threat of defection—especially if TVA had not lived up to its promise of low rates. Thus, the all-requirements contract was fundamental to TVA's survival in the region.

1. Rationales for Expansion

In the 1930s and 1940s, the leaders of TVA's power program worked to secure demand from municipalities and rural electric cooperative utilities for TVA power. TVA sought to secure load for several reasons. First, TVA's leaders believed that public power could bring widespread access to electricity to the farm. In 1929, fewer than one percent of farms in the Tennessee Valley had electric power.[58] Four IOUs served the area. Those utilities in turn were subsidiaries of two national holding companies, Commonwealth & Southern Corporation and Electric Bond & Share Company.[59] The IOUs owned generation, transmission, and distribution infrastructure. For the most part, they generated, transmitted, and distributed power straight to end-use customers (residents and businesses). In electrified localities, IOUs owned the existing distribution systems. In a minority of cases, where municipal or cooperative utilities distributed power, they were nevertheless dependent upon IOUs for generation and transmission.[60]

TVA's early leaders were aligned with the public power movement, which saw the failings of private power to provide equitable access to electricity between rural and non-rural communities and sought to supplant private utility company

56. *See* BROWN, *supra* note 48, at 73, 90-91; *see also* Proposed Rule, *60-Day Notice of Proposed Information Collection: Wholesale Contracts for the Purchase and Sale of Electric Power and Energy*, 55 Fed. Reg. 38,930, 38,930 (Sept. 21, 1990).

57. *See* HARGROVE, *supra* note 16, at 44.

58. Carl Kitchens, *The Role of Publicly Provided Electricity in Economic Development: The Experience of the Tennessee Valley Authority, 1920-1955*, 74 J. ECON. HIST. 389, 400 tbl. 2A (2014).

59. For the story of how Electric Bond & Share—a New York-based holding company formed by General Electric—came to the Southeast, *see* Conor Harrison, *The historical-geographic construction of power: electricity in Eastern North Carolina*, 18 LOCAL ENV'T 469, 475 (2013).

60. PRITCHETT, *supra* note 11, at 67.

service (to varying degrees) with publicly-owned and provided service and to introduce public power to unserved areas.[61] They were not satisfied with mere coexistence with existing private utilities. This movement believed that public power was necessary for the public interest, not just in Tennessee but nationwide.[62]

Second, TVA saw high levels of demand as necessary to realize its vision of yardstick rates. As discussed above, some of TVA's founders and proponents (including President Roosevelt) envisioned using TVA rates as a point of comparison (a yardstick) with IOU rates.[63] Early on, there was a question of how the yardstick would function—and, critically, how to achieve sufficiently low rates. In 1933, TVA adopted a "low cost, high usage" rate design, which required high levels of usage to justify low rates.[64] Its first set of rates were so low as to be promotional—given TVA's small customer base, it could not operate as a going concern with so little revenue.[65] However, TVA economists theorized—correctly—that low rates would attract increased demand, which, in turn, would make those low rates economically sound.[66]

Third, TVA desperately needed an outlet for its expanding electric generating capacity. The TVA Act directed TVA to present a plan to Congress for "unified development of the Tennessee River System."[67] In 1936, it did, proposing the construction of nine high dams on the Tennessee River.[68] By January 1942—not quite nine years after its creation—TVA owned ten operating hydroelectric dams

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61. HARGROVE, *supra* note 16, at 35, 40-41 (discussing TVA Director David E. Lilienthal's public power vision and distrust of utilities, which conflicted with the views of Board Chairman Arthur Morgan but ultimately prevailed in TVA's early internal power struggles).

62. *See* FUNIGIELLO, *supra* note 46, at 256-64 (discussing the composition and competing visions within the New Deal-era public power movement).

63. *See supra* Part II.A.3.

64. TVA AND THE POWER FIGHT, *supra* note 1, at 59.

65. *Id. But see* Kitchens, *supra* note 58, at 412-15. There is some debate over the empirical basis for TVA's 1933 rates. *Compare* TWENTIETH CENTURY FUND, *supra* note 16, at 179 ("TVA rates were not . . . drawn out of a hat. Operating data were available from past generating experience at Wilson Dam, and from the results of operation under low rates in public plants like that at Tacoma, Washington, together with the results of an exhaustive three-year study of the costs of distributing electricity made by the New York State Power Authority."), *with* TVA AND THE POWER FIGHT, *supra* note 1, at 60 ("The valuation [of the Wilson Dam], though vital to the rates finally set, would be essentially arbitrary. . . . The ratemakers disagreed among themselves over many details, but they all knew that prices had to be set quickly. They accordingly took short cuts, employed arbitrary figures and methods, and finished their work in a ridiculously brief time. Most of the consultants were highly qualified economists, but their work in this case was basically (and necessarily) an exercise in intuition.").

66. *See, e.g.*, TVA, POWER ANNUAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 1960, at 22 (1960) [hereinafter 1960 ANNUAL REPORT] ("It is axiomatic that low costs can result in low prices. Not so well recognized is the other side of the coin—low prices, or low electric rates, can lead to lower unit costs through increased consumption and the economies of mass production. TVA's policy of low rates has led to large and rapid increases in the use of electricity."); *see also* TWENTIETH CENTURY FUND, *supra* note 16, at 179 (explaining that its government backing allowed TVA to experiment with "the effects of rates and sales conditions upon both demand and costs").

67. Pub. L. No. 74-412 § 2 (codified as amended at 16 U.S.C. § 831c(j)).

68. TVA, ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED JUNE 30, 1938, at app. c, § 3(j) (1938).

with a capacity of 836.6 megawatts.[69] It had acquired two and constructed the other eight, in the course of which it developed "one of the largest construction organizations in the country."[70] And it had plans to reach a total of nineteen dams, with a total capacity of 2.3 gigawatts.[71] Thus, from its earliest years, TVA was presented with the challenge of finding customers for its power in order to justify its program of expansion.[72]

2. TVA's Expansion Strategy

How would TVA secure the customers it needed, given the presence of IOUs already serving some municipalities in the Valley? TVA could conceivably have built duplicative facilities and competed with existing companies for consumers on the basis of price or quality of service. It also could have sold power from its hydroelectric facilities to the existing utilities for their distribution to end-use consumers. The former path was financially and technically daunting, though TVA did pursue a limited duplication strategy described below. The latter path was mostly foreclosed by the preference clause of the TVA Act, which required TVA to give preference in electricity sales to public entities and nonprofit cooperatives over private customers[73] (though TVA sold power from the Wilson Dam to Commonwealth & Southern for a time).[74] Indeed, municipalities were already clamoring for TVA power.[75] And TVA's power program leaders were pessimistic about the prospects for fair dealing with private utilities.[76]

Thus, TVA embarked on a program of (1) acquiring the existing transmission facilities of the incumbent utilities; (2) building its own new generation and transmission; (3) facilitating municipalities' and cooperatives' acquisition of existing distribution facilities, or financing (via the Public Works Administration ("PWA") and, later, the REA) new construction where no distribution facilities yet existed; and (4) signing all-requirements contracts with its new distribution utility customers. By the close of the 1930s, TVA had used this strategy to achieve near-total control over the generation of electricity and its transmission of electricity to communities in the Tennessee Valley.

In 1934, TVA entered into contracts with the subsidiaries of Commonwealth & Southern and Electric Bond & Share to acquire certain circumscribed portions

69. TWENTIETH CENTURY FUND, *supra* note 16, at 178. For a diagram of its construction progress as of 1940, *see* TVA, ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED JUNE 30, 1940, at ix (1940) [hereinafter 1940 ANNUAL REPORT].

70. TWENTIETH CENTURY FUND, *supra* note 16, at 177.

71. *Id.* at 178.

72. *See* PRITCHETT, *supra* note 11, at 75; TWENTIETH CENTURY FUND, *supra* note 16, at 182; Kitchens, *supra* note 58, at 394. When it inherited the Wilson Dam, TVA also inherited a contract under which it sold power from the dam to a subsidiary of Commonwealth & Southern. Until it had built or bought more transmission lines, TVA had to keep selling the power to the subsidiary, because it was the only buyer in the area and TVA didn't have the infrastructure to transmit the power to a (legally preferred) municipality or cooperative. *See* TVA AND THE POWER FIGHT, *supra* note 1, at 41-43; *see also* McCarthy, *supra* note 43, at 117. Like TVA of the early 1930s, suppliers seeking to sell power in the region today have only one potential customer: TVA.

73. 16 U.S.C. § 831i.

74. *See* PRITCHETT, *supra* note 11, at 394.

75. TVA AND THE POWER FIGHT, *supra* note 1, at 59.

76. *See* Reiter, *supra* note 51.

of their transmission and distribution facilities in the Tennessee Valley, in exchange for which TVA agreed not to serve the companies' existing customers outside of its newly acquired territory.[77]

This arrangement faltered when Commonwealth & Southern and Electric Bond & Share discovered the effectiveness of staving off TVA competition in the courts.[78] Starting in September 1934, utilities challenged the legality of TVA and related New Deal programs. This litigation was ultimately unsuccessful in securing the legal relief the utilities sought. In *Ashwander v. TVA* (1936),[79] the Supreme Court disagreed with Judge Grubb and held that it was constitutional for the federal government to sell surplus power from the Wilson Dam as an incident to its war and commerce powers.[80] In *Alabama Power Co. v. Ickes* (1938),[81] the Court unanimously dismissed a challenge to the PWA's authority to issue loans and grants to municipalities for the construction of duplicative electric distribution systems, holding that existing utility companies operating without exclusive franchises were not immune from duplicative competition by municipalities and thus suffered no judicially cognizable injury.[82] Finally, in *Tennessee Electric Power Co. v. TVA* (1939),[83] the Court cited *Alabama Power* in again dismissing for lack of cognizable injury a claim by TVA's competitors that TVA's power program (except for its Wilson Dam operations) was an unconstitutional exercise of federal power, observing that no state law "confer[red] on the [investor-owned utilities] the right to be free of competition"[84]

After their third loss at the Supreme Court, the utilities came back to the negotiating table. Faced with uncertainty and the prospect of losing customers to municipal systems carrying cheap TVA power, the holding companies finally sold their facilities to TVA.[85] In the meantime, however, TVA pursued a temporary strategy of expansion through existing municipal utilities and duplication.[86]

TVA also promoted rural electrification—and thereby secured additional outlets for its power—by facilitating the formation of rural electric cooperatives. Several years before the creation of the REA, TVA advised and financed the formation

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77. TVA AND THE POWER FIGHT, *supra* note 1, at 65-66.

78. *Id.* at 69. This treatment may be an understatement of the boldness and effectiveness of the litigation strategy, led by Wendell Wilkie, then Chairman of Commonwealth & Southern. Wilkie's strategy apparently came to be known as the "thirty million dollar yell" because while the utilities ultimately lost in court, their tactics allowed Commonwealth & Southern to sell its southeastern properties to TVA at double the originally negotiated price. *See* George D. Haimbaugh Jr., *The TVA Cases: A Quarter Century Later*, 41 IND. L.J. 197, 198 (1966).

79. 297 U.S. 288 (1936), *aff'g* 78 F.2d 578 (5th Cir. 1935), *rev'g* 9 F. Supp. 965 (N.D. Al. 1935).

80. *Id.* at 330, 332–339. See *supra* Part II.A.2 for discussion of 1935 TVA Act amendments provoked by the district court decision in *Ashwander*.

81. 302 U.S. 464 (1938).

82. *Id.* at 478–80.

83. 306 U.S. 118 (1939).

84. *Id.* at 118, 139-40 (1939).

85. PRITCHETT, *supra* note 11, at 72-73.

86. In 1933, TVA signed a preliminary agreement with Tupelo, Mississippi, to begin supplying wholesale power by February 1934. *See* TVA AND THE POWER FIGHT, *supra* note 1, at 64-65; *Federal Contract Cuts Power Rates*, N.Y. TIMES (Nov. 19, 1933), https://nyti.ms/3zngJEM. Unlike other municipalities, Tupelo already owned its own distribution facilities and was relatively close to the Wilson Dam. TVA AND THE POWER FIGHT, *supra* note 1, at 65.

of these farmer-owned utilities, sold them the distribution facilities that it acquired from the incumbent IOUs, and supplied their power. The REA largely took over TVA's cooperative organization and financing activities in 1935.[87]

Most of TVA's customers had to wait until 1939, however, because most municipalities did not yet own their own distribution lines. On May 12, 1939, TVA, Commonwealth & Southern, twenty-four municipalities (including Nashville and Chattanooga), and eleven cooperatives signed an agreement under which Commonwealth & Southern would sell the electric properties of its Tennessee subsidiaries for aggregate consideration of $78.6 million, with generation and transmission properties going to TVA and distribution properties going to the various new municipal and cooperative distribution utilities.[88] Municipalities and cooperatives that had not signed on by May 1939 could join the agreement at any time.[89] TVA agreed to supply credit to any distributor that had insufficient funding to purchase a system itself.[90] And TVA agreed to enter into power supply agreements, according to its standard form contract, with each distributor party.[91]

Thus, TVA carried out "a program of negotiation and purchase which put practically every city in Tennessee, as well as many in adjacent states, in the power business."[92] TVA effectuated its own expansion and cemented for itself an outlet

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87. PRITCHETT, *supra* note 11, at 73-74. *See, e.g.*, *Amended Contract between TVA and Tishomingo County Electric Power Ass'n* (Jan. 10, 1939), *in* ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED JUNE 30, 1939, at 388 (1940) [hereinafter 1939 ANNUAL REPORT] ("Whereas, association has . . . since July 19, 1935 purchased power at wholesale from Authority . . . and Whereas, Authority has heretofore financed the acquisition and construction by association of all rural electric transmission and distribution lines now owned and operated by association and the existing power contract . . . contains covenants and obligations inconsistent with other borrowings by association; and Whereas, association and Authority mutually desire to cancel and rescind said contract and to adopt this amended power contract in order that Association may receive the benefit of a loan proposed to be made to it for the construction of additional rural electric lines by United States of America; acting through the Administrator of the Rural Electrification Administration. . . .").

The REA, now called the Rural Utilities Service, has long required generation and transmission (G&T) cooperative borrowers to sign all-requirements contracts with their distribution utility member-owners. For documentation of this historical practice, see, e.g., Ala. Power Co. v. Ala. Elec. Cooperative, 394 F.2d 672, 675-76 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968); *Proposed Rule, Wholesale Contracts for the Purchase and Sale of Electric Power and Energy*, 55 Fed. Reg. 38,930, 38,930–31 (Sept. 21, 1990). The requirement continues today. *See 60-Day Notice of Proposed Information Collection: Wholesale Contracts for the Purchase and Sale of Electric Power*, 87 Fed. Reg. 42,996 (July 19, 2022).

88. *See Contract between the Commonwealth & Southern Corp., TVA, City of Nashville, City of Chattanooga et al., Dated as of May 12, 1939, for the Purchase and Sale of the Electric Properties of the Tennessee Electric Power Co. and Southern Tennessee Power Co.*, *in* 1939 ANNUAL REPORT, *supra* note 87, at 236, 238-256.

89. *Id.* at 238.

90. *Id.* at 239.

91. *Id.* at 239, 241. To the extent Commonwealth & Southern retained distribution facilities, TVA agreed to sell it power for the lesser of 20 years or whenever the facility was taken over by a municipality or cooperative. *Id.* at 241.

92. PRITCHETT, *supra* note 11, at 73. This dynamic occurred on a smaller scale for the City of Knoxville. Knoxville received power from The Tennessee Public Service Company. Knoxville threatened to establish its own municipal utility and build duplicative distribution lines (with PWA funding). The utility sued, arguing that Knoxville did not have authority to contract with a construction company to build distribution facilities. *See* Tenn. Pub. Serv. Co. v. Knoxville, 170 Tenn. 40, 43 (Tenn. 1936). The Supreme Court of Tennessee held that the utility had standing to sue: "[w]hether the city can, lawfully, make such contracts, and having made them, can lawfully compete with complainant are questions which complainant, having a property right in its franchise,

for its ever-increasing generation capacity by acquiring the IOUs' bulk power systems, facilitating local acquisition of distribution systems, and—one by one—signing its standard all-requirements power supply contract with local utilities.

3. TVA's Early All-Requirements Contracts

TVA entered into 110 virtually identical power supply contracts by 1940, largely with municipal and cooperative distribution utilities (also called Local Power Companies, or LPCs) but also with some industrial customers and a few IOUs. Taking effect upon acquisition of necessary facilities from the IOUs, the contracts required TVA to supply its new municipal and cooperative utility customers their "entire power requirements," and required the customer utilities to purchase all such requirements only from TVA, for twenty-year terms.[93] The contracts contained no provision for termination, extension, or renewal by either party.[94] The distributors agreed to buy power from TVA and resell power to customers according to uniform schedules set out unilaterally by TVA.[95] However, if TVA lowered its rates for another customer, it agreed to offer those lower rates to the distributor (unless unique conditions justified differential treatment).[96]

By 1951, TVA served ninety-five municipal and fifty cooperative distribution utilities pursuant to all-requirements contracts, under which TVA set its own wholesale rates and its customers' retail rates, all without regulatory oversight.[97] It had chased private electric utilities out of Tennessee and secured for itself a monopoly territory in which to offload the power from its massive hydroelectric projects.[98] And it was building more transmission lines to reach more unserved rural customers. The all-requirements supply contract was a fundamental part of this story.

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is entitled to have adjudicated," though the franchise was nonexclusive. *Id.* at 45-46. But it upheld Knoxville's ability to acquire and operate a distribution system. *Id.* at 53. Following the decision, the utility agreed to sell its facilities to TVA and Knoxville. *See* TVA, THE COST OF DISTRIBUTING POWER 10 (1939), https://hdl.handle.net/2027/uiug.30112066401826; *Ratify Sale to Knoxville*, N.Y. TIMES (July 13, 1938), https://nyti.ms/3zrRlNO.

93. *See, e.g.*, *Contract between TVA and City of Athens, Tenn.* §§ 1-2 (May 15, 1939), *in* 1939 ANNUAL REPORT, *supra* note 87, at 163 [hereinafter Athens Contract]; *Contract between TVA and Blue Ridge Electric Membership Corp.* §§ 1-2 (Dec. 12, 1938), *in* 1939 ANNUAL REPORT, *supra* note 87, at 190 [hereinafter Blue Ridge Contract]. If the power needs of the municipality increased by a defined demand threshold, TVA would be obligated to meet the excess demand—provided it had power available, and certain notice requirements were met. *See, e.g.*, Athens Contract § 2, *supra* note 93 (3,300 kilowatt threshold); Blue Ridge Contract § 2, *supra* note 93 (300 kilowatt threshold). An appendix to TVA's 1939 Annual Report contains the 110 contracts between TVA and municipal and cooperative utilities that TVA had executed by that year.

94. The exception was a contract with Bells Light & Power, a privately-owned utility serving Bells, Tennessee. This contract allowed for termination by TVA with five years' notice, as required by section 10 of the TVA Act. *See Contract between TVA and Bells Light & Water Co.* § 9 (Feb. 1, 1939), *in* 1939 ANNUAL REPORT, *supra* note 87, at 179; *see also* 16 U.S.C. § 831i.

95. *See, e.g.*, Athens Contract § 4–5, Terms and Conditions § 15, *supra* note 93; Blue Ridge Contract § 4, Terms and Conditions § 14, *supra* note 93.

96. *See, e.g.*, Athens Contract, Schedule of Terms and Conditions § 13, *supra* note 90; Blue Ridge Contract, Schedule of Terms and Conditions § 12, *supra* note 90.

97. TVA, ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED JUNE 30, 1951, at 13 (1951).

98. *See* Kitchens, *supra* note 58, at 398.

As TVA matured and its mission and finances evolved, so too did the all-requirements contract. By the late 1950s, TVA's original contracts had lapsed or were soon to lapse, and it began to renew its agreements with its distributors. Its second and third rounds of contracts (from the late 1950s/early 1960s, and late 1970s/early 1980s, respectively) looked similar to the original set, with the exception of two key changes that shifted the balance of power between the parties in favor of TVA.

First, they provided for termination. Starting ten years after the contract's effective date, either party could terminate the contract with four years' notice.[99] Second, should the distributor exercise its termination right, TVA was "under no obligation from the date of receipt of such notice [to terminate] to make or complete any additions to or changes in any transformation or transmission facilities for service" to the distributor, unless the distributor "agrees to reimburse TVA for its nonrecoverable costs in connection with the making or completion of such additions or changes."[100] The contracts still did not contain renewal provisions; TVA materials suggest that there was a practice of ad hoc renewal.[101] This was the state of the TVA all-requirements contract until the late 1980s.

### *C. 1949–1959: Congress Ends TVA Appropriations and Builds the TVA Fence*

In the mid-twentieth century, TVA expanded its power capacity to meet the growing demand of its distribution customers and to power the war effort. This expansion triggered a political battle with threatened neighboring utilities, one that only ended (or, perhaps more accurately, went on an extended hiatus) in 1959 when TVA's power program became independent of congressional appropriations and Congress drew a "fence" outside of which TVA could not serve. These two changes arguably created the most important constraints within which TVA operates today and explain much about its 2019 evergreen all-requirements contract. Together, they made TVA existentially dependent upon the continued loyalty (voluntary or coerced) of its existing customers.

During World War II, TVA scaled up its electric generation capacity. By 1945, its system consisted of twenty-six hydroelectric dams, producing twelve billion kilowatt hours of energy per year. About 75% of this output went to the war effort.[102]

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99. *See, e.g.*, *Power Contract between TVA and City of Oxford, Miss.* (1970) [hereinafter Oxford Contract], *in* TVA, ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED JUNE 30, 1970, at A71 (1970) [hereinafter 1970 ANNUAL REPORT]; *see also* 1960 ANNUAL REPORT, *supra* note 66, at 16.

100. *See, e.g.*, Oxford Contract, *supra* note 99; *see also* 4-County Elec. Power Ass'n v. TVA, 930 F. Supp. 1132, 1135 (S.D. Miss. 1996) (describing a supply contract between TVA and a Mississippi cooperative "executed October 31, 1978, for a twenty-year term" that "requires that TVA supply and 4-County purchase from TVA all of its power for distribution to 4-County's customers and authorized either party to terminate the contract on four years' notice to the other"). The *4-County* court describes these terms as "[l]ike each of the preceding contracts between the parties," *id.*, but that claim is not quite accurate. The parties' 1938 power supply contract did not provide for termination by either party, with or without notice. *See Contract between TVA and 4-County Electric Power Association* (1938), *in* 1939 ANNUAL REPORT, *supra* note 87, at 272-74 (1940).

101. In fiscal year 1960, 92 distributors had renewed their contracts for a second twenty-year term; only Memphis chose to (temporarily) "follow a different course and begin to provide its own power supply." 1960 ANNUAL REPORT, *supra* note 66, at 16.

102. HARGROVE, *supra* note 16, at 60; PRITCHETT, *supra* note 11, at 38–41.

In the aftermath of the war, TVA conceived of itself as a power company and took steps to further that mission. As Erwin Hargrove explains, "[i]t became TVA doctrine that the supply of energy was the [principal] stimulus for demand and that therefore TVA must always stay ahead of existing demand . . . in order to meet future needs."[103] Pursuing this vision in the late 1940s and early 1950s, TVA initiated a strategy of further expanding its generating capacity. President Truman and the Democratic majority in Congress approved appropriations for nine new TVA coal plants starting in 1949 and continuing in the 1950s.[104]

This course of action created "prolonged partisan political struggle" in Congress.[105] Investor-owned utilities in the Southeast saw TVA's growing capacity and feared government-backed competition in their service territories.[106] President Eisenhower was skeptical of the entire TVA project; he felt that federal appropriations meant "the nation's taxpayers would be forever committed to providing cheap power for the people in the TVA region," and "justice to other regions requires some kind of adjustment."[107] In the face of this contestation and uncertainty, TVA began to seek independence from congressional appropriations.[108]

Congress resolved this conflict in 1959 by ceasing appropriations to TVA's power program and authorizing TVA to issue bonds to fund the program, up to a maximum debt limit of $750 million.[109] Principal and interest on the bonds were to be repaid solely with revenue from power sales.[110] The legislation also provided that "[b]onds issued by the Corporation hereunder shall not be obligations of, nor shall payment of the principal thereof or interest thereon be guaranteed by, the United States."[111]

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103. HARGROVE, *supra* note 16, at 127.

104. *Id.* at 126. *See also Coal*, TVA, https://www.tva.com/energy/our-power-system/coal; TVA, AGING COAL FLEET EVALUATION 10 (2021), https://www.tva.com/environment/environmental-stewardship/environmental-reviews/nepa-detail/cumberland-fossil-plant-retirement (select "Aging Coal Fleet Evaluation" under "Related Documents").

105. HARGROVE, *supra* note 16, at 125.

106. Wellington Wright, *TVA Not Interested in Expansion, Clapp Says*, ATLANTA CONST. (Mar. 8, 1949), available at ProQuest Historical Newspapers: The Atlanta Constitution (1946-1984).

107. HARGROVE, *supra* note 16, at 142. He also accused TVA of "creeping socialism." *Id.* at 141.

108. *See* Hardin v. Ky. Utils. Co., 390 U.S. 1, 6-7 (1968).

109. Pub. L. No. 86-137, 73 Stat. 280 (1959) (codified as amended at 16 U.S.C. § 831n-4). As passed by Congress, the legislation gave Congress authority to veto TVA's new construction plans. To convince President Eisenhower to sign the bill into law, TVA's Chairman promised him that the House and Senate would immediately pass a new bill striking this provision. *See* Richard E. Mooney, *Eisenhower Signs T.V.A. Bond Bill; Acts After Congress Pledges Deletion of Clause Held Threat to His Powers*, N.Y. TIMES (Aug. 7, 1959), https://www.nytimes.com/1959/08/07/archives/eisenhower-signs-t-v-a-bond-bill-acts-after-congress-pledges.html; Pub. Law No. 86-157, 73 Stat. 338 (1959). The amendments also continued the existing requirement that TVA make installment payments to the Treasury reimbursing it for previous appropriations. *See* Letter from Elmer B. Staats, U.S. Comptroller General, to Joe L. Evins, U.S. Congressman (Apr. 27, 1973), https://www.gao.gov/assets/b-114850-096389.pdf.

110. Pub. L. No. 86-137, 73 Stat. at 281.

111. *Id.* at 282 (codified as amended at 16 U.S.C. § 831n-4(b)). In spite of this, TVA benefits from its federal affiliation. *See, e.g.*, *Moody's assigns a Aaa rating to TVA's note offering*, MOODY'S INVESTOR SERV. (Mar. 27, 2023), https://www.moodys.com/research/Moodys-assigns-a-Aaa-rating-to-Rating-Action--PR_475274 ("TVA's Aaa rating . . . incorporates a one-notch uplift to reflect a high probability of extraordinary support from the Government of United States of America.").

In exchange for its financial independence, section 15d(a) of the amendments prohibited TVA from making "contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which [they] were the primary source of power supply on July 1, 1957."[112] It thus restricted TVA from serving new distribution utility customers outside of its existing footprint, creating TVA's "Fence."[113] The purpose of this provision was to end franchise competition between private utilities and TVA.[114]

The 1959 legislation sheltered TVA from politics and the specter of privatization, at least temporarily, at the expense of two new, fundamental constraints the presence of which helps to explain TVA's doubling-down on control over customers and sustained resistance to competition and open access. First, TVA would be funded solely through issuance of debt, paid off by revenues from sales to distribution utilities. While this arrangement would make TVA independent of the annual appropriations process, it would still require Congress to raise TVA's debt ceiling and tied its financial fate and capacity for expansion to its ability to generate power revenues.[115] Second, TVA was forbidden from expanding its customer base outside of its existing service territory. Congress thus tied TVA's ability to survive to its ability to maintain a sufficient customer base, while drawing for TVA what it had, until then, lacked: a circumscribed service territory.

### *D. 1960s–1990s: TVA Takes on Debt and Raises Rates*

In the second half of the twentieth century, TVA racked up debt expanding its generating capacity and raised rates. This dynamic introduced tension into TVA's relations with its distribution utility customers.

In 1966, TVA initiated a program of nuclear power plant construction. Between 1950 and 1960, residential electricity demand in TVA's service territory had increased fourfold. TVA projected another doubling between 1960 and

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112. *Id.* at 280–281 (adding TVA Act § 15d) (codified as amended at 16 U.S.C. § 831n-4(a)).

113. *The Great Compromise*, TVA, https://www.tva.com/about-tva/our-history/tva-heritage/the-great-compromise. Hargrove describes a conversation between President Eisenhower and the TVA Board during negotiations to pass the bill in which "Eisenhower broke in irritably to say that he wanted to sign and that the private utilities wanted him to do so. He said he was receiving calls from their presidents at night and that 'they would give me a golf course in Georgia if I would sign it.'" HARGROVE, *supra* note 16, at 152.

In *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968), the Supreme Court held that it would defer to TVA's determination of what constitutes an "area," so long as it found the determination had "reasonable support in relation to the statutory purpose of controlling, but not altogether prohibiting, territorial expansion." *Id.* at 9.

114. *See Hardin*, 390 U.S. at 6-7.

115. In 1999, Congress ended appropriations for TVA's non-power programs. TVA, 2001 ANNUAL REPORT 27 (2001), https://web.archive.org/web/20130411193257/http://www.tva.com/finance/reports/pdf/fy2001ar.pdf [hereinafter 2001 ANNUAL REPORT]. This move was highly contested. Members of Congress from non-TVA states saw appropriations for TVA development programs as unfair subsidies. Other IOUs in the Southeast, which formed groups called "TVA Watch" and "TVA Reform Alliance," opposed appropriations, as well, because forcing TVA to pay for non-power programs with power program revenues would increase its rates, thus reducing downward pressure on IOU rates. Members from TVA states opposed ending appropriations. *See The Future of the Tennessee Valley Authority and its Non-Power Programs: Hearing before the Subcomm. on Water Res. & Env't of the H. Comm. on Transport. & Infrastructur*e, 105th Cong. (1997), http://commdocs.house.gov/committees/Trans/hpw105-27.000/hpw105-27_0f.htm.

1968,[116] as well as continued demand from the Vietnam War effort.[117] By this point, TVA already operated a large generation portfolio, including fourteen gigawatts of coal-fired capacity (eleven plants)[118] and four gigawatts of hydroelectric capacity (forty-seven dams).[119] But to meet the expected doubling of demand, TVA changed gears. Nuclear power was particularly attractive to TVA (and the rest of the electric power industry) because it provided an opportunity to hedge against the price of coal, it was (in the normal course) less polluting than coal, and nuclear plants were seen as less costly to construct than coal plants.[120] Thus, TVA set out to expand its capacity and achieve a power mix of approximately 50% nuclear, 20% fossil fuels, and 30% hydroelectric.[121] It announced plans to build seven nuclear power plants, consisting of seventeen individual reactors with approximately nineteen gigawatts of generating capacity.[122]

To fund this ambitious construction project, TVA issued debt. Congress continuously raised its statutory debt limit—without much scrutiny into the prudence of the nuclear program or responsiveness to concerns of stakeholders that TVA should invest in energy efficiency and renewable energy instead of central power plant buildout.[123] In 1966, Congress raised TVA's debt limit from $750 million to $1.75 billion. In 1970, it was increased again to $3.5 billion; in 1976, to $15 billion; and finally, in 1979, to $30 billion.[124] Indeed, by late 1980, TVA debt had reached $17 billion.[125] Its debt peaked in 1997 at $27.4 billion[126] before lowering gradually to $23.6 billion in 2010[127] and $19.5 billion today.[128]

Unfortunately, TVA's nuclear program was plagued with difficulties. Most fundamentally, TVA's expectations for ever-increasing demand proved incorrect. The 1970s energy crisis reduced electricity demand nationwide.[129] In a familiar problem, TVA would have no outlet for its increased capacity. Additionally, its

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116. Will Davis, *TVA Prepares to Write Final Nuclear Chapters*, NUCLEAR NEWSWIRE (Apr. 17, 2015), https://www.ans.org/news/article-1686/tva-prepares-to-write-final-nuclear-chapters/#sthash.y8TgXNQ0.dpbs.

117. HARGROVE, *supra* note 16, at 186.

118. Davis, *supra* note 116; *see also Coal*, TVA, https://www.tva.com/energy/our-power-system/coal.

119. Davis, *supra* note 116.

120. HARGROVE, *supra* note 16, at 185–86.

121. HARGROVE, *supra* note 16, at 185.

122. Davis, *supra* note 116. This phenomenon—projections of rapidly escalating demand, met with calls to for a large buildout of nuclear power infrastructure—may resonate with modern electric sector observers.

123. *See Increasing the Tennessee Valley Authority Bond Ceiling*: *Hearing before the Sen. Comm. on Env't & Pub. Works*, 96th Cong. 33-38 (1979) (testimony of Dan Feather and Louise Gorenflo, Tennessee Valley Energy Coalition) ("[O]n the issue of the debt ceiling that there has been an inadequate public participation in this in the valley. There has been no public hearing, no public forum. We are going to be the ones who are stuck with the bill.").

124. HARGROVE, *supra* note 16, at 185, 188, 223.

125. HARGROVE, *supra* note 16, at 225.

126. US. GOV'T ACCOUNTABILITY OFFICE, GAO-06-810, TENNESSEE VALLEY AUTHORITY: PLANS TO REDUCE DEBT WHILE MEETING DEMAND FOR POWER 10 (2006), https://www.gao.gov/products/gao-06-810.

127. TVA, ANNUAL REPORT (FORM 10-K) 56 (Nov. 19, 2010), https://tva.q4ir.com/financial-information/sec-filings/sec-filings-details/default.aspx?FilingId=7570042.

128. TVA, ANNUAL REPORT (FORM 10-K) 45 (Nov. 14, 2023), https://tva.q4ir.com/financial-information/sec-filings/sec-filings-details/default.aspx?FilingId=17052755.

129. HARGROVE, *supra* note 16, at 189.

projects experienced safety issues,[130] regulatory hurdles, and cost overruns.[131] Inflation in the 1970s imperiled power plant construction across the country.[132] In response, TVA mothballed most of its planned nuclear construction, but not before expending hundreds of millions of dollars in the construction process.[133]

Because TVA was newly freed from the shackles of federal appropriations and because it could not sell *more* power, TVA increased its electricity rates to raise revenue necessary to pay off its mounting debt. In 1967, it increased residential rates for the first time,[134] citing inflation.[135] In 1970, it raised rates again—this time by 23%—citing rising costs of coal and interest rates.[136] In 1972, it increased rates by 9%, citing coal costs and rising interest on its borrowing for its nuclear program.[137] Rates rose again at least seven times throughout the 1980s.[138] By-and-large, TVA attributed the increases to the nuclear program,[139] though they also incorporated the costs of a 1980 consent decree between TVA and the Environmental Protection Agency addressing TVA's non-compliance with the Clean Air Act.[140]

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130. *See* HIRSCH, *supra* note 32, at 66.

131. By 1977, the costs of building Browns Ferry and Sequoyah reached tripled their estimates; Watts Bar and Bellefonte doubled. *See* HARGROVE, *supra* note 16, at 189.

132. *Id.* at 187-89.

133. Caroline Payton, *Nuclear Ghosts and the Atomic Landscape of the American South*, ENV'T & SOC'Y PORTAL (Oct. 2015), https://www.environmentandsociety.org/arcadia/nuclear-ghosts-and-atomic-landscape-american-south. The Browns Ferry project was completed in 1974, three years later than planned. Sequoyah was completed by 1982, eight years late. Watts Bar's first unit was completed in 1996, compared to a 1977 planned deadline; its second unit was completed in 2016. *See Watts Bar Unit 2 Complete and Commercial*, TVA (Oct. 19, 2016), https://www.tva.com/newsroom/watts-bar-2-project. Three plants (Hartsville, Phipps Bend, and Yellow Creek) were cancelled by 1984, some while construction was underway. And after being idled in 1988, restarted in 1993, cancelled in 2006, and revived in 2009, the Bellefonte project was finally cancelled in 2021. *See* Dave Flessner, *The end of an era: TVA gives up construction permit for Bellefonte nuclear plant after 47 years*, CHATTANOOGA TIMES FREE PRESS (Sept. 20, 2021) https://www.timesfreepress.com/news/2021/sep/17/end-eratvgives-constructipermit-bellefonte-nu/; Rod Walton, *TVA withdraws construction permit for abandoned Bellefonte nuclear project after judge nixes sale to private group*, POWER ENG'G (Sept. 17, 2021), https://www.power-eng.com/nuclear/tva-withdraws-construction-permit-for-abandoned-bellefonte-nuclear-project-after-judge-nixes-sale-to-private-group/.

134. This was not TVA's first rate increase for non-residential customers. *See* John N. Popham, *T.V.A. to Increase Rate to Big Users*, N.Y. TIMES (June 26, 1951), https://nyti.ms/42TjdIm.

135. HARGROVE, *supra* note 16, at 187. This rate change "contained an automatic annual adjustment to reflect changes in the cost to TVA of money and fuel," the first escalation under which occurred in August 1969. *See* 1970 ANNUAL REPORT, *supra* note 99, at 33.

136. *See TVA to Raise Rates*, N.Y. TIMES (July 17, 197), https://nyti.ms/40MpjJj; *see also T.V.A. Chief Defends Plan to Increase Power Rates*, N.Y. TIMES (Aug. 2, 1970), https://nyti.ms/40QuBTz; 1970 ANNUAL REPORT, *supra* note 96, at 28.

137. *TVA Will Increase Rates by 9 Per Cent*, ATL. CONST. (Nov. 30, 1972), available at ProQuest Historical Newspapers: The Atlanta Constitution (1946-1984).

138. *See* Tom Madden, *TVA Nuclear Program Stirs Controversy*, L.A. TIMES (Oct. 19, 1980), available at ProQuest Historical Newspapers: Los Angeles Times (1923-1995); Rebecca Ferrar, *TVA to raise its rates by 9.95%*, KNOXVILLE NEWS-SENTINEL (Feb. 14, 2006), available at ProQuest Central: News Sentinel (1994-current).

139. Madden, *supra* note 138.

140. *See Increasing the Tennessee Valley Authority Bond Ceiling*: *Hearing before the Sen. Comm. on Env't & Pub. Works*, 96th Cong. 5-6 (1979) (statement of Sen. Muskie) ("For years TVA has been among the largest polluters in the nation. Their recalcitrance was an embarrassment to those of us who believe that the public

It was during the buildout of TVA's ambitious nuclear program that two key moments in the development of TVA's all-requirements contract took place. As noted above, until the 1980s, TVA's all-requirements contracts with its distribution utilities had twenty-year terms and required four years' notice for termination. In 1989, faced with an imminent surplus of generating capacity, TVA began offering a "Growth Credit Program" to its distributors, intended to incentivize demand growth. For eight years, enrolled distributors would apply bill credits to the retail power bills of new industrial customers or existing industrial customers who increased their demand. TVA would reimburse the distributor 110% of the value of the credits allotted. In exchange for this attractive incentive, TVA extended participating distributors' termination notice requirement to ten years from four.[141] It also added an important new provision:

> [B]eginning on the tenth anniversary of [its] effective date, and on each subsequent anniversary thereof . . . this contract shall be extended automatically without further action of the parties for an additional 1-year renewal term beyond its then-existing time of expiration.[142]

For the first time, TVA contracts contained an automatic annual one-year term extension. Each year that the contract is in place, its termination date extends by an additional year.

In 1994, TVA established an "Enhanced Growth Credit Program," which was "similar in form and purpose" to the 1989 program, but was unavailable to distributors that "did not have, and maintain, a 10-year contractual commitment" with TVA—meaning a distributor that had exercised its ten-year termination notification right was ineligible for the enhanced incentive program.[143] 147 of TVA's then-160 distributors agreed to participate in the Enhanced Growth Credit Program.[144] After all, in the midst of a period of frequent rate increases, any distributor that declined the industrial rate discount in favor of retaining its four-year termination period or that exercised its termination right risked losing cost-conscious industry and subjecting residents and businesses to markedly higher electric rates than their neighbors. This was apparently the first example of a practice TVA came to use again in 2019.

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mission of the agency demanded a broader, more progressive view of power production."). *See also* TVA, ANNUAL REPORT OF THE TENNESSEE VALLEY AUTHORITY FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 1981, VOL. II-APPENDIXES 12 (1981).

141. *4-County Elec. Power Ass'n*, 930 F. Supp. at 1135-36. *See, e.g.*, Letter from G. Douglas Carver, Manager, Distributor Marketing and Services, TVA, to Dr. James Edward Jones, Chairman, Board of Public Utilities, Clinton, Tenn. (Oct. 1, 1989) (on file with author) (memorializing an amendment to Clinton's power supply contract providing for its participation in the Growth Credit Program); Letter from G. Douglas Carver to Joe F. Lester, Chairman, Board of Electric Light & Waterworks Comm'rs, Morristown, Tenn. (Oct. 1, 1989) (on file with author) (memorializing an amendment to Morristown's power supply contract providing for its participation in the Growth Credit Program).

142. *See, e.g.*, Letter from G. Douglas Carver, Manager, Distributor Marketing and Services, TVA, to Dr. James Edward Jones, Chairman, Board of Public Utilities, Clinton, Tenn., *supra* note 141; Letter from G. Douglas Carver, to Joe F. Lester, Chairman, Board of Electric Light & Waterworks Comm'rs, Morristown, Tenn., *supra* note 141.

143. *4-County Elec. Power Ass'n*, 930 F. Supp. at 1136.

144. *Id.* at 1138. The program was terminated in 2010. *See* Letter from Kenneth R. Breeden, Executive Vice President, Customer Relations, TVA, to Herbert Ward, Chairman, Clinton Utilities Board (Aug. 20, 2010) (on file with author).

By the mid-1990s, most of TVA's all-requirements power supply contracts contained twenty-year terms, annual one-year term extensions, and ten-year termination notice requirements.

### *E. 1980s–2000s: TVA Survives Electric Sector Restructuring*

At the end of the twentieth century, a series of watershed reforms aimed at introducing competition to the electric sector left TVA mostly unscathed. The twentieth-century electric utility sector was characterized by IOU dominance over generation, transmission, and distribution.[145] Starting in the 1970s, however, the energy crisis and rapidly increasing electricity costs put pressure on utilities[146] and spurred industrial customers to build (or threaten to build) their own sources of generation.[147] In the 1990s and 2000s, Congress, FERC, and the states responded to these conditions with a wave of competition-oriented reforms to electric sector regulation. This surge of activity included the Energy Policy Act of 2005, which gave federal regulators newfound authority to order TVA to transmit power at rates and pursuant to terms and conditions that were non-discriminatory and "comparable to those that . . . it charges itself." This law posed a potential challenge to TVA's longstanding policy of refusing to transmit non-TVA power to TVA customers within the Fence.

#### 1. Reform at FERC and TVA's Transmission Service Guidelines

Starting in the late 1970s and continuing into the 1990s, policymakers in Congress and at FERC designed and implemented a series of landmark reforms intended to weaken IOU control over the electric power industry in order to facilitate competition.[148] In 1996, FERC issued Order No. 888, the first in a line of "open-access" orders. Order No. 888 restructured wholesale transmission service by requiring IOUs under its jurisdiction to provide comparable, open-access transmission service at non-discriminatory rates to all customers. This ended each utility's *de facto* preference for its own power plants. If non-FERC-jurisdictional utilities wanted to take service from jurisdictional IOUs' open-access tariffs, they would have to adopt functionally equivalent terms—a policy called "reciprocity."[149] TVA was a non-jurisdictional utility within the meaning of Order No. 888.[150]

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145. *See* Ari Peskoe, *Is the Utility Transmission Syndicate Forever?*, 42 ENERGY L.J. 1, 4–6, 11–18 (2021); Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992: A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. REGUL. 447, 451 (1993).

146. HIRSCH, *supra* note 32, at 68–69.

147. Peskoe, *supra* note 145, at 19.

148. HIRSCH, *supra* note 32, at 73, 86–88

149. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC STATS. & REGS. ¶ 31,036, at 31,755-31,763 (1996) (cross-referenced at 75 FERC ¶ 61,080) (1996); *see* Peskoe, *supra* note 145, at 22.

150. FERC issued Order No. 888 pursuant to its authority under sections 205 and 206 of the Federal Power Act ("FPA") to remedy undue discrimination in interstate transmission service. Order No. 888, FERC STATS. & REGS. ¶ 31,036 at 31,634-31,635; *see* 16 U.S.C. §§ 824d–824e. This authority extends only to transmission service by "public utilities," 16 U.S.C. §§ 824d(b), 824e(a), a group defined to exclude TVA, *id.* § 824(e). *See also* Order No. 888, FERC STATS. & REGS. ¶ 31,036 at 31,858 ("TVA is not a public utility under section 201(e) of the FPA and, thus, is not required to file a non-discriminatory open access transmission tariff under this Rule.").

Unlike other non-jurisdictional federal power marketing administrations and state-owned utilities, TVA did not file a voluntary open-access tariff, and never has.[151] Instead, it adopted its first set of Transmission Service Guidelines. The Guidelines defined an "eligible customer" for TVA transmission service to exclude any entity that FERC "is prohibited from ordering by Section[212] of the Federal Power Act"—*i.e.*, a customer seeking to transmit power to be consumed inside the TVA Fence.[152] The Guidelines confirmed TVA's policy of refusing to transmit third-party power for consumption within its territory, which is inconsistent with Order No. 888's requirements for jurisdictional utilities. That policy is still in place today.[153]

2. Reform in Congress

Though TVA was unaffected by FERC's reforms in the 1990s, distinct reform efforts took place in Congress. Throughout the 1990s, Congress debated a number of TVA reform proposals as part of its broader restructuring efforts. Some of TVA's largest customers, including Knoxville and Memphis, supported proposals that involved dismantling the TVA Fence, thereby allowing TVA to compete for customers outside of its 1950s territory and opening TVA territory to competition from outsiders; restructuring contracts with distributors to allow for termination notice of only one or two years; and subjecting TVA to FERC rate regulation.[154] Others proposed stripping TVA of its power to set customers' retail rates and introducing mechanisms for contesting TVA's wholesale rates.[155] Even more dramatic suggestions included privatizing TVA altogether[156] or prohibiting TVA from building new plants.[157]

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151. Each federal power marketing administrations has sought to develop and file acceptable reciprocity tariff—not all successfully, in their most recent forms. *See W. Area Power Admin.*, 182 FERC ¶ 61,206 (2023) (granting in part the Western Area Power Administration's petition for a declaratory order requesting that the Commission qualify its tariff as an acceptable reciprocity tariff); *Bonneville Power Admin.*, 145 FERC ¶ 61,150 (2013) (denying Bonneville's petition for a declaratory order requesting that the Commission qualify its tariff as an acceptable reciprocity tariff); *Sw. Power Admin.*, 130 FERC ¶ 61,224 (2010) (finding that the Southwestern Power Administration's tariff qualifies as an acceptable reciprocity tariff).

152. *See* TVA, TRANSMISSION SERVICE GUIDELINES: FY 2021 EDITION § 1.15 (2020), http://www.oatioasis.com/woa/docs/TVA/TVAdocs/TSG%20FY2021.pdf; *infra* notes 275-76 and accompanying text (describing TVA's interpretation of the FPA).

153. TVA, TRANSMISSION SERVICE GUIDELINES: FY2023 EDITION § 1.15 (2022), http://www.oatioasis.com/woa/docs/TVA/TVAdocs/TSG%20FY2023.pdf.

154. Rebecca Farrar, *House eyes TVA's future: Deregulation timing debated*, KNOXVILLE NEWS-SENTINEL (Sept. 14, 1999), available at ProQuest Central: News Sentinel (1994-current).

155. *Id.*

156. *See, e.g.*, Adam Thierer, *A Five Point Checklist for Successful Electricity Deregulation Legislation*, HERITAGE FOUND. (Apr. 13, 1998), https://www.heritage.org/government-regulation/report/five-point-checklist-successful-electricity-deregulationlegislation.

157. *See, e.g.*, Farrar, *supra* note 159; Richard Powelson, *Bill would force TVA to sell nuclear, coal plants*, KNOXVILLE NEWS-SENTINEL (June 15, 2000), available at ProQuest Central: News Sentinel (1994-current) (describing a bill that would force TVA to sell its operating nuclear and coal plants). Unlike many members of TVA-state congressional delegations, Senator Mitch McConnell championed IOU efforts to weaken TVA. *See* Ken Silverstein, *The future of TVA*, UTIL. BUS. (Aug. 2000), available at ProQuest Central: Utility Business (1998-2002); TVA Distributor Self-Sufficiency Act of 2001, S. 608, 107th Cong. (2001), https://www.con-

TVA saw the writing on the wall.[158] Some customers were able to take advantage of this political momentum to negotiate more favorable contracts with TVA.[159] Moreover, TVA endorsed a "consensus" position formulated with "the vast majority of [its] distributors" and a coalition of industrial customers. This group proposed: (1) permitting TVA to sell power outside the Fence; (2) permitting customers to buy power from other suppliers; (3) removing "statutory impediments" (though perhaps not TVA-imposed impediments) to other suppliers wheeling power into the Fence area; (4) renegotiating supply contracts and giving customers a statutory right to terminate with three years' notice; and (5) reducing TVA's regulatory oversight over its customers.[160]

In May 2000, three senators from TVA states introduced a bill containing the endorsed provisions.[161] In addition to dismantling the TVA Fence,[162] the bill would have directed TVA and its distributors to make "good faith efforts" to renegotiate their contracts.[163] If those efforts failed, distributors could terminate their relationship with TVA or opt for a partial requirements contract (with two to three years' notice).[164] TVA would be prohibited from unduly discriminating against a supplier that exercised its termination or partial requirements rights.[165]

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gress.gov/bill/107th-congress/senate-bill/608?s=1&r=16. Southeastern IOUs eagerly supported bringing competition to TVA while stridently (and successfully) resisting restructuring efforts in their own territories. *See* Harrison & Welton, *supra* note 9.

158. *See* TVA, 2000 ANNUAL REPORT 19 (2000) [hereinafter 2000 ANNUAL REPORT]; *The Future of the Tennessee Valley Authority and its Non-Power Programs*: *Hearing before the Subcomm. on Water Res. & Env't of the H. Comm. on Transport. & Infrastructure*, 105th Cong. (1997), http://commdocs.house.gov/committees/Trans/hpw105-27.000/hpw105-27_0f.htm (testimony of TVA Chairman Craven Crowell).

159. John J. Fialka, *New Deal Undone: Using Savvy Tactics, Bristol, Va., Unplugs From a Federal Utility*, WALL ST. J. (May 27, 1997) ("In recent months, the TVA's five biggest customers . . . have banded together. [T]he cities are . . . studying the law, hiring consultants and getting bids from outside suppliers. [The] president of the Nashville Electric Service[] points out the Big Five consortium constitutes 30% of the TVA's market and carries considerable political clout in Congress. As Congress focuses on the electricity industry, he notes, there will be proposals to privatize the giant agency, or to carve it up. If the TVA allows more 'flexibility' in its prices and contracts, he suggests, 'we have the ability to help them, politically.' Without such concessions, 'we're just going to have a knock-down, drag-out battle. . . . That will probably harm both of us.'"). Memphis threatened to leave TVA in the early 2000s. *See* Ed Hicks, *As deregulation looms, MLGW ponders generating own power*, MEMPHIS BUS. J. (2000), available at ProQuest Central: Memphis Business Journal (1999-2004). It ultimately decided to stay, but negotiated a favorable contract. The Kentucky cities of Hopkinsville, Glasgow, and Bowling Green all gave notice of termination in the early 2000s, later rescinded. When Bristol, Virginia gave its notice of termination, TVA allegedly retaliated. *See The Application of the Antitrust Laws to the Tennessee Valley Authority and the Federal Power Marketing Administrations*: *Hearing Before the Comm. on Judiciary*, 105th Cong. (Oct. 22, 1997) (statement of Sen. Boucher) (describing retaliatory tactics deployed by TVA after Bristol gave notice of termination, including "scare tactics," "predatory pricing . . . by offering to sell TVA power to Bristol's largest customers for 2 percent less than whatever the price the City of Bristol could offer," and "pursu[ing] the City of Bristol for alleged stranded investments.").

160. 2000 ANNUAL REPORT, *supra* note 158, at 19. This consensus position was first adopted by TVA and its distributors in September 1999, and was reaffirmed in May 2000 with support of a coalition of industrial customers. *See* 2001 ANNUAL REPORT, *supra* note 115, at 27.

161. S. 2570, 106th Cong. (2000).

162. *Id.* § 2.

163. *Id.* § 5(a).

164. *Id.* § 5(b)–(c).

165. S. 2570 § 5(d); *see infra* Part IV (discussing discrimination allegations against TVA by 4-County Electric Power Association).

The bill would have subjected TVA to full FERC rate regulation[166] and eliminated TVA's authority to oversee and regulate its distributors' rates and practices.[167] Finally, it would have subjected TVA to federal antitrust law.[168] The bill failed to make any progress.

Ultimately, despite TVA's embrace of a reform proposal, congressional restructuring left TVA mostly untouched,[169] with one important exception. The Energy Policy Act of 2005 added section 211A to the Federal Power Act, giving FERC new authority to order certain utilities—including TVA—to provide open-access transmission service on non-discriminatory terms. This law challenged TVA's Transmission Service Guidelines.

*Sections 210, 211, and 211A of the FPA.* In 1978, Congress had enacted sections 210 and 211 of the FPA. Section 210 authorized FERC, upon application of "any electric utility," to order the physical interconnection of the transmission facilities of another electric utility with the applicant. Likewise, section 211 authorized FERC, upon application of "any electric utility," to order "transmitting utilities" to provide transmission service to the applying utility.[170] Because the FPA defines "electric utility" and "transmitting utility" to include TVA, sections 210 and 211 allow FERC to reach TVA, unlike most other provisions of the FPA.[171]

Section 210 chipped away at TVA's insulation from competition, though FERC's power to order TVA's interconnection with neighboring systems is inherently less potent than its power to order TVA to transmit power over its transmission system. In its *East Kentucky Power Cooperative* orders,[172] FERC acted under its section 210 authority to order TVA to interconnect with a neighboring generation & transmission ("G&T") cooperative's transmission system so that the cooperative could serve a departing TVA customer located at the edge of the TVA Fence. Importantly, the G&T competitor already had or would build transmission

166. *Id.* §§ 6, 8.

167. *Id.* § 7.

168. *Id.* § 9. TVA is exempt from antitrust law. *See* McCarthy v. Middle Tenn. Elec. Membership Corp., 466 F.3d 399, 414 (6th Cir. 2006); *see also The Application of the Antitrust Laws to the Tennessee Valley Authority and the Federal Power Marketing Administrations*: *Hearing before the Comm. on Judiciary*, 105th Cong. (1997). By contrast, investor-owned utilities are subject to federal antitrust law. *See* Otter Tail Power Co. v. U. S., 410 U.S. 366, 373-74 (1973); Reiter, *supra* note 51, at 336 nn.8, 9.

169. The culmination of Congress's work was the Energy Policy Act of 2005. Pub. L. No. 109–58, 119 Stat. 594 (2005). That legislation repealed the Public Utilities Holding Company Act of 1935, thus "paving the way for a wave of utility mergers and perhaps ushering in a new era of IOU transmission dominance." Peskoe, *supra* note 145, at 63; *see also* Tyson Slocum, *The Failure of Electricity Deregulation: History, Status, and Needed Reforms*, at 5 (Mar. 2007), https://www.ftc.gov/sites/default/files/documents/public_events/Energy%20Markets%20in%20the%2021st%20Century:%20Competition%20Policy%20in%20Perspective/slocum_dereg.pdf.

170. FPA § 211, 16 U.S.C. § 824j(a).

171. 16 U.S.C. §§ 796(22), (23) (defining "electric utility" and "transmitting utility" to include TVA).

172. *See E. Ky. Power Cooperative*, 111 FERC ¶ 61,031 (2005) (proposed order); *E. Ky. Power Cooperative*, 114 FERC ¶ 61,035 (2006) (final order), *order denying reh'g*, 115 FERC ¶ 61,347 (2006); *E. Ky. Power Cooperative*, 121 FERC ¶ 61,255 (2007) (granting motion to terminate proceedings for mootness and denying TVA's request to vacate prior *East Kentucky* orders).

facilities to reach the customer and sought only interconnection service, not transmission service; FERC emphasized that interconnection was only necessary for "certain coordination services" from TVA.[173] Thus, although *East Kentucky Power Cooperative* demonstrates that FERC has meaningful authority to order TVA to interconnect (and provide related services) under section 210, that authority does not necessarily help customers reachable only through TVA transmission facilities.

Section 211, in contrast, posed a problem for TVA's maintenance of its generation and transmission monopoly. Section 211 conflicted with TVA's longstanding policy not to transmit power generated by third-parties for consumption within TVA's territory.[174] Were section 211 applicable to TVA, customers deep within the Fence could access outside sources of generation without building duplicative transmission, creating potential competition for TVA's generation business.

In 1992, Congress solved this problem for TVA: section 211 orders had to "meet the requirements" of section 212, which Congress amended to provide at subsection (j) that FERC could not order TVA to provide transmission service to another utility if the power to be transmitted would be consumed within the TVA Fence.[175] Indeed, in 2002, the Commission found that section 212(j) prohibited it from ordering TVA to transmit power from a third-party supplier to an industrial customer inside the Fence.[176]

The Energy Policy Act of 2005 complicated TVA's happy state of affairs by adding section 211A to the FPA. This new section allowed FERC to order an "unregulated transmitting utility"—including TVA—"to provide transmission services . . . at rates that are comparable to those that the [utility] charges itself; and . . . on terms and conditions (not relating to rates) that are comparable to those under which the [utility] provides transmission services to itself and that are not unduly discriminatory or preferential."[177] The import of this provision for TVA—whether FERC would wield its new authority to chip away at TVA's total control over transmission service—remained unresolved until FERC's 2021 decision in *Athens Utilities Board v. TVA*,[178] discussed in detail below.

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173. *See E. Ky. Power Cooperative*, 114 FERC ¶ 61,035 at P 35; *E. Ky. Power Cooperative*, 115 FERC ¶ 61,347 at PP 13-14. The departing customer, Warren Rural Electric Cooperative Corporation, ultimately decided to remain with TVA. *See E. Ky. Power Cooperative*, 121 FERC ¶ 61,255 (2007). But two other Kentucky distribution utilities (the municipal utilities of Paducah and Princeton) left TVA. *See* James Bruggers, *Bad bet traps Paducah in coal-fired nightmare*, COURIER J. (Feb. 13, 2015), https://www.courier-journal.com/story/tech/science/environment/2015/02/13/paducah-power-bets-coal-loses-prairie-state-energy-campus/23322435/.

174. TVA, TRANSMISSION SERVICE GUIDELINES: FY2023 EDITION § 1.15 (2022), http://www.oatioasis.com/woa/docs/TVA/TVAdocs/TSG%20FY2023.pdf.

175. FPA § 212, 16 U.S.C. § 824k(j); *see* Fialka, *supra* note 159.

176. The supplier, Tennessee Power Company, asked FERC to order TVA to transmit the power under section 211 (relying on a claim that the industrial customer was not covered by the section 212(j) prohibition because TVA was not the "primary" supplier in the customer's area as of 1957, invoking a carveout from the 212(j) prohibition, *see infra* note 253). FERC denied the request, finding it was prohibited from issuing the requested order by section 212(j). *See Tenn. Power Co.*, 100 FERC ¶ 61,092, at PP 8-9 (2002).

177. FPA § 211A, 16 U.S.C. §§ 824j-1(a), (b).

178. 177 FERC ¶ 61,021, *order on reh'g*, 177 FERC ¶ 62,162 (2021), *order on reh'g*, 179 FERC ¶ 62,045 (2022); *see infra* Part IV.A.

## III. MODERN HISTORY OF TVA AND THE ALL-REQUIREMENTS CONTRACT

TVA today is in a position of near-insurmountable advantage over its customers. As discussed above, TVA has supplied electricity to distribution utilities through all-requirements contracts since the very beginning of its power program. By the end of the twentieth century, TVA's contracts still required customers to purchase all of their power requirements from TVA. During the twenty-year term of the contract, customers could not buy even a fraction of their power needs from non-TVA suppliers. They also could not build their own generation or permit end users to enjoy on-site (distributed) generation. Second, the contracts required ten years' notice prior to cancellation by either party. Third, the contract terms extended by one year annually. A utility manager had to anticipate whether, in ten years' time, the utility would want to leave TVA. And because the contracts continuously extended, only affirmative termination provided a potential opportunity for renegotiation or exit. Moreover, between receiving written notice of termination and the contract's effective termination date, TVA was not obligated to complete any additions or changes to its transmission facilities serving the utility unless it was reimbursed by the utility.

Furthermore, under TVA's Transmission Service Guidelines, TVA refused to transmit power from suppliers outside the Fence to distribution utilities inside the Fence. Should a utility choose to leave TVA after the requisite ten-year notice period, it would be required to plan, permit, and build redundant transmission infrastructure to bring its new supplier's power to its distribution grid.

Yet another key moment in the development of the all-requirements contract took place in 2019, when TVA's Board of Directors adopted a resolution entitled "Long Term Partnership Option for Local Power Companies"[179] and thereby approved a new, considerably different power supply contract to be offered to its customers.[180] Aware of threats to its security and continuity—particularly, customer dissatisfaction with rising rates, resulting in potential for defection to distributed generation or competitive suppliers—TVA used its existing monopoly power and strategies familiar from its history to shepherd its customers into a maximally restrictive, long-term relationship. The 147 utilities that have signed the contract have ceded their one source of bargaining power vis-à-vis TVA—the threat of defection—and are handcuffed to a newly-emboldened TVA for the foreseeable future. But in turn, TVA garnered meaningful resistance from small and large customers.

### *A. Key Terms of the 2019 All-Requirements Contracts*

The all-requirements contract approved by the TVA Board in August 2019 contained several categories of relevant provisions.

*More stringent provisions governing term, termination, and extension.* The 2019 contracts maintained the same term of twenty years. However, the amount of notice required for termination of the contract by either party was increased to

179. *See* Complaint Ex. C, Protect our Aquifer v. TVA, 654 F. Supp. 3d 654 (W.D. Tenn. 2023) (No. 2:20-cv-02615-TLP-atc) (Minutes of Meeting of TVA Board of Directors, at 28) (Aug. 22, 2019) [hereinafter TVA August 2019 Board Meeting Minutes].

180. *See id.* Ex. B (TVA's Long Term Agreement Form) [hereinafter 2019 Long-Term Agreement].

twenty years. Additionally, the contract would "be extended automatically . . . for an additional 1-year renewal term beyond its then-existing time of expiration," starting "on the first anniversary of the effective date."[181]

*Favorable rate provisions for utilities that do not exercise right to terminate.* In a reprisal of the tactics employed in TVA's Growth Credit Program and Enhanced Growth Credit Program,[182] the 2019 contracts give distributors a 3.1% discount on their wholesale power costs (excluding fuel costs).[183] However, if a distributor gives TVA its twenty years' notice of termination, its discount is "reduced and phased out in 10 equal percentages over each of the following ten years" following the notice.[184]

The contracts also constrain TVA somewhat from increasing wholesale rates. If TVA raises its non-fuel rates either (1) "by more than 10% . . . during any consecutive five-fiscal-year period . . . within 20 years of the Effective Date, compared to the [rates] applied as of the end of the TVA fiscal year immediately preceding that consecutive five-year period" or (2) by more than 5% above 2019 rates before September 30, 2024; and (3) if the parties engage in good-faith contract renegotiations and cannot come to an agreement, then the contract termination period is reduced to ten years.[185]

*Other benefits for utilities that do not exercise right to terminate.* The 2019 contract provides that if "TVA elects, in its sole discretion," to offer additional benefits "to other distributors of TVA power because they have executed a similar long-term agreement" then "Distributor will [also] receive the additional benefits."[186] If a utility exercises its right to terminate the contract, however, it loses this right. Thus, for the following twenty years, the departing customer must continue to buy its power from TVA—but any discounts or incentives that TVA chooses to offer to other utility customers will not be offered to the departing utility.

*Power supply flexibility for utilities that do not exercise right to terminate.* The 2019 contract originally provided that "TVA commits to collaborating with Distributor . . . to develop and provide enhanced power supply flexibility, with mutually agreed-upon pricing structures, for 3-5% of Distributor's energy [by] October 1, 2021." If the parties cannot agree on an arrangement, the distributor "may elect . . . to terminate this Agreement," by "deliver[ing] a notice of termination to TVA under the 'Term of Contract' section of the Power Contract."[187] This agreement to collaborate was only available to non-terminating utilities. In February 2020, responding to customer pressure, the TVA Board accelerated the availability of the 5% self-generation cap from October 2021 to June 2020.[188]

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181. *Id.* § 1.

182. *See supra* Part II.D.

183. 2019 Long Term Agreement, *supra* note 180, § 2(a).

184. *Id.* § 2(c).

185. *Id.* § 2(a). It is somewhat ambiguous from the terms of the contract whether in this case a ten-year terminating utility would be entitled to a credit phase-out.

186. *Id.* § 2(d).

187. 2019 Long Term Agreement, *supra* note 180, § 2(e).

188. Press Release, TVA, TVA Green Lights Local Power Company Electric Generation (June 22, 2020), https://www.tva.com/newsroom/press-releases/tva-green-lights-local-power-company-electric-generation; Press

*Improvements during termination period.* As in previous contracts, upon notice of termination, "TVA will have no obligation to make or complete any additions to or changes in any transformation or transmission facilities for service to [the distributor], unless [the distributor] . . . agrees to reimburse TVA for its nonrecoverable costs" for the changes.[189]

*Remedies for default.* If a distributor consumes power not supplied by TVA without TVA's consent, it has defaulted and "must pay TVA an amount equal to TVA's losses of revenue and load served, and for all actual expenses incurred by TVA and resulting from" the default "over the remaining term of the Power Contract."[190]

### *B. Rationales for the 2019 All-Requirements Contract*

The TVA Board's "Long Term Partnership Option for Local Power Companies" resolution explained that "[a]dding certain defaults and remedies provisions to the wholesale power contract will strengthen the long-term commitments made by the parties."[191] TVA was explicit about the benefits it expected from keeping distributors tightly bound to it over the long term. The concerns that drove the adoption of the contract tie back to the issues TVA faced throughout the twentieth century.

*Demand certainty.* First, longer-term contracts would increase certainty about demand. TVA's failure to accurately project future demand was one of the downfalls of its 1970s nuclear program (in stark contrast to the success of its "low cost, high usage" strategy in the 1930s and 1940s). Two modern conditions have only increased the risk to TVA of load defection and uncertainty: the rise of competitive markets for generation—which increases distribution utilities' ability to procure competitively priced wholesale power from suppliers other than TVA—and the prevalence and attractiveness of cheap, clean distributed generation, which decreases the amount of power a distribution utility needs to procure from *any* supplier.

TVA's 2019 Integrated Resource Plan ("IRP") captures these concerns in a section discussing potential sources of inaccuracy in TVA's forecasted demand between 2019 and 2038.[192] The 2019 IRP highlights two major threats to the accuracy of TVA's demand forecasts: (1) "competitive pressures"—*i.e.*, distributors' and industrial customers' ability to cancel their contracts with TVA and switch to another supplier; and (2) the availability of inexpensive self-generation.[193] The longer-term contract—requiring a terminating customer to give

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Release, TVA, TVA Board Adopts Principles of Public Power Flexibility (Feb. 13, 2020), https://www.tva.com/Newsroom/Press-Releases/TVA-Board-Adopts-Principles-of-Public-Power-Flexibility.

189. *Id.* § 1.

190. *Id.* §§ 3(b), (f).

191. TVA August 2019 Board Meeting Minutes, *supra* note 179, at 28.

192. TVA, 2019 INTEGRATED RESOURCE PLAN: VOL. I – FINAL RESOURCE PLAN (2019), https://www.tva.com/environment/environmental-stewardship/integrated-resource-plan [hereinafter TVA 2019 IRP].

193. TVA 2019 IRP, *supra* note 192, at 4-2. *See also* TVA, ANNUAL REPORT (FORM 10-K) 49 (2022), https://tva.q4ir.com/financial-information/sec-filings/sec-filings-details/default.aspx?FilingId=16202878 [hereinafter TVA 2022 10-K] ("As the amount of [distributed energy resources] grows on the TVA system, the need

twenty years' notice to terminate—obviates both of these concerns, because TVA's generation planning process occurs on a twenty-year time frame.[194] In other words, locking in customers to a guaranteed twenty-year term at the start of a twenty-year generation plan nullifies the main source of demand uncertainty over that period, because no customer can leave without breaching the contract. The primary remaining sources of uncertainty are unplanned fluctuations in demand from increased or decreased household or industrial energy usage, whether due to changing economic activity or energy conservation[195] and efficiency measures. To that end, the Board resolution perhaps understated the matter when it said that "increasing the length of TVA's wholesale power contracts with its LPCs" would "provide more certainty in TVA's long-term generation and financial planning."[196]

*Creditworthiness and financing.* Second, longer-term contracts bolster TVA's financial condition and thus provide certainty that TVA can continue to take on new long-term debt, meet existing debt obligations, and maintain its creditworthiness. TVA relies exclusively on debt for its financing: unlike an IOU, it cannot raise equity.[197] TVA already has a large debt obligation to service—$19.5 billion—and intends to incur more debt in the coming years to finance new investments.[198] Years of rate increases, used to cut down its debt from a peak of $27.4 billion in 1997, have already caused great dissatisfaction—and risk of defection—among its customers.[199]

To achieve its financial goals, TVA must maintain creditworthiness (*i.e.*, its ability to attract lenders) despite the threat of customer defection. TVA and observers view long-term commitments from distributors as supporting creditworthiness because (1) the long-term commitments reduce the risk of decreased power revenues; [200] and (2) the long-term commitments secure TVA's ability to set and

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for TVA's traditional generation resources may be reduced. . . . If TVA were unable to compensate for the resulting decrease in demand for TVA electricity, TVA's cash flows, results of operations, and financial condition could be negatively impacted, likely resulting in higher rates and changes to TVA's operations.").

194. *See* TVA 2019 IRP, *supra* note 192, at ES-3, ES-4. *See also* EPA, STATE ENERGY AND ENVIRONMENT GUIDE TO ACTION: ELECTRICITY RESOURCE PLANNING & PROCUREMENT 7, 9 (2022), https://www.epa.gov/statelocalenergy/energy-and-environment-guide-action ("IRP planning horizons are typically 10–30 years, and the frequency of IRP updates are commonly 2–3 years.").

195. In the 2019 IRP, TVA noted that the Tennessee Valley region's economy "tends to be more sensitive to economic conditions impacting the demand for manufactured goods," and that it expects such economic conditions to "slow the pace of demand increase for all goods and services, including power," during the tail end of the IRP period. *See* TVA 2019 IRP, *supra* note 192, at 4-2.

196. TVA August 2019 Board Meeting Minutes, *supra* note 179, at 28.

197. *See* 16 U.S.C. § 831n–4; *The Tennessee Valley Authority and Financial Disclosure: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 107th Cong. (2002) (statement of Alan L. Beller, Director, Division of Corporation Finance, SEC) (describing TVA's financing practices) [hereinafter Beller Testimony].

198. TVA 2019 IRP, *supra* note 192, at ES-3. Until 2005, TVA was exempt from federal securities laws, a gap that caused consternation given its extensive borrowing. *See* Beller Testimony, *supra* note 197. In December 2004, Congress added certain filing requirements for TVA. *See* Consolidated Appropriations Act, Pub. L. No. 108-447 § 604, 118 Stat. 2809, 3267 (2005) (codified at 15 U.S.C. § 78nn(a)).

199. *See, e.g.*, Press Release, Athens Utils. Bd., *supra* note 2.

200. *See* TVA 2022 10-K, *supra* note 193, at 46, 49 ("A significant portion of TVA's total operating revenues is concentrated in a small number of LPCs. . . . The loss of customers could have a material adverse effect on TVA's cash flows, results of operations, or financial condition, and could result in higher rates, especially

raise its rates as it wishes without imminent risk of losing frustrated customers.[201] For TVA, long-term contracts don't just guarantee energy sales: they guarantee long-term control over wholesale and retail rates charged for those sales. TVA has 153 locked-in customers and unilateral authority to increase its prices—an authority that can be constrained only by goodwill, politics, or an act of Congress.

The Board resolution states that the 2019 contracts were expected to bolster TVA's financing capacity. Specifically, "increasing the length of TVA's wholesale power contracts" would "ensure that TVA has the revenue necessary to satisfy its long-term financial obligations as they come due."[202] Additionally, in its 2022–2026 financial plan, TVA states that the widespread adoption of the new contracts creates "better alignment of customer contract terms with TVA's overall financial obligations" and "clos[es] the gap between TVA's committed revenues and long-term obligations."[203]

*Benefit sharing.* Finally, TVA offers a third justification for the contracts: a rising tide lifts all boats. The Board Resolution states that the contracts will "help[] fulfill TVA's statutory obligation to sell power at rates as low as are feasible." It also states that "the financial benefits from [the] long-term contracts" would be "shared with [customers] that agree to extend the termination notice requirement to 20 years in the form of monthly bill credits equal to a percentage of the amount that distributors pay TVA through base rates that are subject to adjustment."[204]

### *C. Distribution Utilities React*

TVA began offering the 2019 all-requirements contract to its distribution utilities before it received formal Board approval, [205] and many utilities signed immediately following the board meeting.[206] The TVA Board approved the contract

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because of the difficulty in replacing customers due to the fence. A significant loss of customers could also impact investor confidence, resulting in TVA paying higher rates on its securities.").

201. *See Moody's assigns a Aaa rating to TVA's note offering*, *supra* note 111 ("TVA's rating benefits from . . . the Board's statutory authority to set TVA's electric rates and long-term contractual arrangements with creditworthy counterparties which, among other things, provide TVA with regulatory control over their retail rates and fund transfers. These attributes, combined with TVA's size, scale, and economic importance within the Tennessee Valley, translate into a more predictable and stable financial profile relative to all other public power and investor-owned utilities.").

202. TVA August 2019 Board Meeting Minutes, *supra* note 179, at 28.

203. TVA, STRATEGIC PLAN: FY 2022–2026, at 23 (2022), https://www.tva.com/about-tva/reports (available under "Additional Reports").

204. *Id. See also* Letter from Dan Pratt, Vice President for Customer Delivery, TVA, to Wes Kelley, President & CEO, Huntsville Utils., *in* Huntsville Utilities Electric Board Meeting 18 (Oct. 21, 2019), https://s3.documentcloud.org/documents/6659542/Huntsville-Utilities-Electric-Board-Package-Oct.pdf.

205. *See* Email from Jeff Lyash, CEO, TVA, to TVA Distrib. Util. Managers, *in* Emails Between Distribution Utility Managers 5 (Aug. 12, 2019), https://www.documentcloud.org/documents/6569887-Kelley08-16-19.html#document/p3/a543858.

206. *See* Email from Mark Iverson, Gen. Manager, Bowling Green Mun. Utils., to TVA Distrib. Util. Managers, *in* Emails Between Distribution Utility Managers 4 (Aug. 15, 2019), https://www.documentcloud.org/documents/6569887-Kelley08-16-19.html#document/p3/a543858 ("I'm understanding that a lot of LPCs are anxious to begin the program credits as soon as possible, and are ready to sign the [long-term partnership proposal] contract next week.").

form at its meeting on Thursday, August 22, 2019.[207] 131 utilities were signed on by October 2019.[208] By November 2022, TVA had executed the 2019 agreements with 147 customers.[209]

TVA's largest customers did not agree to TVA's new terms immediately. While Nashville Electric Services (409,000 electric customers, representing 8% of TVA's sales)[210] signed the agreement in September 2019,[211] Chattanooga Electric Power Board (186,000 customers), Huntsville Utilities (195,000 customers), and Knoxville Utilities Board (205,000 customers) signed on in January, February, and March 2020, respectively.[212]

The Memphis Light, Gas and Water Division (MLGW) (415,000 customers,[213] representing 9% of TVA's operating revenue[214]) did not agree to the new contract, instead maintaining its existing five-year evergreen contract[215] And initiating an integrated resource planning process to consider leaving TVA and instead procuring power from the Midcontinent Independent System Operator

207. *See* TVA August 2019 Board Meeting Minutes, *supra* note 179, at 1, 28-29. The City of LaFollette Board of Public Utilities, serving 22,000-plus electric customers in northeast Tennessee, signed its agreement that same day. Motion to Intervene and Answer in Opposition and Protest of the Coalition of LPCs to Complaint/Petition at 5, *Athens Utils. Bd.*, 177 FERC ¶ 61,021 (Feb. 22, 2021) (FERC Docket Nos. EL21-40, TX 21-1).

208. TVA, ANNUAL REPORT (FORM 10-K) 10 (2019), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001376986/ef40623a-8d16-484b-8174-6399d80d74c0.html.

209. TVA 2022 10-K, *supra* note 193, at 11. *See also* Memorandum from Wes Kelley, President/CEO of Huntsville Utils., to Elec. Bd. of Huntsville Utils., *in* Huntsville Utilities Electric Board Meeting 14 (Oct. 15, 2019) ("[T]he agreement states that if TVA provides additional benefits to utilities with 'similar long-term agreements,' those who already signed will have the option to enjoy those benefits. I believe a good number of those that executed the agreement 'as is' did so knowing the door was open for others to improve the agreement. Of course, this tactic only works if some utilities forego the immediate bill credits and push for changes.").

210. Jeffrey M. Panger, *Tennessee Valley Authority In Review: How the TVA's Relationship With Local Power Companies Is Evolving*, S&P GLOB. RATINGS (Mar. 18, 2021), https://www.spglobal.com/ratings/en/research/articles/210318-tennessee-valley-authority-in-review-how-the-tva-s-relationship-with-local-power-companies-is-evolving-11858648.

211. Caroline Eggers, *Memphis may leave TVA to reduce costs and carbon. That could raise bills in Nashville*, NASHVILLE PUB. RADIO (Aug. 30, 2022), https://wpln.org/post/memphis-may-leave-tva-to-reduce-costs-and-carbon-that-could-raise-bills-in-nashville/.

212. For the number of electric customers (and percentage of TVA sales) for each utility, see Panger, *supra* note 210. For the dates each utility signed onto the agreement, see Press Release, EPB, EPB Board Approves Long Term Agreement with TVA (Jan. 24, 2020), https://epb.com/newsroom/press-releases/epb-board-approves-long-term-agreement-tva/ (Chattanooga); Dave Flessner, *Huntsville, Alabama approves long-term contract with TVA*, CHATTANOOGA TIMES FREE PRESS (Feb. 28, 2020), https://www.timesfreepress.com/news/2020/feb/27/huntsville-alabama-approves-long-term-contract-tva/ (Huntsville); Maggie Shober, *The Good, the Bad, and the Ugly: How KUB's New Contract Sells Its Customers Short*, S. ALL. FOR CLEAN ENERGY (Mar. 13, 2020), https://cleanenergy.org/blog/the-good-the-bad-and-the-ugly-how-kubs-new-contract-sells-its-customers-short/ (Knoxville).

213. *See* Panger, *supra* note 210.

214. TVA 2022 10-K, *supra* note 193, at 11.

215. Samuel Hardiman, *MLGW votes against signing 20-year deal with Tennessee Valley Authority*, COMMERCIAL APPEAL (Dec. 7, 2022), https://www.commercialappeal.com/story/news/local/2022/12/07/mlgw-board-votes-against-20-year-contract-with-tennessee-valley-authority/69708172007/.

(MISO), the independent electric grid operator for the central United States.[216] MLGW is perhaps the utility with the most bargaining power over TVA, given Memphis's size and proximity to the border of the TVA Fence.[217] As discussed above, longstanding TVA policy is to refuse to transmit power from a third-party supplier to a distributor within its Fence. Thus, distributors are effectively unable to purchase and consume third-party power—and non-incumbent suppliers are effectively unable to serve customers inside the Fence—unless they build duplicate transmission lines to bring the power to their systems. This was the very problem TVA faced when it sought to sell power from the Wilson Dam in the 1930s. Only utilities located close to the TVA Fence border—like MLGW—might feasibly build duplicative lines.[218]

TVA's large, urban utilities face relatively high levels of pressure from their retail customers and elected officials to increase their use of renewable energy.[219] Some, like Nashville Electric Services, serve municipalities that must comply with legally binding renewable portfolio standards or targets.[220] And because these utilities represent large portions of TVA's customer base and operating revenues, they may have individual bargaining power over TVA that their smaller peers do not. Thus, some of these utilities sought to exact special renewables deals as concessions from TVA in exchange for signing on to the long-term contracts.[221] They

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216. *See Power Supply Alternatives IRP*, MLGW, https://www.mlgw.com/about/PowerSupplyAlternativesIRP. Though MLGW management recommended staying with TVA and signing the 2019 evergreen contract, the MLGW Board voted to continue with its existing, rolling contract with its five-year termination period. *See* MLGW, 2022 ANNUAL REPORT 2, https://www.mlgw.com/images/content/files/pdf/2022CombinedAnnualReport_FinalWEB.pdf.

217. *See* Panger, *supra* note 210.

218. Like MLGW, North Georgia Electric Membership Cooperative—TVA's largest customer in Georgia—is located close to the TVA Fence and is considering leaving TVA. *See* Dave Flessner, *TVA fights to keep its biggest customer as Memphis and other distributors eye split with utility*, CHATTANOOGA TIMES FREE PRESS (May 27, 2020), https://www.timesfreepress.com/news/2020/may/27/tva-fights-keep-its-biggest-customer-memphis/; *TVA wholesale increase, inflation driving up electric rates for NGEMC members*, NORTH GEORGIA ELECTRIC MEMBERSHIP COOPERATIVE (Sept. 27, 2024), https://www.ngemc.com/node/136 ("NGEMC's current contract (executed in 1976) requires the co-op to purchase 100% of its wholesale power from TVA with a five-year exit clause. NGEMC continues efforts to obtain flexibility from TVA to buy power from other potential suppliers.").

219. James Bruggers, *Southern Cities' Renewable Energy Push Could be Stifled as Utility Locks Them Into Longer Contracts*, INSIDE CLIMATE NEWS (Dec. 16, 2019), https://insideclimatenews.org/news/16122019/tva-rate-lock-in-renewable-energy-cities-nashville-memphis-knoxville/.

220. *See* NASHVILLE, TENN. CODE ch. 2.32.080 (renewable portfolio standard requiring that certain percentages of energy consumed by the Nashville metropolitan government come from carbon-free and/or renewable sources each year, starting with 53% carbon-free (including 22.5% renewable) in 2020 and reaching 100% renewable (excluding hydroelectric power) by 2040); MEMPHIS & SHELBY CTY. DIVISION OF PLAN. & DEV., MEMPHIS AREA CLIMATE ACTION PLAN 65-70, https://www.develop901.com/osr/memphisClimateActionPlan (targeting 100% carbon-free energy in electric supply by 2050).

221. *Id.* (explaining that Nashville "is looking for its own special deal with TVA"); Press Release, TVA, Vanderbilt, NES, TVA and Silicon Ranch Partner on Landmark Renewable Energy Deal (Jan. 22, 2020), https://www.tva.com/newsroom/press-releases/vanderbilt-nes-tva-and-silicon-ranch-partner-on-landmark-renewable-energy-deal (announcing an agreement between TVA, Nashville Electric Service, Vanderbilt University, and Silicon Ranch to develop a 35 MW solar project to serve Vanderbilt); Shober, *supra* note 212 (describing Knoxville Utility Board's decision to sign the long-term contract in exchange for TVA's agreement to "pursue 212 [MW] of solar for KUB and pass the clean energy and financial savings onto KUB customers").

also were able to negotiate with TVA over contractual language. In joint negotiations between TVA, Knoxville, Chattanooga, and Huntsville, the distributors exacted several concessions from TVA, including: "extend[ing] the rate protection provisions beyond the initial term of 20 years to extend the full life of the contract; agree[ing] that if TVA were sold without [the distributor's] consent, [its] contract term would revert to five years;" and "agree[ing] that if the 20-year agreement were terminated, the cost for ongoing transmission improvements would be determined on a reasonable cost basis."[222] It was only once these terms were negotiated that the three utilities signed onto the contract.[223]

As of late October 2019, approximately twenty-three utilities of various sizes still had not signed new contracts.[224] Publicly-available communications between leaders of certain TVA distribution utilities and between the CEO and Board of Directors of Huntsville Utilities distill some of the major concerns with the contracts. These concerns can be divided into four categories.

*1. Fairness concerns about the structural coerciveness of the TVA-distribution utility relationship.* This concern took two forms. First, in exchanging the long-term commitments for the 3.1% rate reduction, TVA's distribution utilities might be sacrificing their major source of power relative to TVA—bargaining power over contract renewal.[225] Second, the arrangement puts distribution utilities at the mercy of future TVA leadership. The evergreen contract put the interests of TVA's distribution utilities in the hands of future federal governments, whose make-up is unpredictable and who answer to a national, not regional, electorate.[226]

*2. Long-term stability concerns about the structural coerciveness of the TVA-distribution utility relationship.* Elaborating on the above concern, the CEO of Huntsville Utilities argued that distribution utilities' loss of bargaining power would sacrifice long-term peace and risk changing the character of electric utility relationships in the TVA region.

> I believe contract renewals created a healthy tension that gave TVA's customers the impression they have a choice in their future. . . . TVA is unique. It has unilateral authority to make power supply, transmission, rate, and regulatory decisions for its

222. Board Meeting Minutes, Knoxville Utils. Bd., at 9847–48 (Mar. 12, 2020), https://www.kub.org/uploads/Minutes_-_March_12,_2020.pdf.

223. *Id.* at 9848.

224. Memorandum from Wes Kelley to Electric Board of Huntsville Utils., *supra* note 209, at 17.

225. *See id.* at 14 ("[T]his reminds me of the story of Jacob and Esau, with Esau trading his birthright for a bowl of stew. In our situation, I worry the bill credits accompanying this proposal might be our bowl of stew."); Email from Mark Iverson, Gen. Manager, Bowling Green Mun. Utils., to TVA Distrib. Util. Managers, *supra* note 206, at 2 ("Twenty one years from now, there will no longer be rate protection provisions. What leverage will our successors have in dealing with TVA?").

226. *See* Memorandum from Wes Kelley, President/CEO of Huntsville Utils., to Elec. Bd. of Huntsville Utils., *supra* note 209, at 20 ("This is not only a business concern but a political one as well. . . . Huntsville will be obligated to pay the 20-year bills of whomever a future TVA Board puts into leadership—a board appointed by whoever is elected President and confirmed by those then in control of the U.S. Senate. Such conditions should reasonably lead to increased interest in the political process by TVA's long-term partners.") *Cf.* Email from Mark Iverson, Gen. Manager, Bowling Green Mun. Utils., to TVA Distrib. Util. Managers, *supra* note 206, at 4 (expressing concern about "burdening a future [utility] board" and management with a 20-year commitment made by a predecessor).

> customers. [I]f discussions with TVA were to become pointless, instead of plotting to leave the Valley, those upset would be stuck with little recourse [other] than directing their efforts at stripping TVA of its exceptional authority and/or its assets.[227]

*3. Differences between the status of TVA's distribution utility customers and transmission-dependent utilities outside of TVA territory that may make the all-requirements contract structure inappropriate.* The CEO of Huntsville Utilities argued:

> While such arrangements are common in our industry, TVA is not a common entity. Due to its federal ownership, TVA is unable to provide its "partners" with financial equity or governance over the infrastructure funded through such commitments. . . . Contractually, [Huntsville Utilities] is entering into a purchase power agreement, and as such, does not have a direct say in the governance or operations of the infrastructure built with its money. TVA is eager to connect [Huntsville Utilities] to its long-term liabilities, but not its assets.[228]

In this regard, TVA distributors are unique among otherwise similar utilities elsewhere in the country. This position may explain why so many distributors quickly signed onto the agreement: if TVA is seen by Congress as failing and is privatized, TVA distributors will have no equity to show for their years of payments into the TVA system. This concern first emerged in late-1950s debates over TVA's future.[229]

*4. Specific components of the contract.* The CEO of Huntsville Utilities expressed to the Huntsville Utilities Board of Directors that notwithstanding "philosophical concern[s] with the contract, . . . a pragmatic decision need[ed] to be made," and thus recommended seeking to negotiate certain terms with TVA before signing. These terms included the provision freeing TVA of its responsibility to add to or change facilities serving a utility after it gives notice of termination; certain types of rate increases excluded from the rate cap; the prohibition on facilitating distributed generation; and "the ability for Congress to override the wholesale power contract."[230] As noted above, Huntsville and several other large customers successfully negotiated with TVA over some, but not all, of these controversial provisions.

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227. *See* Memorandum from Wes Kelley, President/CEO of Huntsville Utils., to Elec. Bd. of Huntsville Utils., *supra* note 209, at 15. *But see* Email from Mark Iverson, Gen. Manager, Bowling Green Mun. Utils., to TVA Distrib. Util. Managers, *in* Emails Between Distribution Utility Managers 1 (Aug. 16, 2019), https://www.documentcloud.org/documents/6569887-Kelley08-16-19.html#document/p3/a543858 ("I will admit this is largely psychological. Practically speaking, an LPC's negotiating position today is much the same as it would be after adopting this proposal. The option of leaving TVA is a fantasy for most, given TVA's transmission exemption. With either a five-year agreement or a twenty-year agreement, politics remains our strongest negotiating tool.").

228. Memorandum from Wes Kelley, President/CEO of Huntsville Utils., to Elec. Bd. of Huntsville Utils., *supra* note 209, at 14, 20.

229. *See Tennessee Valley Authority Financing*: *Hearings Before the H. Subcomm. on Flood Control of the Comm. on Pub. Works*, 85th Cong. 172–73 (May 6–7, 1957).

230. Memorandum from Wes Kelley, President/CEO of Huntsville Utils., to Elec. Bd. of Huntsville Utils., *supra* note 209, at 15.

## IV. LITIGATION RESPONDING TO THE CONTRACTS

In addition to the political opposition to the 2019 agreement described above, two legal challenges arose in the months and years following its approval and implementation. In *Athens Utilities Board v. TVA*,[231] four small municipal and cooperative utilities that did not wish to enter into the agreement asked FERC to order TVA to wheel power to them from third-party suppliers. In *Protect Our Aquifer v. TVA*,[232] environmental groups challenged the contracts for failure to comply with required environmental reviews and for violating the provision of the TVA Act limiting TVA's power supply contracts to twenty-year terms. TVA won both cases.

Before diving into these cases, it is helpful to consider briefly the backdrop of deference to TVA ratemaking against which they arose. All-requirements provisions are common in the energy sector; they have survived antitrust and other legal scrutiny where applicable[233]—and TVA is exempt from federal antitrust laws altogether.[234] But why didn't the plaintiffs mount legal challenges to the other coercive terms of the contract, such as the termination of rate caps or the phase-out of the rate discount for terminating utilities?

The answer may lie in the considerable deference courts have historically afforded to TVA in contract disputes. In a line of cases dating to the 1970s, courts have deemed TVA's rates and calculation thereof to be nonjusticiable.[235] One decision from a federal district court rejecting statutory and contract law challenges to benefits conditioned on a contract's duration illustrates the deference afforded to TVA rates and the high bar challengers must meet.[236]

In 1996, 4-County Electric Power Association, a Mississippi cooperative utility, accused TVA of discriminating against it for exercising its right to give ten years' notice to terminate its all-requirements contract. Shortly after 4-County

231. 177 FERC ¶ 61,021, *order on reh'g*, 177 FERC ¶ 62,162 (2021), *order on reh'g*, 179 FERC ¶ 62,045 (2022).

232. 654 F. Supp. 3d 654 (W.D. Tenn. 2023).

233. *See Ala. Power Co.*, 394 F.2d at 676 (immunizing the REA's requirement that borrower cooperatives enter into long-term all-requirements contracts from antitrust scrutiny); *id.* at 677-80 (Godbold, J., dissenting) ("The complaint . . . sets out a classic case of an exclusive supply contract which violates Section 3 of the Clayton Act because it forecloses in the relevant market a substantial share of the line of commerce affected. . . .While I view the violation as otherwise unquestionable, if there be any question the 35-year duration lays it to rest. It is an exclusive dealing arrangement that can foreclose the Power Company for the rest of the twentieth century. . . . Nor do I have any doubt that the contracts, and the effects alleged, constitute restraints violating the Sherman Act. . . . Standing alone the contracts violate the antitrust laws. As part of a wider course of dealings they violate the antitrust laws and so characterize that broader spectrum as to make it a violation." (citations omitted)).

234. *See supra* note 168.

235. *See, e.g.*, *McCarthy*, 466 F.3d at 406 (observing that a "long line of precedent exists establishing that TVA rates are not judicially reviewable" and "by virtue of TVA's having been granted by Congress full discretionary authority with respect to setting rates, TVA's rate-making decisions are beyond the scope of judicial review under the APA"). *See also* Holbrook v. TVA, 527 F. Supp. 3d 853 (W.D. Va. 2021), *aff'd*, 48 F. 4th 282, 291-92 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2608 (2023).

236. *4-County Elec. Power Ass'n*, 930 F. Supp. at 1132.

gave notice,[237] TVA adopted the Enhanced Growth Credit Program, a rate credit available only to utilities with ten-year contractual commitments to purchase power from TVA—and therefore unavailable *only* to 4-County unless it withdrew its termination notice.[238]

In *4-County Electric Power Association v. TVA*,[239] 4-County argued that TVA's refusal to allow it to participate in the program was purely punitive and thus arbitrary and capricious, in violation of the Administrative Procedure Act.[240] Rejecting this argument, the court found that the design of the incentive program was an unreviewable component of TVA ratemaking–and that even if judicial review were available, TVA's decision was reasonable.[241] 4-County also argued that TVA's actions violated section 11 of the TVA Act, which states: "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 *equitably* among the States, counties, and municipalities within transmission distance."[242] The court disagreed, interpreting "equity" to merely require that TVA offer its customers an "opportunity to participate . . . on exactly the same basis as all other distributors, i.e., subject to the condition of its agreeing to a ten-year commitment." It found "nothing discriminatory" in TVA's development of an incentive available for all customers except the one exercising its termination rights.[243]

Repeating its conclusion that TVA had treated 4-County fairly and in good faith, the court also rejected 4-County's breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty claims.[244]

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237. 4-County decided to leave TVA in December 1993 due to "concerns over the agency's troubled nuclear program, its inability to control electric rates and its massive debt." Nita Chilton McCann, *4-county withdrawal could cost remaining customers millions*, MISS. BUS. J. (May 1, 1995), available at ProQuest Central: The Mississippi Business Journal (1986-2012).

238. *See 4-County Elec. Power Ass'n*, 930 F. Supp. at 1136; *TVA accused of blocking 4-County's participation in program*, KNOXVILLE NEWS SENTINEL (June 9, 1995), available at ProQuest Central: News Sentinel (1994-current); *see also supra* Part II.D.

239 930 F. Supp. 1132, 1135 (S.D. Miss. 1996)

240. 5 U.S.C. §§ 551–559.

241. *4-County Elec. Power Ass'n*, 930 F. Supp. at 1137–38.

242. TVA Act of 1933 § 11 (codified as amended at 16 U.S.C. § 831j) (emphasis added).

243. *4-County Electric Power Ass'n*, 930 F. Supp. at 1138–39. 4-County also alleged that TVA violated section 11 by offering the incentive to its industrial retail customers without a 10-year commitment. The court found that "since TVA's wholesale customers (distributors) are in a different class than TVA's directly-served retail customers, there is no basis for a claim of discrimination." *Id.* at 1139. As support for this proposition, the court offered the following citation: "*See* 16 U.S.C. § 831k ("electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class")." *Id.* at 1139. However, the quoted provision, when recited in full, is inapplicable:

> *All contracts entered into between [TVA] and any municipality or other political subdivision or cooperative organization shall provide that* the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the Board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization.

16 U.S.C. § 831k (emphasis added).

244. *4-County Elec. Power Ass'n*, 930 F. Supp. at 1139-43.

Finally, 4-County argued that its supply contract was substantively unconscionable because if it was "interpreted as urged by TVA, then for eight years, 4-County will not have access to the same [incentive program] that is available to virtually every other TVA distributor, and will have no recourse to other suppliers."[245] The court held that this claim was improperly raised, but noted that "[f]or the reasons that the court has fully discussed with respect to plaintiff's other claims, the court would have granted summary judgment for TVA on this claim in any event."[246]

4-County did not appeal the decision.[247] No other adjudicator had occasion to weigh in on this set of facts until the 2019 contracts litigation arose.

### *A. Athens Utilities Board v. TVA*

Most of TVA's smaller customers signed the 2019 contracts almost immediately, and most of its largest customers negotiated to exact concessions before signing. Importantly, though, some smaller utilities also resisted. Four prominent hold-outs were Athens Utilities Board, Gibson Electric Membership Corporation, Joe Wheeler Electric Membership Corporation, and Volunteer Energy Cooperative, which in aggregate serve 215,000 customers.[248] Like their larger peers, these four utilities resisted signing the new, evergreen contract, citing "increasing bundled contract prices" and "draconian provisions."[249] But unlike their larger peers, they were not able to extract attractive concessions from TVA.

Instead, the utilities looked to alternative sources of power supply to meet their demand. They worked with a consultant to conduct a competitive bidding process and found that third-party supply "would enable [their] members to realize significant savings as compared to the rates [they] currently pay TVA."[250] Predictably, when the utilities requested TVA to provide transmission-only ("unbundled") service for wheeling power from a third-party supplier to their distribution systems over TVA transmission lines, TVA refused, citing its policy of refusing to wheel non-TVA power to the TVA service territory, as codified in its Transmission Service Guidelines and reaffirmed in a Board Resolution:[251] "A departing

245. *Id.* at 1143.

246. *Id.* at 1143 n.9.

247. After its win, TVA sued 4-County for $65 million in stranded costs, threatened to move a $470 million planned coal plant out of the cooperative's service territory, and used other tactics to encourage 4-County to remain in TVA. 4-County's CEO explained: "'We just couldn't win. . . . They visited our customers and basically made us out to be villains. . . . It was extremely hardball." 4-County soon canceled its termination notice. *See* Fialka, *supra* note 159.

248. *See* Complaint and Petition at 7-9, *Athens Utils. Bd.*, 177 FERC ¶ 61,021 (Jan. 11, 2021) (FERC Docket Nos. EL21-40, TX21-1) [hereinafter Complaint and Petition]. Joe Wheeler Electric Membership Corporation withdrew from the case and signed the 2019 agreement in August 2021. *See* Dave Flessner, *North Alabama power company gives up fight to break up TVA power fence*, CHATTANOOGA TIMES FREE PRESS (Aug. 31, 2021), https://www.timesfreepress.com/news/2021/aug/31/tva-power-battle-shifts/.

249. Complaint and Petition, *supra* note 24, at 3, 12.

250. *Id.* at 62 (affidavit of Eric T. Newberry, Jr., General Manager of Athens Utilities Board); *id.* at 101 (Affidavit of Elaine Johns, President and CEO of EnerVision, Inc.).

251. *See supra* Part II.E.

customer must make the necessary arrangements to deliver third-party supply to its load without relying on the transmission system in any way."[252]

Those refusals were dated November 19, 2020. On January 11, 2021, the four utilities filed a document styled "complaint and petition" asking FERC to take action. Specifically, the utilities asked FERC to exercise its authority under section 211A of the Federal Power Act to order TVA to provide unbundled transmission service and, under section 210, to require continued interconnection of the distributors to the TVA transmission system.[253]

*Relevant statutes.* FERC does not have authority over TVA's rates under sections 205 and 206 of the FPA, which direct FERC to ensure that public utility rates are just, reasonable, and not unduly discriminatory or preferential.[254] As described briefly above, however, FERC has some authority over transmission service provided by utilities whose rates it does not ordinarily regulate.[255]

Congress enacted sections 210, 211, and 212 of the FPA in 1978 and added subsection 212(j) as part of the Energy Policy Act of 1992. Section 210 gives FERC authority to order the interconnection of the transmission facilities of any "electric utility"—including TVA—with the facilities of another electric utility requesting such interconnection, if it finds the interconnection to be in the public interest.[256] Section 211 authorizes FERC to order a "transmitting utility"—including TVA—to provide transmission service to an electric utility applicant, after notice and opportunity for a hearing, if the Commission "finds that such order meets the requirements of section 212 and would otherwise be in the public interest."[257] As relevant to TVA, section 212 states at subsection (j):

> *Equitability within territory restricted electric systems.* With respect to an electric utility which is prohibited by Federal law from being a source of power supply . . . outside an area set forth in such law, no order issued under section 211 may require such electric utility . . . to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such Federal law, unless the order is in furtherance of a sale of electric energy to that electric utility.[258]

Section 212(f) operates in the other direction: it requires FERC to stay any section 210 or 211 order if the order "would result in violation of the third sentence of section 15d(a)" of the TVA Act, prohibiting TVA from selling power outside the

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252. Complaint and Petition, *supra* note 248, at Ex. No. LPC-007 (Letter from TVA Vice President of Customer Delivery to Eric Newberry (Nov. 19, 2020)) (citing TVA Board's "Reaffirmation of Policy on Requests to use the TVA Transmission System to Deliver Power to Local Power Companies").

253. *Id.* at 1–2.

254. 16 U.S.C. §§ 824(e)–(f), 824d–824e; *see* 177 FERC ¶ 61,021, at P 8 ("As an instrumentality of the United States, TVA is not a 'public utility' under the terms of the FPA and is therefore not subject to Commission regulation under sections 205 and 206 of the FPA.").

255. *See supra* Part II.E.

256. 16 U.S.C. §§ 824i(a)–(c); *id.* § 796(22)(B) (defining "electric utility" to include TVA and municipal and cooperative utilities). *See supra* Part II.E.2.

257. *Id.* § 824j; *id.* § 796(23) (defining "transmitting utility" to include TVA by reference to 16 U.S.C. § 824(f)).

258. *Id.* § 824(j). The provision proceeds to exempt from this prohibition Bristol, Virginia, which was then in the process of leaving TVA. *See* Fialka, *supra* note 159.

Fence.[259] Therefore, standing on its own, section 212 prohibits FERC from using section 211 to cross the TVA Fence in either direction.

In 2005, Congress added section 211A to the FPA. That provision, titled "Open access by unregulated transmission utilities," defines an "unregulated transmission utility" to include TVA.[260] It states, as relevant here:

> [T]he Commission may, by rule or order, require an unregulated transmission utility to provide transmission services
> (1) at rates that are comparable to those that the unregulated transmitting utility charges itself; and
> (2) on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.[261]

Section 211A also states that FERC "shall exempt" from an order issued under that provision a utility that "meets other criteria the Commission determines to be in the public interest."[262]

*Parties' Arguments*. The petitioning utilities asked FERC to order TVA to provide them with unbundled (transmission-only) service using its section 211A authority and to order TVA to provide interconnection service under section 210.[263] The petitioners analogized to *Iberdrola Renewables v. Bonneville Power Administration*,[264] the first FERC proceeding to apply section 211A. In *Iberdrola*, owners of wind generation challenged a policy of the Bonneville Power Administration—a federal power marketer under the Department of Energy umbrella—that ordered wind generators to curtail production without compensation during high water periods, when federal hydropower plants produced more power than the transmission system could handle. FERC found that the policy resulted in non-comparable transmission service: the "non-Federal renewable resources are similarly-situated to Federal hydroelectric and thermal resources for purposes of transmission curtailment because they all take firm transmission service," yet Bonneville's policy curtailed the non-federal resources "without causing similar interruptions to firm transmission service held by Federal resources."[265] While

259. 16 U.S.C. § 824(f).

260. *Id.* § 824j-1(a).

261. *Id.* § 824j-1(b). This authority is "subject to section 212(h)" which prohibits FERC from directing a utility to transmit power directly to a retail (not wholesale) customer. *Id.* § 824k(h). The FPA reserves regulation of retail sales to the states. *See* Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360, 1372, 1395–96 (2021); Jim Rossi, *Energy Federalism's Aim*, 134 HARV. L. REV. 228, 239 n.71 (2021).

262. 16 U.S.C. § 824j-1(c).

263. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 at P 11.

264. 137 FERC ¶ 61,185 (2011), *order on reh'g*, 141 FERC ¶ 61,233 (2012), *aff'd sub. nom.* Nw. Requirements Utils. v. FERC, 798 F.3d 796 (9th Cir. 2015). A limited set of orders discussed section 211A before *Iberdrola*. *See Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119, at P 192 (2007) (declining to adopt a generic rule to implement section 211A); *Town of Edinburgh v. Ind. Mun. Power Agency*, 132 FERC ¶ 61,102, at PP 20-21 (2010) (exercising discretion under section 211A to decline to review claim due to pendency of judicial proceedings that might resolve section 211A issues); *Transmission Plan. & Cost Allocation by transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC ¶ 61,051, at P 815 (2011) (declining to adopt a generic rule under section 211A to require unregulated transmission utilities to participate in regional transmission planning processes).

265. *Iberdrola*, 137 FERC ¶ 61,185 at P 62.

FERC was reluctant to exercise its section 211A authority,[266] it did so in this "compelling case" because the policy "significantly diminishes open access to transmission," which section 211A was meant to protect.[267]

The *Athens Utilities Board* petitioners argued that their case fell neatly under *Iberdrola*. Like the Bonneville policy, TVA's favored TVA's own generation (analogous to federal hydroelectric resources) "over the power suppliers that could otherwise serve the LPCs' supply needs" (analogous to the similarly-situated non-federal wind resources) by denying those suppliers access to transmission service to wheel power to customers inside the Fence, privileging transmission access for TVA-owned or procured generation.[268] Additionally, like the wind generators, the petitioners "and/or entities seeking to serve their load" were "similarly situated to any other prospective TVA transmission customers" (outside the Fence), for whom TVA would wheel power, because TVA was as "operationally capable" of wheeling power into its territory as it was across it.[269] Finally, the utilities explained that TVA's policy threatened open-access principles:

> TVA's outright refusal to provide unbundled transmission service to Petitioners effectively locks them into TVA's excessive bundled rates and precludes Petitioners[] from seeking any meaningful supply alternatives. In other words, TVA has created a supply monopoly within its considerable footprint that stifles all competition. TVA has taken advantage of this arrangement to charge unreasonably high bundled rates, with no incentive to efficiently manage the costs it imposes on its captive wholesale customers. . . . [W]ithout open access to the TVA transmission system, Petitioners would have no choice but to duplicate the local existing transmission system—which they continue to pay for—or sign the New Power Contract—which perpetuates TVA non-competitive monopoly with a 20-year evergreen term. The avoidance of duplicating bulk transmission systems was a fundamental premise to the Commission's promotion of open access policies.[270]

Thus, as in *Iberdrola*, the conditions justifying a section 211A order—lack of comparable service for similarly situated customers, resulting in impairment of the open-access principle—were met.

In its response, TVA relied on a conception of the 1957 Fence as an "equitable two-way barrier" keeping TVA inside its territory (via TVA Act section 15d(a) and FPA section 212(h)) and keeping other utilities out (via FPA section 212(j)).[271] It argued that Congress did not intend for section 211A to disturb this state of affairs,[272] and that interpreting the provision according to the petitioners' view—

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266. *Id.* P 32 ("[W]e expect that the need to use this statutory authority would be rare.").

267. *Id.* PP 32-33; *see also Nw. Requirements Utils.*, 798 F.3d at 808 (explaining that the text, title, and legislative history of section 211A evince that it "was designed to foster an open and competitive energy market by promoting access to transmission services on equal terms").

268. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 at P 19 (citing Complaint and Petition, *supra* note 248, at 32).

269. *Id.* PP 17, 19-20 (quoting Complaint and Petition, *supra* note 248, at 33-34).

270. Complaint and Petition, *supra* note 248 at 3-4.

271. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 at P 41 (citing Protest, Answer, and Motion to Intervene of TVA at 19, *Athens Utils. Bd.*, 177 FERC ¶ 61,021 (Feb. 22, 2021) (FERC Docket Nos. EL21-40, TX21-1) [hereinafter TVA Answer]).

272. TVA Answer, *supra* note 271, at 20-22 (noting that Congress considered and rejected proposals to give FERC "full jurisdiction over TVA's transmission system" and to tear down the Fence in both directions); *id.* at 30 (arguing that Congress would not "casually and silently [do] what it previously had explicitly declined to do").

unbounded by 212(j)[273]—would upend the Fence and "conflict[] with the TVA Act."[274]

Rather, TVA offered an alternative conception. TVA argued that sections 211 and 212(j) and (f) continue to govern requests for *new* transmission service;[275] section 211A merely "gives the Commission discretionary authority to oversee the rates and non-rate terms and conditions for transmission service that is *already being provided*, but not to order new wheeling service."[276] Under section 211A, the Commission could evaluate existing transmission service—whether provided voluntarily or pursuant to a section 211 order—and act if the rates, terms, and conditions are non-comparable or unduly discriminatory.[277] *Iberdrola* comported with this proposed framework because Bonneville already provided transmission service and was ordered to revise the terms and conditions of that service to achieve comparability.[278]

Even were FERC to agree with the petitioners' interpretation of section 211A, TVA argued, FERC should still deny their request for two reasons. First, the facts at hand did not meet the "non-comparability" and "similarly situated" criteria. Comparability was a "flexible" standard, TVA argued, not always requiring identical service and taking into account "potential impediments or consequences," like those that "would harm TVA's remaining customers" in the event the petitioners succeeded.[279] And the petitioners were not "similarly situated" to customers located outside of the Fence: wheeling power to petitioners would result in a "cost-shift problem" that would not arise from serving outside-the-Fence customers.[280]

Second, TVA argued that FERC should exercise its discretion to deny the request for a petition, noting that it had done so "on a number of occasions" and had expressed its expectation that it would use section 211A rarely.[281] TVA set forth a number of reasons why an order would not be in the public interest: an order resulting in load loss would shift stranded costs onto remaining customers;

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273. Responding to the contention that section 211A, unlike section 211, does not reference section 212(j) (and vice versa)—and thus does not mean to incorporate its restriction—TVA argued that this silence "does not mean that Congress meant to eliminate that restriction on FERC's wheeling authority. That point is further demonstrated by the numerous other restrictions on the Commission's wheeling authority that Congress did not attempt to exhaustively list in section 211A but which would nevertheless still apply to any order issued under section 211A," like § 211(b), which TVA stated prohibits wheeling orders that the Commission finds would "unreasonably impair the continued reliability of electric systems" at issue. TVA Answer, *supra* note 271, at 33–35.

274. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 at PP 44-46 (citing TVA Answer, *supra* note 271, at 27). Specifically, such an interpretation would allegedly conflict with the TVA Act by contradicting the Fence provision, *id.* P 44, interfering with the TVA Board's statutory authority to operate its transmission system, *id.* P 46, and reducing its revenues, thereby impairing the TVA Board's authority to engage in discretionary ratemaking and to execute its multi-fold mission, *id.* PP 45-46.

275. *Id.* P 49.

276. *Id.* P 44 (citing TVA Answer, *supra* note 271, at 26-27) (emphasis added).

277. *Id.* PP 49-51 (citing TVA Answer, *supra* note 271, at 36).

278. 177 FERC ¶ 61,021, at P 51; TVA Answer, *supra* note 271, at 39 n.51.

279. TVA Answer, *supra* note 271, at 50-51.

280. *Id.* at 52.

281. *Id.* at 39.

the order would incentivize inequitable "cherry-picking"[282] of TVA customers; it would create a free-rider problem; and it would impair TVA's ability to pursue its "broad set of responsibilities."[283]

Finally—strikingly—TVA stated that open-access principles were "not compelling" in TVA territory, where there was "no longstanding policy favoring competition" and, allegedly, no congressional intent to change that.[284]

*The Commission Order*. FERC dismissed the case in four paragraphs, holding that "[its] authority under section 211A is discretionary," and therefore "declin[ing] to issue a rule or order" requiring TVA to wheel power to the utility petitioners.[285] The order "clarif[ed]" that section 211A did not establish freestanding requirements for unregulated transmitting utilities, and thus was not capable of being violated: it explained that FERC's "jurisdiction under section 211A(b)(1) is not invoked automatically" by some utility action; rather, FERC "has the discretion to choose to exercise, or as relevant here to instead choose not to exercise, this authority."[286]

What might that aforementioned "authority" entail? FERC spoke to the question only briefly, and opaquely, in a footnote restating the statutory text: "section 211A authorizes the Commission, at its discretion, to act to achieve certain results should the Commission choose to do so (e.g., to require an unregulated transmitting utility to provide transmission service at 'comparable' rates)."[287]

The Commission's terse and unilluminating holding was followed by separate statements from each of the four participating commissioners.[288] Chairman Glick concurred, stating without further explanation that he did not "believe that Congress intended to give this Commission the authority to ignore the [Fence] when it enacted the Energy Policy Act of 2005." He shared his view that the Fence was a "vestige of a bygone era" that Congress should replace with open access and competition.[289]

Commissioner Danly also concurred and concluded that FERC "probably does not have the authority under FPA section 211A" to issue the requested order." He opined that while section 211A "authorizes the Commission to require government-owned utilities to provide the type of service petitioners seek," that authority

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282. TVA stakeholders sometimes refer to FPA section 212(j) as the "Anti-Cherry-Picking Amendment." *Athens Utils. Bd.*, 177 FERC ¶ 61,021 at P 9.

283. TVA Answer, *supra* note 271, at 43-44.

284. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 at P 58 (quoting TVA Answer, *supra* note 281, at 46). *Compare* McCarthy, *supra* note 43, at 127 (explaining that in the 1930s, TVA studied and issued three reports to Congress on the issue of inequitable freight-rate structures that disadvantaged the South and restricted the market for southern manufactured goods; the Interstate Commerce Commission conducted an investigation and in 1945 issued a ruling requiring the railroads to remove the North-South rate disparity).

285. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 at P 89.

286. *Id.* P 90.

287. *Id.* P 90 n.187.

288. Chairman Richard Glick and Commissioners James Danly, Alison Clements, and Mark Christie participated in the decision. Commissioner Neil Chatterjee did not participate.

289. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 (Glick, Chairman, concurring at PP 1-2).

with respect to TVA is "limited by Section 212(j)" and by the need to harmonize the FPA with the TVA Act.[290]

Commissioner Christie concurred to write that "[c]hanging the basic statutes governing the Tennessee Valley Authority is the prerogative of Congress," not FERC, but made a suggestion to that end. He suggested that Congress amend the TVA Act to require TVA to procure power on a "competitive, least-cost, non-discriminatory basis" to reduce power supply costs while avoiding the potential cost-shifting implications of allowing customers to leave TVA.[291]

Commissioner Clements dissented. She first concluded that the Commission had the necessary authority to grant the petitioners' request under the plain language of section 211A. Quoting the Ninth Circuit's 2015 decision dismissing a challenge to *Iberdrola*, Commissioner Clements observed that Congress enacted section 211A to "prevent[] anticompetitive behavior by utilities that seek to stifle competitors' generation through control over generation," taking a "further step in the legislative and administrative effort to progressively open energy markets."[292] To accomplish this goal, she explained, section 211A(b) permits the Commission to "require an unregulated transmitting utility to provide transmission services" at rates, terms, and conditions comparable to those under which it serves itself. TVA's interpretation—that section 211A only applies once a utility *already* provides transmission service—would directly contradict this grant of authority and "read open access out of the statute." That Congress intended FERC to be able to order new transmission service was supported by section 211A(h), providing that "[t]he provision of transmission services under [211A](b) does not preclude a request for transmission services" under section 211.[293]

Commissioner Clements then argued that no other provisions of the Federal Power Act nor the TVA Act cut against section 211A's plain meaning. Section 212(j), she argued, applies only to section 211 orders; Congress could have revised the FPA to limit section 211A with section 212(j), but did not.[294] In fact, it enacted a savings clause in section 212 providing that "except as provided in . . . this section, such sections shall not be construed as limiting or impairing any authority of the Commission under any other provision of law."[295] And section 211 was simply

290. *Id.* (Danly, Comm'r, concurring at P 2).

291. *Id.* (Christie, Comm'r, concurring at P 2). This policy was proposed by Senator Mitch McConnell in a 2001 bill, S. 608, the TVA Distributor Self-Sufficiency Act of 2001. *See supra* note 154.

292. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 (Clements, Comm'r, dissenting at P 2) (quoting *Nw. Requirements Utils.*, 798 F.3d at 808 (cleaned up)).

293. *Id.* (Clements, Comm'r, dissenting at P 3) (citing FPA § 212A(h), 16 U.S.C. § 824j-1(h)).

294. *Id.* (Clements, Comm'r, dissenting at P 4 n.12) (citing *E. Ky. Power Cooperative*, 111 FERC ¶ 61,031 at P 20 n.17 ("Section 212(j) . . . provides that with respect to [TVA,] *no order issued under section 211* may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such federal law, unless the order is in furtherance of a sale of electric energy to that electric utility.") (emphasis in original). *See also E. Ky. Power Cooperative*, 115 FERC ¶ 61,347 at P 13 ("[Congress] limited the section 212(j) prohibition to section 211 transmission orders. It did not extend the section 212(j) prohibition to section 210 interconnection orders. . . . [S]ome provisions of section 212 explicitly apply to only sections 210 or 211, while other portions apply to both.").

295. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 (Clements, Comm'r, dissenting at P 10) (citing FPA § 212(e), 16 U.S.C. § 824k(e)(1)).

a different tool in the Commission's toolbox—not a reason for reading section 211A differently.[296] Finally, Commissioner Clements argued that the TVA Act does not affect the Commission's authority under section 211A. Rather, TVA must carry out its statutory mission in accordance with applicable law, including section 211A orders.[297]

Commissioner Clements next concluded that granting the petition would have furthered the public interest by enabling petitioners to procure lower-cost power and thus "supplying a modicum of competition and its associated benefits to the region."[298] Regarding the interest cutting in the other direction—that of customers remaining in TVA—Commissioner Clements wrote that TVA failed to provide persuasive evidence of "significant[] impact," and that those customers might, in fact, be benefited by an adjustment to TVA's incentives.[299]

*Epilogue*. FERC's decision was issued on October 21, 2021. On February 18, 2022, the petitioners petitioned for D.C. Circuit review.[300] On September 7, the Gibson Electric Membership Corporation board resolved to sign its long-term contract.[301] On October 28, the petitioners filed a motion to voluntarily dismiss the case.[302] The remaining utilities do not appear to have signed the long-term agreement to date.

*Analysis.* FERC's decision in *Athens Utilities Board* was made expressly in terms of discretion—while the Commission had some authority to "require an unregulated transmitting utility to provide transmission service at comparable rates,"[303] it exercised its discretion not to use that authority to grant a request to order TVA to wheel power to utilities inside its Fence. Given that three commis-

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296. *Id.* (Clements, Comm'r, dissenting at P 12).

297. *Id.* (Clements, Comm'r, dissenting at PP 6, 8-9) (citing *Iberdrola*, 137 FERC ¶ 61,185, wherein FERC rejected claims that Bonneville's organic statute took precedence over the FPA).

298. *Id.* (Clements, Comm'r, dissenting at P 13). *See also E. Ky. Power Cooperative*, 111 FERC ¶ 61,031 at P 38 ("[T]he requested interconnections would encourage the conservation of energy and capital by providing Warren with access to more economical sources of power. As a result of the interconnection, Warren and its customers would be able to purchase power at lower rates than they pay TVA. We also find that an order directing TVA to interconnect with EKPC would optimize the use of existing facilities by allowing increased competition.").

299. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 (Clements, Comm'r, dissenting at P 14 n.31) (citing "inconsistency between TVA's assertion that the loss of 3.6% of TVA's total load would cost its other customers $3.3 billion through 2040, and the statements of its CEO and other executive officers elsewhere that 10% loss of load would "not really [cause] a material impact" and would not "create a significant financial impact for us [or] create a significant rate issue for our customers").

300. Petition for Review, Athens Utilities Board v. FERC, No. 22-1024 (D.C. Cir. Feb. 18, 2022). The FPA requires parties to first request rehearing at FERC before seeking judicial review of an order. *See* 16 U.S.C. §§ 825*l*(a)–(b). The *Athens Utilities Board* petitioners' request was denied by operation of law on April 22, 2022. *See Athens Utils. Bd. v. TVA*, 179 FERC ¶ 62,045 (2022).

301. Kyle Peppers, *Gibson EMC board resolves to sign long-term contract with TVA*, WBBJ TV (Sept. 7, 2022), https://www.wbbjtv.com/2022/09/07/gibson-emc-board-resolves-to-sign-long-term-contract-with-tva/.

302. *See* Unopposed Motion for Voluntary Dismissal, Athens Utilities Board v. FERC, No. 22-1024 (D.C. Cir. Oct. 28, 2022); *see also* Maggie Shober, *Local Utilities Withdraw Appeal for Transmission Access from TVA*, S. ALL. FOR CLEAN ENERGY (Oct. 24, 2022), https://cleanenergy.org/blog/local-utilities-withdraw-appeal-for-transmission-access-from-tva/.

303. *Athens Utils. Bd.*, 177 FERC ¶ 61,021 at P 90 n.187.

sioners supported dismissal with only one dissent, it is worth noting that the Commission majority's precedent-creating order did not itself outright embrace TVA's interpretation and disclaim section 211A over TVA. This might suggest that the Commission left the door open to future attempts to introduce some minimal level of competition to TVA with section 211A.

The three commissioners concurring in the judgment suggested—with varying degrees of confidence, and altogether unconvincingly—that FERC likely had no authority to force TVA to wheel power into its borders. No concurring commissioner offered his own statutory interpretation of the text of section 211A, perhaps because confronting that language means reaching the opposite result. The dissent was clearly correct in its interpretation of the plain meaning of section 211A.

TVA and the concurring commissioners' arguments that reconciling the FPA and the TVA Act requires reading section 211A differently were similarly unavailing. Commissioner Danly cited in his concurrence TVA's claim that "section 211A conflicts with [the] TVA Act" and argued that because "when possible, conflicting statutory provisions must be interpreted in harmony with one another," section 211A must be read to be limited by section 212(j).[304]

As an initial matter, section 211A can be harmonized with the TVA Act without construing the statutory text to say that which it does not. The Fence, a product of political compromise specific to the moment in which it was established, keeps TVA inside its 1957 borders without speaking to the rights of outside-the-Fence suppliers. The Fence was built to protect neighboring IOUs from the type of territorial expansion that TVA had embarked upon in the region not long before.[305] It was not designed to work in the other direction. Nor should it have been: in 1959, generation and transmission were a bundled business across the country; only several decades after the Fence was built did competitors for incumbent utilities' generation business emerge. Section 211A, enacted in modern electric sector conditions, by its plain terms permits the Commission to override TVA's Transmission Service Guidelines (a regulation, not a statute) and order TVA to provide transmission service into its service territory—the opposite direction of the Fence, responding to modern and different conditions than those present in 1959. Section 211A and the TVA Act do not conflict.

Nor does section 211A conflict with section 212(j). Section 212(j) applies to orders issued pursuant to section 211, not to orders issued pursuant to section 211A. As the dissent explains, sections 211 and 211A are different tools in the Commission's toolbox; they have different triggers[306] and apply to different sets of entities,[307] among other distinctions. Section 211A(h) honors the provisions'

304. *See id.* (Danly, Comm'r, concurring at P 2) (internal citations omitted).

305. *See supra* Part II.C.

306. Section 211 orders must be requested by an electric utility, a federal power marketing agency, or wholesale power generator. 16 U.S.C. § 824j(a). Section 211A requires no such request and permits the Commission to take unilateral action. *See id.* § 824j-1(b).

307. Section 211A orders apply to "unregulated transmitting utilities," *id.* § 824j-1(b), which includes *only* publicly or cooperatively-owned utilities that own or operate facilities for the transmission of electricity in interstate commerce, *id.* § 824j-1(a) (citing *id.* § 824(f)). Section 211 orders apply to "transmitting utilities," *id.* §

unique roles: "The provision of transmission services under [section 211A(b)] does not preclude a request for transmission services under section [211]."[308] Congress empowered the Commission to order comparable transmission service into TVA territory using the mechanism it created in section 211A; it left intact the section 211 wheeling mechanism, applying to a broader range of companies, and TVA's protection from orders thereunder. These two statutory mechanisms can operate simultaneously—giving full meaning to their plain terms—and need not be read to conflict.

But even if the plain text of section 211A was indeed read to irreconcilably conflict with a policy reflected in the TVA Act or sections 211 or 212(j) of the FPA, the solution is not to invent a strained interpretation of these provisions. Rather, an irreconcilable conflict would necessarily lead to the conclusion that in enacting section 211A, Congress impliedly repealed any such policy.[309] With section 211A, Congress established conditions under which the Commission could order "open access by unregulated transmitting utilities."[310] It defined (completely anew) "unregulated transmitting utilities" to include TVA. It incorporated a number of restrictions on those orders, including some by reference to section 212, but did not choose to incorporate the restriction in section 212(j). If, in 1959 or 1992, Congress created a prospective policy restricting any future exercise of Commission authority to order wheeling into TVA, we must conclude that Congress repealed that policy in 2005.

Only a strained interpretation of the text of the Federal Power Act—combined with an expansive reading of the TVA Act, unsupported assumptions about congressional intent, and disregard for section 211A's explicit open access policy—could justify dismissing the *Athens Utilities Board* petition. The *Athens Utilities Board* majority's decision not to adopt such a strained interpretation in the majority order suggests that should this issue come before the Commission again, it would have a second chance to consider the issue.

### *B. Protect Our Aquifer v. TVA*

In August 2020, three Southeast-based environmental groups challenged TVA's approval and implementation of the evergreen contracts under the APA.[311] The plaintiffs—Protect Our Aquifer, Energy Alabama, and Appalachian Voices—claimed that TVA had violated procedural and substantive requirements of the National Environmental Policy Act ("NEPA")[312] and the TVA Act and asked the

824j(a), which includes "unregulated transmitting utilities" in addition to any other entity that owns, operates, or controls facilities used for the interstate transmission of electricity for wholesale sales, *id.* § 796(23).

308. 16 U.S.C. § 824j-1(h).

309. "[R]epeals by implication are not favored." TVA v. Hill, 437 U.S. 153, 154 (1978). Nevertheless, where two statutory provisions "are in irreconcilable conflict," such that they are incapable of coexistence, the later-enacted provision constitutes an implied repeal of the earlier-enacted provision to the extent of the conflict. Radzanower v. Touche Ross & Co., 426 U.S. 148, 154-55 (1976).

310. 16 U.S.C. § 824j-1.

311. 5 U.S.C. §§ 551, 553-559, 701-706.

312. 42 U.S.C. §§ 4321-4370m-12.

court to utilize its authority under APA to issue a judgment "enjoining, setting aside, vacating, or reforming" the 2019 contracts.[313]

The plaintiffs claimed that TVA violated NEPA by failing to conduct and publish an environmental impact analysis before executing the contracts. TVA's monopoly power figured into the alleged connection between the contracts and environmental impacts: the plaintiffs claimed that the contracts "effectively insulate TVA from competition," which "will forever constrain the development of renewable energy in the TVA region, resulting in greater emissions of greenhouse gases and other pollutants." This would also "have lasting and harmful consequences for the Valley's aquifers and surface water resources," on which fossil fuel-powered generators rely. And the contracts were "likely to result in increased electricity demand," which would "exacerbat[e] TVA's greenhouse gas emissions, other pollution, and water consumption."[314] The failure to consider these effects, the plaintiffs argued, violated NEPA and injured the plaintiffs by depriving them of important information that they historically relied upon for their advocacy.[315]

The plaintiffs also alleged that the approval and implementation of the contracts violated section 10 of the TVA Act, which authorizes TVA "to enter into contracts for [sale of surplus power] for a term not exceeding twenty years."[316] Despite their formal ("purported") term of twenty years, the contracts effectively "never expire[] with the passage of time" because of their automatic renewal, twenty-year termination periods, and withholding of rate discounts and protections upon notice of termination.[317]

In response, TVA argued that the plaintiffs lacked standing to bring either of their claims.[318] On the NEPA claim, TVA argued that it had reasonably determined that the contracts were not subject to NEPA, because they would merely continue the status quo: "TVA's generation facilities would continue to supply all of the LPC's power requirements just as they did before the LTAs were executed."[319]

TVA also contested the plaintiffs' TVA Act claim, claiming that judicial review was unavailable for TVA's supply contract terms, and, in the alternative, its contract did not violate the twenty-year limit. TVA argued that "Congress gave it to discretion to make rates"; that "defining the length of the [evergreen contract] qualifies as ratemaking"; and thus, the court "should decline to review the [contract] term."[320] TVA claimed that it exercises its "exclusive authority to set rates for the sale of TVA electricity . . . primarily through the contracts it enters into

313. Amended Complaint at P 191, *Protect Our Aquifer*, 654 F. Supp. 3d. 654 (No. 2:20-cv-02615-TLP-atc) [hereinafter Amended Complaint].

314. *Id.* PP 231-33.

315. *Id.* P 5.

316. 16 U.S.C. § 831i.

317. Amended Complaint, *supra* note 313, at PP 84-87, 245-46.

318. *See* TVA Motion to Dismiss at 15-20, *Protect Our Aquifer*, 654 F. Supp. 3d. 654 (No. 2:20-cv-02615-TLP-atc); TVA Motion for Summary Judgment at 39-44, *Protect Our Aquifer*, 654 F. Supp. 3d 654 (No. 2:20-cv-02615-TLP-atc).

319. TVA Motion for Summary Judgment, *supra* note 318, at 28-30.

320. Protect Our Aquifer v. TVA, 554 F. Supp. 3d 940, 948 (W.D. Tenn. 2021).

with LPCs"[321] and cited a line of precedent "recogniz[ing] the broad discretion Congress gave the board to set power rates and the terms and conditions of TVA's power contracts."[322] Contract length was one such term, and was therefore unreviewable.[323] Moreover, TVA argued, the contract term did not exceed twenty years: "the amended section contemplates three separate, distinct periods of fixed duration: an initial term of 20 years, automatic or evergreen 1 year renewal term(s), and a termination notice period." Advancing a formalist argument that did not recognize the interactions between these provisions and other provisions, TVA concluded that "there are no circumstances under which the [contract] is for a term exceeding 20 years."[324]

At the motion to dismiss stage, Judge Thomas L. Parker of the Western District of Tennessee ruled for the plaintiffs, holding that they had met their burden to establish standing on both claims[325] and had successfully shown that judicial review was available for the contract terms. On reviewability, Judge Parker explained that TVA had not provided "clear and convincing evidence that Congress intended to eliminate judicial review" for TVA contract terms.[326] Notwithstanding TVA's broad rate-making authority, Congress had expressly limited its supply contract terms to twenty years. The court found that it had jurisdiction to review whether TVA "clearly violate[d]" the TVA Act.[327]

Following an embattled period of discovery,[328] TVA finally prevailed against the plaintiffs on summary judgment. On their TVA Act claims, the court found that the plaintiffs did not meet the increased evidentiary burden required to establish standing following discovery.[329] In a footnote, the court opined that it nevertheless would have ruled for TVA on the merits.[330]

The Court found that the plaintiffs did have standing to bring their NEPA claims, particularly due to the informational injuries they suffered from TVA's decision not to conduct and publish an environmental review.[331] But it decided that TVA's decision was a reasonable one and granted TVA's motion for summary judgment.[332] The plaintiffs did not appeal.

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321. TVA Motion to Dismiss, *supra* note 318, at 3-4 (citing 16 U.S.C. § 831a(g)(1)(L)).

322. *Id.* at 8-10.

323. *Id.* at 9.

324. TVA Motion for Summary Judgment, *supra* note 318, at 22-23.

325. *Protect Our Aquifer*, 554 F. Supp. 3d. at 952-53, 956.

326. *Id.* at 949-50.

327. *Id.* at 950.

328. *See* Protect Our Aquifer v. TVA, No. 2:20-cv-02615-TLP-atc, 2022 WL 341014 (W.D. Tenn. Jan. 24, 2022) (order granting in part motion to complete the administrative record).

329. *See Protect Our Aquifer*, 654 F. Supp. 3d at 668-684.

330. *Id.* at 684 n.8 ("Defendant's contractual regime—with a twenty-year initial term, twenty-year termination notice requirement, and an evergreen provision—is a deliberate attempt at maximizing TVA's Congressional authority under Section 10. Defendant's push for these contractual provisions may be zealous, extravagant, and some might say excessive. But they are not unlawful. . . . Section 10 is silent on evergreen provisions, which are legally valid under federal common law of contracts. . . . And as for termination, Section 10 . . . has no explicit notice requirement for contracts for the sale of power to public utilities. . . . And so, termination notice in contracts for the sale of public power falls within Defendant's discretion—so long as the contract's length is for a term of twenty years." (internal citations omitted)).

331. *Id.* at 686-87.

332. *Id.* at 688-92.

Beyond its disposition in favor of TVA, *Protect Our Aquifer* contained subtle wins and losses for both sides. The court's finding that TVA's contract term was reviewable under the APA was a genuine win for the plaintiffs and future parties seeking to hold TVA accountable. It illustrated that the discretion often afforded to TVA ratemaking will not necessarily extend to every component of TVA's relations with its contractual counterparties. On the other hand, the court's dictum about the permissibility of the "never-ending" contracts suggests that courts are comfortable affording TVA deference even after finding grounds for judicial review. Finally, the court's denial of standing to plaintiffs on their TVA Act claim illustrated its hesitancy to recognize the connection between TVA's monopoly power and future greenhouse gas emissions.

## V. EPILOGUE: EFFORTS AT REFORM IN THE FIVE YEARS SINCE THE 2019 ALL-REQUIREMENTS CONTRACTS

TVA prevailed in *Athens Utilities Board* and *Protect Our Aquifer*. FERC and the district court left largely unchecked TVA's ever-growing dominance over its customers, competitors, and other stakeholders. Few existing legal levers remain to bring the benefits of open access to the Tennessee Valley through FERC or the courts.

As important as the potential foreclosure of legal pathways for challenging TVA is the power imbalance these cases left intact. By successfully defending its 2019 contracts, TVA effectively insulated itself from meaningful political pressure. As customers observed when the contracts were first introduced, the threat of distributors' departure created leverage to negotiate with TVA over prices, fuel mix, and other points of contention. The 2019 contracts—together with TVA's transmission dominance—obviate its customers' ability to bring TVA to the negotiating table.[333]

A few customers remain able to leave TVA. MLGW and North Georgia Electric Membership Cooperative, for example, both retained contracts with five-year termination periods and are located on the border of the Fence. These customers can leverage their ability to exit to gain concessions from TVA.[334]

One pathway to external legal oversight remains. Provoked specifically by FERC's decision in *Athens Utilities Board*, Congress—the only body with unquestionable political power and legal authority to affect change at TVA—began paying attention. In January 2022, the House of Representatives Committee on Energy and Commerce sent a letter to TVA expressing "concern[] that TVA's business practices are inconsistent with [its] statutory requirements to the disadvantage of TVA's ratepayers and the environment" and asking TVA to respond to sixteen detailed questions about its rates, energy mix, energy efficiency practices,

333. *See supra* Part III.C.

334. *See supra* note 220 and accompanying text.

compliance with PURPA, compliance with Biden Administration carbon emissions targets, and participation in and funding of lobbying against environmental regulations for the electric sector.[335]

In September 2022, Representative Steve Cohen of Memphis—who touts himself as "a vocal critic" of TVA[336]—introduced legislation that would eliminate the TVA Fence, repeal FPA section 212(j), and subject TVA to the full gamut of FERC regulation.[337] In January 2023, Representative Tim Burchett of Knoxville introduced legislation to increase the transparency of TVA board meetings; the legislation is co-sponsored by Cohen and Representative Diana Harshbarger of Kingsport, Tennessee.[338] Cohen also introduced legislation seeking to reduce the salary of TVA's CEO (currently the highest paid employee of the federal government).[339] This growing pressure on TVA only increased after it ordered rolling blackouts across its territory in December 2022, two days before Christmas.[340]

Reform efforts in Congress gained further momentum in light of TVA's 2024/2025 IRP process. In May 2023, TVA initiated development of its 2024 IRP. A coalition of environmental groups pushed back on what they alleged was a lack of opportunity for broad stakeholder participation and transparency in the IRP process.[341] In March 2024, Representatives Burchett and Cohen introduced the TVA Increase Rate of Participation (IRP) Act, which would establish an Office of Public Participation at TVA, increase opportunities for public comment on TVA IRPs, and mandate disclosure of certain information in TVA IRPs.[342]

Like the wave of reforms that preceded them in the 1990s, these efforts have not become law. But they may nonetheless have some effect in pressuring TVA to change in order to stave off further threats of reform. In 2024, for example, the TVA Board assembled a task force to examine CEO compensation and adopted

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335. Letter from Reps. Frank Pallone, Jr., Bobby L. Rush, Diana DeGette, & Paul D. Tonko, House Comm. on Energy and Com., to TVA CEO Jeffrey J. Lyash (Jan. 13, 2022), https://cleanenergy.org/wp-content/uploads/TVA-Letter-re-business-practices-and-adherence-to-TVA-Act.pdf.

336. *See* Press Release, Congressman Chen Introduces Tennessee Valley Authority Reform and Consumer Protection Act (Sept. 29, 2022), https://cohen.house.gov/media-center/press-releases/congressman-cohen-introduces-tennessee-valley-authority-reform-and.

337. *See* TVA Reform and Consumer Protection Act, H.R. 9042, 117th Cong. (2022). The bill would also strike the 20-year limit on the duration of TVA's supply contracts.

338. *See* Tennessee Valley Authority Transparency Act of 2023, H.R. 404, 118th Cong. (2023).

339. *See* H.R. 7673, 117th Cong. (2022); H.R. 6761, 117th Cong (2022). *See also* Toby Sells, *Cohen Bill Would Likely Lower TVA CEO Salary*, MEMPHIS FLYER (May 6, 2022), https://www.memphisflyer.com/cohen-bill-would-likely-lower-tva-ceo-salary.

340. Austyn Gaffney, *TVA Reaches an Inflection Point*, SIERRA (Feb. 18, 2023), https://www.sierraclub.org/sierra/tva-reaches-inflection-point; Anila Yoganathan, *3 takeaways from TVA's report to Tennessee lawmakers about December's rolling blackouts*, KNOXVILLE NEWS SENTINEL (Feb. 8, 2023), https://www.knoxnews.com/story/news/local/tennessee/2023/02/08/tva-takeaways-december-rolling-blackouts-tennessee-lawmakers/69881921007/.

341. Amanda Durish Cook, *Nonprofits Attempt to Force a More Transparent TVA IRP Process*, RTO INSIDER (Nov. 5, 2023), https://www.rtoinsider.com/60520-nonprofits-force-more-transparent-tva-irp-process/. TVA released a draft IRP for public comment in September 2024. TVA, 2025 INTEGRATED RESOURCE PLAN, https://www.tva.com/environment/integrated-resource-plan.

342. TVA Increase Rate of Participation Act, H.R. 7595, 118th Cong. (2024); *see also* Amanda Durish Cook, *Tenn. Congressmen Introduce Bill to Make TVA IRP Process More Public*, RTO INSIDER (Mar. 10, 2024), https://www.rtoinsider.com/73350-tenn-reps-introduce-bill-tva-irp-process-more-public/.

reforms such as lowering end-of-year incentive payments[343] and tying performance measures to addition of renewable energy generating capacity, energy conservation, and demand response to the TVA system.[344]

## VI. CONCLUSION

TVA has a complex role to play in the Tennessee Valley region. With its lack of state or federal regulatory oversight, its plenary rate-setting authority, and its persistent insulation from open access mandates, TVA has greater monopoly and monopsony power than perhaps any other utility in the United States. It has exercised this power to unilaterally increase rates, make short-sighted investment decisions, and coerce its customers into signing deeply one-sided contracts. For communities of the Tennessee Valley, TVA has been a longstanding and frequent perpetrator of environmental injustice,[345] including the 2008 Kingston coal ash environmental disaster, in which a dike failure released 5.4 million cubic yards of coal ash from the Kingston Fossil Plant into the Emory River.[346]

On the other hand, TVA is a politically accountable arm of the federal government, with leadership appointed by the President and confirmed by the Senate. It is among the many transformative government projects championed by FDR's New Deal. It is a major employer of unionized workers in the Tennessee Valley.[347] Its corporate purpose is to further economic development of the Tennessee Valley region and better the lives of its residents,[348] not to maximize shareholder profits.

Understanding TVA's actions—here, its pursuit of control over its customers and resistance to reform—requires understanding its legal, political, and economic history and the institutional features that evolved from that history. TVA's reliance on debt financing, its large outstanding debt obligations, and its Fence explain

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343. Daniel Dassow, *TVA board, let by Biden picks, asserts power to overhaul CEO's record-high salary*, KNOXVILLE NEWS-SENTINEL (May 10, 2024), https://www.knoxnews.com/story/news/local/2024/05/10/tva-board-reduces-ceo-pay-as-highest-paid-federal-job-faces-scrutiny/73627788007/.

344. *See* TVA, CURRENT REPORT (FORM 8-K), at 3 (Sept. 17, 2024), https://tva.q4ir.com/financial-information/sec-filings/sec-filings-details/default.aspx?FilingId=17847608.

345. *See., e.g*, Pearl Walker & Rev. Michael Malcom, *TVA must address its history of environmental injustice*, THE TENNESSEAN (Nov. 3, 2022), https://www.tennessean.com/story/opinion/contributors/2022/11/03/opinion-tva-must-address-history-environmental-injustice-coal-ash-spill-kingston/69614931007/; Chloe Hilles, *Long burdened by a coal plant, South Memphis residents say no to coal ash in their backyard*, ENERGY NEWS NETWORK (Aug. 22, 2022), https://energynews.us/2022/08/22/long-burdened-by-a-coal-plant-south-memphis-residents-say-no-to-coal-ash-in-their-backyard/; Dulce Torres Guzman, *Public records show TVA planned coal ash storage months before informing Memphians*, TENN. LOOKOUT (May 12, 2022), https://tennesseelookout.com/2022/05/12/public-records-show-tva-planned-coal-ash-storage-months-before-informing-memphians/; Oliver Houck, *Unfinished* Stories, 73 U. COLO. L. REV. 867, 921–42 (2002). *See also* NANCY L. GRANT, TVA AND BLACK AMERICANS: PLANNING FOR THE STATUS QUO, at xv–xvii, xxix–xxxi (1990).

346. *See* Inspection Report: Review of the Kingston Fossil Plant Ash Spill Root Cause Study and Observations about Ash Management, TVA Office of the Inspector Gen. (July 23, 2009), https://www.oversight.gov/sites/default/files/oig-reports/TVA/2008-12283-02.pdf; Joel K. Bourne, Jr., *Coal's Other Dark Side: Toxic ash that can poison water and people*, Nat'l Geographic (Feb. 19, 2019), https://www.nationalgeographic.com/environment/article/coal-other-dark-side-toxic-ash.

347. TVA 2022 10-K, *supra* note 193, at 39.

348. *See* McCarthy, *supra* note 43, at 116 ("[TVA] is . . . convincing proof that the economic problems of a great river valley were capable of solution through democratic means.").

why it is incentivized to retain customers. Its statutory self-regulation and immunity from open-access transmission policy enable it to do so through more onerous measures, and with less accountability, than those available to other utilities.

In a press release following a 2023 TVA price hike,[349] the Assistant General Manager of Athens Utilities Board lamented: "We have a hard time understanding why TVA can't operate more like a true public power provider."[350] He captures the problem perfectly. TVA is the definitive American public power provider. Yet to secure its own continuity, it systematically behaves like a market power-seeking private corporation. Throughout its history, TVA has secured its dominance in the Tennessee Valley through an ever-increasingly-burdensome all-requirements relationship with its customers. In recent years, that dominance has been threatened by the rise of market competition and affordable clean energy in the electric sector. TVA will surely continue to be a site of contestation as these forces clash.

349. TVA raised its rates 4.25% in October 2023 and 5.25% in October 2024. *See* Dave Flessner, *TVA to boost electric rates this fall by biggest amount in a decade*, CHATTANOOGA TIMES FREE PRESS (Aug. 22, 2024), https://www.timesfreepress.com/news/2024/aug/22/tva-to-boost-electric-rates-this-fall-by-biggest/. Together, these rate hikes fall just under the 10% cap established in the 2019 contracts. *See supra* note 185 and accompanying text.

350. Press Release, Athens Utils. Bd., *supra* note 2.