

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Athens Utilities Board;)	Docket No. EL21-__-000
)	
Gibson Electric Membership Corporation;)	
)	
Joe Wheeler Electric Membership Corporation;)	
and)	
)	
Volunteer Energy Cooperative Petitioners,)	
)	
v.)	
)	
Tennessee Valley Authority Respondent.)	

**COMPLAINT AND PETITION FOR ORDER UNDER FEDERAL POWER ACT
SECTIONS 210 AND 211A
AGAINST
TENNESSEE VALLEY AUTHORITY**

January 11, 2021

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**COMPLAINT AND PETITION FOR ORDER UNDER FEDERAL POWER ACT
SECTIONS 210 AND 211A AGAINST TENNESSEE VALLEY AUTHORITY**

Pursuant to sections 210, 211A, 306, 307, 308 and 309 of the Federal Power Act (“FPA”)¹ and Rule 206 of the Federal Energy Regulatory Commission’s (“FERC” or the “Commission”) Rules of Practice and Procedure,² Athens Utilities Board, Gibson Electric Membership Corporation (“Gibson EMC”), Joe Wheeler Electric Membership Corporation (“Joe Wheeler EMC”), and Volunteer Energy Cooperative (together, “Petitioners”), respectfully submit this complaint and petition (“Petition”) for an order against the Tennessee Valley Authority (“TVA”) directing TVA to (1) provide unbundled transmission service to Petitioners and/or outside power suppliers seeking to serve Petitioners’ load at rates and on terms and

¹ 16 U.S.C. §§ 824i, 824j-1, 825e, 825f, 825g, and 825h (2018).
² 18 C.F.R. § 385.206.

conditions comparable to those TVA offers itself, and (2) formalize interconnection arrangements and provide interconnection service to Petitioners when Petitioners terminate their existing full-requirements power supply contracts with TVA.

I. EXECUTIVE SUMMARY

Petitioners seek unbundled transmission service from the only transmission provider that can feasibly serve them, in accordance with the Commission’s longstanding open access principles. Petitioners are not-for-profit municipal and cooperative distribution utilities, known as “local power companies” (“LPCs”), located in TVA’s service territory. Petitioners currently receive their power supply and delivery requirements from TVA under bundled full-requirements power supply contracts (*i.e.*, including both power and delivery service) (“Power Contract”).³ The Power Contracts have 20-year terms with five-year evergreen clauses, but permit Petitioners to terminate their contractual relationship with TVA upon five-year’s notice.⁴ Petitioners have operated under this arrangement for decades, receiving bundled wholesale power from TVA to serve their retail customers, and renewing their Power Contracts on multiple occasions.

Recent developments have disrupted the economic utility of this arrangement for Petitioners and other LPCs in TVA’s footprint. First, the bundled rates Petitioners pay under the Power Contracts have steadily risen in past years. According to the Energy Information Administration (“EIA”), TVA’s Sales for Resale rate increased approximately 9.76% from 2010

³ See Exhibit No. LPC-0010, Power Contract of Athens Utilities Board; LPC-0011, Power Contract of Gibson EMC; LPC-0012, Power Contract of Joe Wheeler EMC; LPC-0013, Power Contract of Volunteer Energy Cooperative.

⁴ See *id.*

to 2019.⁵ Second, TVA has begun offering new power supply contracts for the LPCs to sign (“New Power Contract”) that differ substantially from the Power Contracts Petitioners have operated under for decades.⁶ These New Power Contracts contain rolling 20-year terms that renew each year and permit termination only upon twenty years’ notice to TVA.⁷ While a large number of LPCs in TVA’s footprint have elected to sign the New Power Contracts, Petitioners have not. Dissatisfied with the excessive bundled rates paid under the Power Contracts and unwilling to submit to the draconian provisions of the New Power Contracts, Petitioners have actively sought alternatives to their source of power supply for the sole purpose of lowering electric costs to their members/consumers. At every step, TVA has stymied their efforts and prevented any discussions regarding unbundled transmission service to the LPCs.

TVA owns all of the transmission facilities capable of serving Petitioners’ loads. Petitioners are scattered throughout the TVA area and none is particularly close to TVA’s interface with another transmission system. Short of taking the very expensive and duplicative step of constructing its own transmission lines, no LPC can feasibly reach an external supplier without service across TVA lines. Nevertheless, TVA made clear, in its Transmission Service Guidelines, in a newly restated TVA Board policy (“Board Policy”), and in letters directly to Petitioners, that it would not provide unbundled service across TVA transmission facilities to enable alternative power suppliers to serve LPC loads under any circumstances. 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

⁵ See Energy Information Administration, *Annual Electric Power Industry Report, Form EIA-861, Operational Data 2010-2019*, available at <https://www.eia.gov/electricity/data/eia861/>.

⁶ See Exhibit No. LPC-0014, New Power Contracts Offered to Athens Utilities Board, Gibson EMC, Joe Wheeler EMC, and Volunteer Energy Cooperative.

⁷ See *id.*

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. Even though Petitioners' current Power Contracts allow for termination, without 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.

Petitioners bring this Petition under section 211A of the FPA⁸ to attain transmission service at rates and on terms and conditions that are comparable to those TVA offers itself. TVA primarily devotes its transmission facilities to serving the LPCs from TVA's own generation sources and those with whom it has contracted, yet TVA denies comparable service to any otherwise eligible customers. Granting the Petition would satisfy Congress' goal of "foster[ing] an open and competitive energy market by promoting access to transmission services on equal terms,"⁹ as well as the Commission's traditional promotion of open access and robust competition.¹⁰ Contrary to TVA's assertions, the Commission is not precluded from issuing an

⁸ 16 U.S.C. § 824j-1.

⁹ *Nw. Requirements Utils. v. FERC*, 798 F.3d 796, 808 (9th Cir. 2015).

¹⁰ *See generally Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080) (Order No. 888), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

order under FPA section 211A by the inapplicable section 212(j),¹¹ which only restricts Commission wheeling orders issued under the distinct section 211.¹² Petitioners merely seek transmission service at a fair price in order to access alternative means of supply outside of the TVA footprint, where Petitioners can meet their power supply needs at prices far below TVA's bundled rates and pass those savings along to their retail members/customers. TVA has simply refused to negotiate such unbundled transmission service.

Further, because any such outside supply arrangements would require Petitioners to serve notice of termination under their Power Contracts, Petitioners ask the Commission to issue an order under FPA section 210¹³ that (1) formalizes the interconnection arrangements between Petitioners' and TVA's transmission systems, and (2) provides for interconnection service across existing facilities. While Petitioners' systems are already interconnected to TVA's transmission system, the interconnection arrangements are not memorialized beyond the Power Contracts, which Petitioners seek to terminate. Accordingly, formalizing the interconnection arrangements that would facilitate unbundled transmission service is in the public interest, as it would allow not-for-profit municipal and cooperative distribution utilities to attain unbundled transmission and power supply at rates that would save their retail members/customers millions of dollars, while utilizing and continuing to pay for existing interconnection and transmission facilities.

To reiterate, Petitioners are not seeking free access to TVA's transmission system. Petitioners merely seek comparable transmission service to that which TVA offers itself, from the only transmission provider that is capable of serving Petitioners' loads. This would allow Petitioners to manage their own power supply while avoiding stranded transmission costs to

¹¹ 16 U.S.C. § 824k(j).

¹² 16 U.S.C. § 824j.

¹³ 16 U.S.C. § 824i.

TVA, as Petitioners will remain TVA transmission customers. Petitioners wish only to avail themselves of the right to unbundled transmission that is readily available to virtually all of the country's load-serving entities, and to better serve their members/customers at competitive prices. Disadvantaging Petitioners solely due to their geographic location is unduly discriminatory and antithetical to Congress' and the Commission's longstanding open access, non-discrimination, and competitive principles.

II. COMMUNICATIONS

All pleadings, correspondence, and communications concerning the above-captioned proceeding should be addressed to the following persons and the same should be included in the official service list in this proceeding:

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III. BACKGROUND

A. Description of Petitioners

1. Athens Utilities Board

Athens Utilities Board is a not-for-profit organization owned by the city of Athens, Tennessee, originally incorporated in 1939. Athens Utilities Board provides electric, gas, water and wastewater services to the cities of Athens, Englewood and Niota, as well as surrounding rural areas. Athens Utilities Board serves more than 13,000 commercial and residential customers with over 500 miles of distribution line. Athens Utilities Board purchases its full power supply and transmission requirements from TVA on a bundled basis, pursuant to a Power Contract entered into on July 25, 1979, and last amended on October 1, 1997.¹⁴

2. Gibson EMC

Gibson EMC is member-owned, not-for-profit cooperative that provides electric power to Crockett, Dyer, Gibson, Haywood, Lake, Lauderdale, Obion, and Madison counties in West

¹⁴ See Exhibit No. LPC-0010.

Tennessee, and Carlisle, Fulton, Graves, and Hickman counties in West Kentucky. Gibson EMC originally incorporated in 1936 and today serves approximately 39,000 commercial and residential customers on over 3,500 miles of transmission line. Gibson EMC purchases its full power supply and transmission requirements from TVA on a bundled basis, pursuant to a Power Contract entered into on July 1, 1976, and last amended on October 1, 1997.¹⁵

3. Joe Wheeler EMC

Joe Wheeler EMC is the fourth largest member-owned electric cooperative in Alabama, serving more than 43,000 members with more than 4,200 miles of line. Beginning operations in 1937, Joe Wheeler EMC today sells more power than any other electric cooperative in the state of Alabama and is the eighth largest electric cooperative in the TVA region. Joe Wheeler EMC is a not-for-profit cooperative that serves commercial and residential customers in Lawrence and Morgan counties, as well as the surrounding communities. Joe Wheeler EMC purchases its full power supply and transmission requirements from TVA on a bundled basis, pursuant to a Power Contract entered into on September 26, 1977, and last amended on October 1, 1997.¹⁶

4. Volunteer Energy Cooperative

Volunteer Energy Cooperative is a not-for-profit electric cooperative that serves Polk, Bradley, Hamilton, McMinn, Meigs, Bledsoe, Rhea, Roane, Pickett, Loudon, Cumberland, Fentress, White, Overton, Putnam, Morgan and Scott counties in eastern Tennessee. Within this territory, VEC provides service to more than 120,000 commercial and residential members on upwards of 10,000 miles of transmission and distribution lines. VEC purchases its full power supply and transmission requirements from TVA on a bundled basis, pursuant to a Power

¹⁵ See Exhibit No. LPC-0011.

¹⁶ See Exhibit No. LPC-0012.

Contract, the most recent of which was entered into on September 15, 1975, and last amended on September 24, 2000.¹⁷

B. Description of TVA

TVA is a corporate agency and instrumentality of the United States of America, created by and existing pursuant to the Tennessee Valley Authority Act of 1933 (“TVA Act”).¹⁸ Among other things, TVA was created to further the economic development of its southeastern service area by selling electricity produced at TVA-owned generation facilities.¹⁹ Today, TVA operates the nation’s largest public power system, supplying power throughout Tennessee, northern Alabama, northeastern Mississippi, and southwestern Kentucky, and portions of northern Georgia, western North Carolina, and southwestern Virginia.²⁰ TVA’s service territory spans 202 counties and nearly 59 million acres. In total, TVA provides power to nearly 10 million people, with total annual revenues exceeding \$10 billion.²¹

TVA generates and sells wholesale electric power to 153 LPCs that distribute that power to residential, commercial, and industrial customers within their individual service areas.²² These not-for-profit organizations are largely comprised of publicly-owned municipal power systems and member-owned rural electric cooperatives.²³ Since 1959, TVA has not received federal

¹⁷ See Exhibit No. LPC-0013.

¹⁸ 16 U.S.C. § 831 *et seq.*; see also Tennessee Valley Authority, *A Guide to Information about the Tennessee Valley Authority*, available at <https://www.tva.com/information/freedom-of-information/a-guide-to-information-about-the-tennessee-valley-authority> (“TVA Guide”).

¹⁹ Securities and Exchange Commission Filing, Tennessee Valley Authority, Annual Report (Form 10-K) (Nov. 17, 2020) at 8 (“TVA Form 10-K”).

²⁰ See TVA Guide.

²¹ TVA Form 10-K at 8-9.

²² *Id.* at 10.

²³ *Id.*

appropriations in support of its power program, and instead derives nearly all of its revenue from power sales to the LPCs.²⁴ To do so, TVA operates a large portfolio of generation facilities, including three nuclear sites, 17 natural gas and/or oil-fired sites, five coal-fired sites, 29 conventional hydroelectric sites, one pumped-storage hydroelectric site, one diesel generator site, and 14 solar-powered sites.²⁵ TVA also acquires power from various power producers through long-term and short-term power purchase agreements, as well as spot market purchases.²⁶ TVA delivers its generated and purchased power over one of the largest transmission systems in North America, which consists of over 16,000 miles of transmission line and 517 transmission substations, power switchyards, and switching stations.²⁷ It also has 69 interconnections to 13 neighboring electric systems.²⁸

In addition to its own usage, TVA offers transmission services across its transmission facilities to and from points external to the TVA area.²⁹ TVA offers these services under its Transmission Service Guidelines, a transmission tariff that is not on file with the Commission.³⁰ The Transmission Service Guidelines exclude from the definition of “Eligible Customer” any customer seeking service that the Commission is prevented from ordering under section 212(j) of the FPA.³¹ This prohibition includes the transmission of power from outside the TVA area that

²⁴ *Id.* at 8, 10.

²⁵ *Id.* at 12.

²⁶ *Id.* at 16.

²⁷ *Id.* at 47, 160.

²⁸ *Id.* at 20.

²⁹ *Id.*

³⁰ *Id.*; see also Exhibit No. LPC-0009, Tennessee Valley Authority, *Transmission Service Guidelines, FY2021 Edition* (published Nov. 1, 2020), also available at https://www.oasis.oati.com/woa/docs/TVA/TVAdocs/TSG_FY2021.pdf.

³¹ Exhibit No. LPC-0009 at 10, section 1.15; 16 U.S.C. § 824k(j).

would be consumed within the TVA area.³² Thus, the Transmission Service Guidelines categorically deny transmission service to any LPC or prospective wholesale supplier of an LPC. For this reason, despite the sheer scale of its transmission system and interconnectedness with numerous surrounding systems, TVA wields its monopoly power in the region as an anticompetitive sword, noting that it “provides electricity in a service area that is largely free of competition from other electric power providers.”³³

C. Power Supply Contracts and Negotiations

For decades, TVA has entered into bundled, full-requirements Power Contracts with the LPCs, requiring the LPCs to purchase from TVA all of the power required for the LPCs to serve their customers.³⁴ Consistent with the limitations contained in the TVA Act, these Power Contracts traditionally held 20-year terms,³⁵ though many now contain five-year evergreen clauses.³⁶ Subsequent amendments to the Power Contracts accorded the parties the right to terminate the Power Contract after five years’ notice to TVA.³⁷

On or around August 22, 2019, TVA began offering LPCs the option to renew their contractual arrangements via the New Power Contracts, which substantially lengthened the contract term and termination notice provisions. While these New Power Contracts contain initial 20-year terms, the term extends automatically after the passing of each year such that the contract never expires:

³² See 16 U.S.C. § 824k(j).

³³ TVA Form 10-K at 21.

³⁴ *Id.* at 10.

³⁵ 16 U.S.C. § 831i.

³⁶ See Exhibit Nos. LPC-0010, LPC-0011, LPC-0012, LPC-0013.

³⁷ See *id.*

This contract is effective as of [date], and will continue in effect for an initial term of 20 years from [date], provided, however, that beginning on the first anniversary of said effective date, and on each subsequent anniversary thereof (whether falling during said initial term or any renewal term as provided for herein), 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.³⁸

Further, the New Power Contract extends the termination notice period from five years to 20 years, which reflects the entire term of the contract.³⁹ If the LPC gives notice of termination to TVA, TVA retains no obligation “to make or complete any additions to or changes in any transformation or transmission facilities” to serve the LPC for the remainder of the twenty-year notice period.⁴⁰ The spirit and benefit of competitive markets are lost by this monopolistic demeanor of nominally allowing termination, yet not accommodating that termination except by the forced duplication of the existing transmission system, whose construction and continued operations Petitioners have subsidized. To this point, Petitioners have declined to sign the New Power Contracts.

D. Requests for Transmission Service

Faced with increasing bundled contract prices and excessive New Power Contract terms, Petitioners have made multiple attempts to receive unbundled transmission service from TVA at the prevailing rates, in the event Petitioners elected to give termination notice on their current Power Contracts. This unbundled transmission service would transmit power originating from alternative power suppliers with generation resources outside TVA, over TVA’s transmission facilities, to the LPCs. TVA has summarily rejected Petitioners’ requests—refusing to engage in any discussions at all regarding the rates, terms and conditions for Petitioners’ requested unbundled transmission service from TVA. Rather than even consider providing such

³⁸ Exhibit No. LPC-0014 at 2, 8, 14, 20.

³⁹ *Id.*

⁴⁰ *Id.*

transmission service to Petitioners, TVA instead rejected Petitioners' requests and formalized this rejection as official policy.

With regard to such requests, on September 28 and September 29, 2020, Athens Utilities Board, Joe Wheeler EMC, and Gibson EMC sent letters to TVA, requesting that, "in the event [the LPC] determines to terminate its existing contract with TVA . . ., TVA would negotiate a contract with [LPC] to provide unbundled transmission services for the delivery of electric capacity and energy to [LPC] delivery points."⁴¹ Seeking a "mutually beneficial transmission arrangement with TVA," Petitioners requested individual meetings to discuss potential transmission arrangements.⁴²

In nearly identical responsive letters dated November 19, 2020, TVA rebuffed the Petitioners' requests, maintaining that it "will not wheel to a departing customer...."⁴³ Accompanying these letters were copies of the TVA Board's newly reaffirmed Board Policy, which generically denies transmission service to LPCs that terminate their Power Contracts with TVA. This "Reaffirmation of Policy on Requests to Use the TVA Transmission System to Deliver Power to Local Power Companies" formalizes TVA's policy of "denying requests for transmission service to serve load within the Fence."⁴⁴ The Board Policy effectively decrees that TVA will deny any request for transmission service by an LPC or outside power supplier to serve an LPC's load. To this end, the Board Policy directs TVA staff to address all transmission service requests to LPCs in this manner, officially and preemptively denying requests from all

⁴¹ Exhibit No. LPC-0006, Letters to TVA from Athens Utilities Board, Joe Wheeler EMC, and Gibson EMC, at 1, 4, 6.

⁴² *Id.* at 2, 5, 7.

⁴³ Exhibit No. LPC-0007, Letters from TVA to Athens Utilities Board, Joe Wheeler EMC, and Gibson EMC, at 2, 4, 6.

⁴⁴ Exhibit No. LPC-0008, Board Policy, at 2.

LPCs that serve termination notice on their Power Contracts.⁴⁵ While Volunteer Energy Cooperative has not sent a similar letter to TVA seeking similar transmission access to TVA’s system, there is no reason to believe that TVA’s response would be any different than its responses to Athens Utilities Board, Gibson EMC, and Joe Wheeler EMC. The reaffirmed Board Policy makes clear that TVA will not provide unbundled transmission service to enable former TVA LPC customers the ability to access an alternative supplier of electricity.

IV. APPLICABLE LEGAL FRAMEWORK

A. TVA Act

The TVA Act established TVA as a corporate agency and instrumentality of the United States. Among other activities, TVA was authorized from its inception to “produce, distribute, and sell electric power.”⁴⁶ In furtherance of this function, the TVA Act enabled TVA to “sell the surplus power not used in its operations”⁴⁷ and to construct, purchase, and operate “transmission lines within transmission distance from the place where generated, and to interconnect with other systems.”⁴⁸ The TVA Board has express authorization to establish the rates for electricity that TVA will charge.⁴⁹

The TVA Act places certain limitations on TVA’s power sale and transmission activities. For example, TVA must “give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers” organized “for the purpose of supplying electricity to its

⁴⁵ *Id.*

⁴⁶ 16 U.S.C. § 831d(l).

⁴⁷ 16 U.S.C. § 831i.

⁴⁸ 16 U.S.C. § 831k.

⁴⁹ 16 U.S.C. § 831c(g)(1)(L).

own citizens or members.”⁵⁰ The TVA Act also limits the terms of the Power Contracts that TVA may execute with the distribution companies to 20 years.⁵¹ Finally, the TVA Act forbids TVA from entering into any “contracts for the sale or delivery of power” that “would have the effect of making [TVA] or its distributors, directly or indirectly, a source of power supply *outside* the area for which [TVA] or its distributors were the primary source of power supply on July 1, 1957.”⁵² This territory, commonly known as the TVA “Fence,” encompasses the areas served by Petitioners and the other LPCs. Notably, although the TVA Act clearly prohibits TVA and LPCs from serving as power suppliers to entities outside the Fence, it contains no provision preventing TVA from transmitting power from outside the Fence to serve the LPCs *inside* the Fence.

B. FPA

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 or 206 of the FPA.⁵³ TVA is, however, explicitly classified as an “electric utility” by the FPA,⁵⁴ and subject to Commission orders under sections 210, 211, 211A, and 212, among others.⁵⁵ TVA is also an “unregulated transmitting utility” under section 211A of the FPA.⁵⁶

⁵⁰ 16 U.S.C. § 831i.

⁵¹ *Id.*

⁵² 16 U.S.C. § 831n-4(a) (emphasis added).

⁵³ 16 U.S.C. §§ 824(f), 824d, 824e.

⁵⁴ 16 U.S.C. § 796(22)(B). Under section 3, “[t]he term ‘electric utility’ means a person or Federal or State agency . . . that sells electric energy.” 16 U.S.C. § 796(22)(A). “The term ‘electric utility’ includes the Tennessee Valley Authority and each Federal power marketing administration.” 16 U.S.C. § 796(22)(B).

⁵⁵ 16 U.S.C. §§ 824i, 824j, 824j-1, 824k.

⁵⁶ 16 U.S.C. § 824j-1. Under section 211A, “the term ‘unregulated transmitting utility’ means an entity that (1) owns or operates facilities used for the transmission of electric energy in interstate commerce; and (2) is an entity described in section 824(f) of this title.” *Id.* Section 824(f) includes the “United States, State, Political Subdivision of a State, or Agency or Instrumentality Thereof.” 16 U.S.C. § 824(f).

With respect to Commission wheeling orders entered under section 211 only, the Commission is limited in the relief it can grant against TVA. Section 212(j) provides that, “[w]ith respect to an electric utility which is prohibited by Federal law from being a source of power supply, either directly or through a distributor of its electric energy, outside an area set forth in such law,” *i.e.*, the TVA Act’s Fence restrictions, “no order issued under section **824j** [211] of this title 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.”⁵⁷ In other words, when acting upon a petition for wheeling service against TVA under section 211, the Commission may not compel TVA to wheel power if such power will be consumed within the TVA Fence. However, Petitioners do not seek a Commission order under section 211 of the FPA. Rather, Petitioners seek Commission action under an entirely separate section of the FPA, section 211A,⁵⁸ which was subsequently enacted as part of the Energy Policy Act of 2005 (“EPAct 2005”).⁵⁹

Despite the clear distinction between sections 211 and 211A, TVA has suggested that it is somehow exempt from section 211A due to section 212(j)’s restrictions.⁶⁰ TVA is mistaken. Section 211 was amended in its current form as part of the Energy Policy Act of 1992 (“EPAct 1992”).⁶¹ Simultaneously, Congress included Section 212(j) in the EPAct 1992 to limit the Commission’s authority to order wheeling under section 211. As noted above, section 212(j)

⁵⁷ 16 U.S.C. § 824k(j) (emphasis added).

⁵⁸ 16 U.S.C. § 824j-1.

⁵⁹ Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified at 15 U.S.C. § 717c-1).

⁶⁰ See Exhibit No. LPC-0007 at 3, 6, 9 (“Section 211A of the FPA does not grant FERC any additional authority to order TVA to wheel power.”).

⁶¹ Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified at 42 U.S.C. ch. 134 § 13201 *et seq.*).

expressly references only section 211 when limiting the Commission’s ability to issue section 211 wheeling orders against TVA.⁶²

Section 211A, by contrast, was enacted thirteen years later as part of the EPAct 2005. In fairly extensive provisions,⁶³ Section 211A authorizes the Commission to compel “an unregulated transmitting utility,”⁶⁴ like TVA, to provide transmission service “at rates . . . and on

⁶² See 16 U.S.C. § 824k(j).

⁶³ In its entirety, section 211A provides as follows:

“(a) **Definition of unregulated transmitting utility.** In this section, the term “unregulated transmitting utility” means an entity that— (1) owns or operates facilities used for the transmission of electric energy in interstate commerce; and (2) is an entity described in section 824(f) of this title.

(b) **Transmission operation services.** Subject to section 824k(h) of this title, the Commission may, by rule or order, require an unregulated transmitting 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.

(c) **Exemption.** The Commission shall exempt from any rule or order under this section any unregulated transmitting utility that—(1) sells not more than 4,000,000 megawatt hours of electricity per year; (2) does not own or operate any transmission facilities that are necessary for operating an interconnected transmission system (or any portion of the system); or (3) meets other criteria the Commission determines to be in the public interest.

(d) **Local distribution facilities.** The requirements of subsection (b) shall not apply to facilities used in local distribution.

(e) **Exemption termination.** If the Commission, after an evidentiary hearing held on a complaint and after giving consideration to reliability standards established under section 824o of this title, finds on the basis of a preponderance of the evidence that any exemption granted pursuant to subsection (c) unreasonably impairs the continued reliability of an interconnected transmission system, the Commission shall revoke the exemption granted to the transmitting utility.

(f) **Application to unregulated transmitting utilities.** The rate changing procedures applicable to public utilities under subsections (c) and (d) of section 824d of this title are applicable to unregulated transmitting utilities for purposes of this section.

(g) **Remand.** In exercising authority under subsection (b)(1), the Commission may remand transmission rates to an unregulated transmitting utility for review and revision if necessary to meet the requirements of subsection (b).

(h) **Other requests.** The provision of transmission services under subsection (b) does not preclude a request for transmission services under section 824j of this title.

(i) **Limitation.** The Commission may not require a State or municipality to take action under this section that would violate a private activity bond rule for purposes of section 141 of title 26.

(j) **Transfer of control of transmitting facilities.** Nothing in this section authorizes the Commission to require an unregulated transmitting utility to transfer control or operational control of its transmitting facilities to a Transmission Organization that is designated to provide nondiscriminatory transmission access.”

⁶⁴ See *supra* note 56.

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.”⁶⁵ As the United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) has explained, “Section 211A *extended* FERC’s jurisdiction over discrimination in electricity transmission to ‘unregulated transmitting utilities,’ including government agencies. . . .”⁶⁶ Congress’ intent in granting the Commission authority separate and apart from that it already possessed under section 210 and 211 was “to authorize FERC to require unregulated transmitting utilities to provide open access to their transmission systems.”⁶⁷

Section 211A was thus an entirely separate statutory *grant* of authority to the Commission and, in contrast to section 211, does not reference nor appear in section 212(j) at all. Notably, while enacting section 211A in the EAct 2005, Congress did not amend section 212(j)—which clearly applies to section 211—to extend its limitations to section 211A orders. In its entirety, section 212(j) provides:

With respect to an electric utility which is prohibited by Federal law from being a source of power supply, either directly or through a distributor of its electric energy, outside an area set forth in such law, no order issued under section 824j [211] of this title 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: Provided, however, That the foregoing provision shall not apply to any area served at retail by

⁶⁵ 16 U.S.C. § 824j-1.

⁶⁶ *Nw. Requirements Utils. v. FERC*, 798 F.3d at 808 (emphasis added).

⁶⁷ S. Rep. No. 109-78, at 49 (June 9, 2005). *See also* 151 Cong. Rec. S7465 (daily ed. June 28, 2005) (statement of Sen. Kyl); statement of Jon Kyl also submitted Nov. 25, 2003, S15903 (“the Energy bill expands jurisdiction over those stakeholders in electric markets that were previously unregulated by the Commission. The ‘FERC-lite’ provision . . . addresses the Federal Energy Regulatory Commission’s efforts to provide open access over all transmission facilities in the United States . . .”).

an electric transmission system which was such a distributor on October 24, 1992, and which before October 1, 1991, gave its notice of termination under its power supply contract with such electric utility.⁶⁸

If it so intended, Congress could have revised section 212(j) to restrict Commission orders “issued under section 824j [211] or 824j-1 [211A].” Section 211A was a lengthy addition to the FPA enacted as part of EAct 2005,⁶⁹ and could not have slipped past the act’s drafters. If Congress wanted to revise section 212(j) to restrict the Commission from issuing orders under section 211A, it could have done so. It did not. As the United States Court of Appeals for the D.C. Circuit has noted in construing the FPA, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”⁷⁰ As originally enacted in the EAct 1992, section 212(j) did not contemplate section 211A orders because section 211A did not exist at the time. When Congress enacted section 211A, it made no changes to section 212(j) to reference section 211A in the EAct 2005, leaving section 212(j) as it stood in 1992. Both the plain language of the provisions and the timing of their enactments therefore contradict TVA’s claim that section 212(j) restricts Commission orders under section 211A.

Several additional factors support the Commission’s ability to issue—without restriction from section 212(j)—a section 211A transmission order as requested in this Petition. First, as noted above, section 212(j) makes clear that it applies only to “order[s] issued under section 824j

⁶⁸ 16 U.S.C. § 824k(j) (emphasis added).

⁶⁹ See *supra* note 63.

⁷⁰ See *W. Minn. Mun. Power Agency v. Fe*, 806 F.3d 588, 594 (D.C. Cir. 2015) (quotations omitted); see *Albany Eng’g Corp. v. FERC*, 548 F.3d 1071, 1075 (D.C. Cir. 2008).

[211] of this title.”⁷¹ Contrary to TVA’s assertions, section 211A is an entirely separate section of the FPA from section 211. Section 1231 of the EPOA 2005 explicitly amended the FPA by “inserting [section 211A] *after* section 211.”⁷² It did not place the text of section 211A within section 211. If it intended to do so, Congress could have included section 211A’s provisions in a new subsection 211(a) or something similar. Or Congress could have made clear that section 212(j) applied to section 211A as well. But Congress did neither, because it intended section 211A to expand access to transmission separately from section 211.

This clear distinction is apparent throughout the FPA whenever sections are listed. For example, section 201(b)(2) states that “[c]ompliance with any order or rule of the Commission under the provisions of section [203(a)(2), 206(e), 210, **211**, **211A**, 212, 215, 215A, 216, 217, 218, 219, 220, 221, or 222] of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission. . . .”⁷³ If 211A were subsumed within 211, there would be no need to list that section separately. Clearly, Congress knew to list both sections 211 and 211A when a given provision applied to both. That Congress declined to do so in section 212(j) emphasizes that difference between sections 211 and 211A.

Second, the plain language of section 211A confirms that it is separate from section 211. Section 211A(h) states that the provision of services under section 211A “does not preclude a request for transmission services under section 211 of this title.”⁷⁴ If section 211A were merely an extension of section 211, this internal reference would be extraneous. Congress’s clear decision to preserve an entity’s right to bring both 211 *and* 211A actions shows that Congress

⁷¹ 16 U.S.C. § 824k(j) (emphasis added).

⁷² EPOA 2005 at section 1231, Open Nondiscriminatory Access (emphasis added).

⁷³ 16 U.S.C. § 824(b)(2) (emphasis added).

⁷⁴ 16 U.S.C. § 824j-1(h).

considered them to be separate grants of power.

Third, when Congress intended to restrict Commission orders under section 211A, it expressly did so. Section 211A(b), which governs the Commission’s authority sought in this Petition, makes such authority “subject to section 824k(h) [212(h)] of this title. . . .”⁷⁵ Section 212(h) prevents the Commission from ordering retail wheeling or sham wholesale transactions and, by its very terms, *already applies to section 211*.⁷⁶ If section 211A were part of section 211, there would be no need to spell out this limitation. Further, if the Commission intended section 212(j) to apply to orders under section 211A, it could have made section 211A “subject to 212(j)” as well as section 212(h). To that end, when Congress wished to limit a section of the EAct 2005 by section 212(j), it did so. FPA section 217, which the EAct 2005 also added, specified in two places that its provisions were subject to 212(j): “Nothing in this subsection affects the requirements of section 824k(j) [212(j)]” and “[t]he Commission shall not issue an order on the basis of this subsection that is contrary to the purposes of section 824k(j) [212(j)].”⁷⁷ Section 211A does not contain any similar restriction or reference to section 212(j).

Fourth, the demarcation of these sections is appropriate, as sections 211 and 211A are procedurally and substantively distinct as well. Procedurally, section 211 permits an applicant to petition the Commission to compel a “transmitting utility” to provide wheeling services to the applicant.⁷⁸ Before the Commission issues an order, it must afford parties the opportunity of a

⁷⁵ 16 U.S.C. § 824j-1(b).

⁷⁶ *See id.*

⁷⁷ 16 U.S.C. § 824q(j)(2)-(3).

⁷⁸ 16 U.S.C. § 824j(a). “The term ‘transmitting utility’ means an entity (including an entity described in section 824(f) of this title) that owns, operates, or controls facilities used for the transmission of electric energy (A) in interstate commerce; (B) for the sale of electric energy at wholesale.” 16 U.S.C. § 796(23).

hearing and must make certain substantive findings.⁷⁹ In addition to transmission services, a section 211 order may also require the “enlargement of transmission capacity necessary to provide such services.”⁸⁰ As such, section 211 petitions are exclusively considered on a case-by-case basis and involve defined regulatory processes. By contrast, section 211A permits the Commission to compel an “unregulated transmitting utility” to provide transmission services.⁸¹ The Commission can broadly compel these services, and they are not necessarily limited to the entity bringing the action. For this reason, the Commission may either require such services by rule or by order.⁸² Further, the Commission’s authority under section 211A is entirely discretionary,⁸³ and the section does not dictate any specific procedures.

The two sections also have different standards for setting applicable transmission rates, terms, and conditions. Wheeling orders under section 211 allow the transmitting utility to set rates that recover its costs, and all such rates, terms, and conditions are held to a “just and reasonable, and not unduly discriminatory or preferential” standard that mirrors the standard for public utility rates, terms, and conditions under section 205 of the FPA.⁸⁴ Orders under section 211A require only that the unregulated transmitting utility provide transmission service (1) at rates that are comparable to those it charges itself and (2) on terms and conditions that are comparable and not unduly discriminatory or preferential.⁸⁵

⁷⁹ 16 U.S.C. § 824j(a).

⁸⁰ *See id.*

⁸¹ *See* 16 U.S.C. § 824j-1(b). For the definition of “unregulated transmitting utility,” *see supra* note 56.

⁸² *See* 16 U.S.C. § 824j-1(b).

⁸³ *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 95-96 (D.C. Cir. 2014) (“Congress’ use of the word ‘may’ in Section 211A plainly permits, but does not mandate, the Commission to require a nonpublic utility to provide transmission service on given terms.”).

⁸⁴ *See* 16 U.S.C. § 824k(a).

⁸⁵ *See* 16 U.S.C. § 824j-1(b).

The proximity of the two sections, as well as section 212, is simply the result of similar—but not identical—subject matter. A similar dynamic is evident elsewhere in the FPA, such as section 215 and 215A. They apply to similar and interrelated subjects—section 215 establishes the Commission’s jurisdiction over electric reliability matters, while section 215A establishes protections for critical electric infrastructure security—but they carry out distinct functions and operate independently of one another. Both sections 211 and 211A grant the Commission the ability to compel transmission service, but they do so in markedly different manners, employ different procedures, and apply to different defined entities.

Furthermore, it is clear from the EAct 2005’s legislative history and contemporaneous accounts leading up to its passage that section 211A was meant to apply to TVA. This application to TVA would be meaningless if it did not include transmission service to delivery points within the vast TVA service territory, especially when TVA already permits transmission to external load. The House Report on the bill that would become the EAct 2005 explained that section 7021—the future FPA section 211A—“grants FERC partial jurisdiction over the interstate transmission of currently non-regulated utilities (municipally-owned utilities, rural electric cooperatives, and *Federal utilities*) to improve the operation of competitive wholesale markets in interstate commerce.”⁸⁶ The report proceeded to identify the federal electric utilities as “Bonneville Power Administration, other Power Marketing Administrations, and the Tennessee Valley Authority.”⁸⁷

Testifying before Congress in support of the bill that would become the EAct 2005, then-FERC Commissioner William L. Massey conveyed his understanding that the proposed

⁸⁶ H. Rep. No. 108-65 (2003) at 171 (emphasis added).

⁸⁷ *Id.*

section 211A would open TVA transmission facilities to open access:

All interstate transmission should be provided under one set of open access rules. That means subjecting the transmission facilities of municipal electric agencies, rural cooperatives, the *Tennessee Valley Authority*, and the Power Marketing Administrations to the Commission's open access rules. These entities control a substantial share of the nation's electricity transmission grid. Their current non-jurisdictional status has resulted in a patchwork of rules that may hinder seamless electricity markets. Markets require an open non-discriminatory transmission network in order to flourish.

Section 7021 of the discussion draft *would allow the Commission to require open access service under a comparability standard by entities that are currently not covered under our open access rules*. I support the thrust of this provision.⁸⁸

Similarly, Deputy Secretary of Energy Kyle McSlarrow testified that “the [Bush] Administration supports efforts to ensure open access for all generators to the wholesale electricity grid” and stated that “the open access language in . . . the draft House bill is a desirable goal.”⁸⁹ In furtherance of this goal, he noted that “the **Tennessee Valley Authority** and the Power Marketing Administrations (PMA) should be an integral part of the national grid . . .”⁹⁰ Taken together, these accounts by officials tasked with carrying out the provisions of the EPAct 2005 confirm that section 211A's open access provisions were meant to include the TVA. Again, this expansion of the Commission's authority to TVA would be meaningless if it precluded delivery to load within the TVA Fence. These clear statements from Commission and Department of Energy officials noting before Congress that 211A should apply to TVA, as well as Congress's decision not to extend section 212(j)'s restrictions to 211A to blunt its coverage of TVA, further

⁸⁸ Comprehensive National Energy Policy: Hearings Before the House Subcomm. On Energy and Air Quality of the Comm. on Energy and Commerce, 108th Cong. at 49-50 (2003) (statement of Hon. William L. Massey, Commissioner, Federal Energy Regulatory Commission) (emphasis added).

⁸⁹ *Id.* at 31 (2003) (statement of Hon. Kyle McSlarrow, Deputy Secretary, U.S. Department of Energy).

⁹⁰ *Id.* (emphasis added).

underscore that Congress did not intend to exempt TVA from section 211A orders.

Given the clear distinction between FPA sections 211 and 211A and Congress's intent that section 211A apply to TVA, the restriction contained in section 212(j) does not apply to Commission orders issued under section 211A. Accordingly, the Commission is not legally barred from issuing an order requiring TVA to provide unbundled transmission service to Petitioners. To find otherwise would unduly restrict the broad reach of section 211A in a sizeable region of the country.

Following the EAct 2005's passage, the Commission set out to carry out its provisions. In Order No. 890, the Commission considered, but declined to adopt, a generic rule implementing section 211A.⁹¹ Instead, the Commission elected to apply section 211A's provisions on a case-by-case basis.⁹² The Commission instructed entities seeking transmission service from unregulated utilities to "file an application with the Commission seeking an order compelling the unregulated transmitting utility to provide transmission service that meets the standards of FPA section 211A."⁹³ Consistent with that direction, the Petitioners hereby submit this Petition for the Commission's consideration.

V. ARGUMENT

Section 211A authorizes the Commission to require an unregulated transmitting utility

⁹¹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119, at P 192 (Order No. 890), *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁹² *Id.* The Commission did, however, amend its regulations to place the burden of proof on applicants bringing section 211A proceedings against non-public utilities that have submitted acceptable safe harbor tariffs to "show why service under the safe harbor tariff is not sufficient and why an FPA section 211A order should be granted." *Id.* TVA does not have a safe harbor tariff on file with the Commission.

⁹³ *Id.*

like TVA to provide transmission service that has two general characteristics: (1) the rates must be comparable to those the unregulated transmission utility charges itself (*see* section V.A, below); and (2) the non-rate terms and conditions must be comparable to those which the utility offers itself and not unduly discriminatory or preferential (*see* sections V.B and V.C, below).⁹⁴ By generically denying transmission service to the LPCs' loads from otherwise eligible customers, and refusing to negotiate rates and terms for unbundled transmission service, TVA has demonstrably failed to abide by both of these statutory standards. TVA does not offer unbundled transmission service to the LPCs or their outside suppliers and therefore refuses to charge *any* rates for the service, comparable or otherwise. Similarly, by broadly denying transmission service from outside the TVA area to LPCs within its territory, TVA offers transmission service on terms and conditions that are not comparable to those under which TVA provides transmission services to itself, as TVA regularly uses its transmission facilities to serve the LPCs. This formal policy unduly discriminates against LPCs solely due to their geographic location, even though the LPCs and/or their outside suppliers are otherwise similarly situated to current and prospective TVA transmission customers.

Accordingly, Petitioners request that the Commission issue an order under FPA section 211A requiring TVA to provide unbundled transmission service to the LPCs and their suppliers at rates and on terms and conditions comparable to those TVA offers itself. Petitioners also ask that the Commission issue an order under FPA section 210 to formalize the interconnection arrangements between TVA and Petitioners and provide for interconnection service. Such an order would advance the public interest by allowing Petitioners to attain unbundled transmission to serve their retail loads, saving their ratepayers millions of dollars and utilizing interconnection

⁹⁴ 16 U.S.C. 824j-1(b).

and transmission facilities that already exist.

A. TVA Does Not Offer Transmission Service to LPCs or Outside Power Suppliers at Rates that Are Comparable to those TVA Charges Itself.

Under section 211A, the Commission may require TVA to provide transmission service at rates that are comparable to those TVA charges itself.⁹⁵ Petitioners are not seeking free transmission service from TVA, nor are Petitioners at this time objecting to a proposed unbundled transmission rate for access to TVA's system. To this point, TVA has refused to negotiate *any* rates for transmission service across its facilities to Petitioners, who hereby reserve their rights to object to any rates that TVA may offer. Petitioners simply request that the Commission require TVA to negotiate unbundled transmission service at rates and terms consistent with section 211A of the FPA.

B. TVA Does Not Offer Transmission Service to LPCs or Outside Power Suppliers at Terms and Conditions that Are Comparable to the Service TVA Offers Itself.

TVA similarly violates the second prong of the statutory standard in section 211A, as it does not offer transmission service at terms and conditions that are comparable to those the unregulated transmitting utility offers itself and that are not unduly discriminatory or preferential.⁹⁶

TVA operates one of the largest transmission systems in North America.⁹⁷ Yet, as a non-public utility under the FPA, TVA is not subject to regulation by the Commission as a public utility under FPA sections 205 and 206, and therefore does not have an Open Access Transmission Tariff ("OATT") on file with the Commission. TVA instead offers transmission

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *See* TVA Form 10-K at 20.

service under its Transmission Service Guidelines, which in many ways reflect the *pro forma* OATT.⁹⁸ The Transmission Service Guidelines differ from the *pro forma* OATT in at least one meaningful respect: they deny service to any outside power suppliers seeking to access load that will be consumed within TVA’s territory, *i.e.*, LPC load.⁹⁹ This prohibition was also contained in TVA’s recently affirmed Board Policy¹⁰⁰ and was reiterated in letters sent directly to certain Petitioners.¹⁰¹ TVA unjustifiably prohibits this service even though TVA derives approximately 92 percent of its total operating revenues from service to the LPCs, compared to the approximately one percent TVA earns from charges under the Transmission Service Guidelines and other sources.¹⁰² In other words, a vast majority of the transmission service TVA provides serves the LPCs. By denying service to any otherwise eligible customer seeking to serve LPC load, TVA does not offer service on comparable terms and conditions to those it offers itself, contrary to FPA section 211A.

The Transmission Service Guidelines deny service to LPC load via the definition of “Eligible Customers.” They generally provide that “[a]ny electric utility (including TVA and any power marketer), Federal power marketing agency, or any person generating electric energy for sale for resale is an Eligible Customer under the Guidelines.”¹⁰³ However, they go on to note that “such entity is not eligible for Transmission Service that the Commission is prohibited from

⁹⁸ TVA has not sought a declaratory order from the Commission granting safe harbor status to the Transmission Service Guidelines as a reciprocity tariff.

⁹⁹ Exhibit No. LPC-0009 at 10, section 1.15.

¹⁰⁰ *See* Exhibit No. LPC-0008.

¹⁰¹ *See* Exhibit No. LPC-0007.

¹⁰² TVA Form 10-K at 10-11.

¹⁰³ Exhibit No. LPC-0009 at 10, section 1.15.

ordering by Sections 212(f), 212(h), and **212(j)** of the Federal Power Act.”¹⁰⁴ As discussed above, FPA section 212(j) prohibits the Commission from issuing an order under section 211 requiring TVA to wheel power if such power will be consumed within the TVA area.¹⁰⁵ Thus, by denying service that the Commission could not order under section 212(j), the Transmission Service Guidelines prohibit any customer from acquiring transmission service if the transmitted power would be consumed within TVA’s territory. This provision categorically precludes any transmission service to serve LPC load, and in so doing, attempts to undercut Petitioners’ and other LPCs’ statutory rights under section 211A through a tariff that is not on file with the Commission.

TVA has recently reaffirmed this restrictive policy, underscoring that it will not entertain any discussions regarding unbundled transmission service. In response to demand letters from certain Petitioners requesting that TVA provide unbundled transmission service to the LPCs and/or their external power suppliers, the TVA Board convened on November 13, 2020 and formalized its policy to refuse to provide transmission service to entities seeking to serve LPC load.¹⁰⁶ The Board Policy states that, “after having carefully considered the issues raised by recent requests for unbundled transmission service to LPC load, the Board reaffirms TVA’s long-standing policy, which treats an entity requesting transmission to serve load within the area described in [FPA section 212(j)] as ineligible for service.”¹⁰⁷ After concluding that it would continue “denying requests for transmission service to serve load within the Fence,” the TVA

¹⁰⁴ *Id.* (emphasis added).

¹⁰⁵ *See* 16 U.S.C. § 824k(j).

¹⁰⁶ *See* Exhibit No. LPC-0007.

¹⁰⁷ Exhibit No. LPC-0008 at 2.

Board “direct[ed] staff to address service requests in a manner consistent with this policy.”¹⁰⁸

The Board Policy notes that “[t]he Transmission Service Guidelines do not prevent an LPC from terminating its wholesale power contract with TVA and choosing a new supplier,” but fails to mention that this termination right is meaningless if no power supplier can access LPC load that is islanded by TVA transmission facilities.¹⁰⁹

TVA echoed the Board Policy’s contents in its responses to certain Petitioners’ letters requesting unbundled transmission service. In these letters, TVA describes the November 13, 2020 TVA Board meeting and explains its resolution: “[T]he Board reaffirmed its longstanding policy on requests to use the TVA transmission system. . . . Under that policy, neither [the LPC] nor any entity seeking to supply [the LPC] is eligible to obtain transmission service from TVA to serve [the LPC’s] load.”¹¹⁰ TVA then erroneously claims that its Board Policy “is consistent with Congressional intent as expressed in the TVA Act and the Federal Power Act” and that “Section 211A of the FPA does not grant FERC any additional authority to order TVA to wheel power.”¹¹¹ Above, Petitioners have dispelled TVA’s specious claim that FPA section 211A does not permit service to LPC load, but TVA nevertheless seems emboldened by its errant reading of the statute, apparently believing it has license to deny to others the service it offers itself.

Therein lies the essence of Petitioners’ claim under section 211A; the predominant existing use of TVA’s transmission system is delivery from TVA’s generation resources or contracted outside suppliers to the LPCs. Through its Transmission Service Guidelines, formalized Board Policy, and correspondence with individual LPCs, TVA denies this very

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Exhibit No. LPC-0007 at 1, 3, 5.

¹¹¹ *Id.* at 2, 4, 6.

service to the LPCs and their outside power suppliers. This is not a matter of incomparable service; it is a wholesale denial of the exact type of service TVA primarily avails itself of, based entirely on a misguided, monopolistic, and protectionist reading of a statute passed to address this very issue.

Whether the power source is located inside or outside the Fence, the power deliveries will utilize existing transmission facilities that TVA has used for decades to deliver power to the LPCs, all of whom have loads within TVA's service territory. As the Ninth Circuit has explained, "Section 211A was designed to foster an open and competitive energy market by promoting access to transmission services on equal terms. This is evident from the language of the provision, which prevents anticompetitive behavior by utilities that seek to stifle competitors' generation through control over transmission."¹¹² TVA has formalized a policy that does exactly that: by controlling the only transmission facilities capable of serving the LPCs, TVA staves off any and all competition from other generators and power suppliers in the area. Not only does this completely obstruct the LPCs' access to other power suppliers, but renders meaningless the statutory 20-year term limit on TVA's Power Contracts and all expiration or termination provisions within those contracts. Currently, on the map of the country's open access territories, the only "white space" (*i.e.*, no open access) is the TVA footprint. This reality is inconsistent with the Commission's longstanding promotion of market forces and robust competition.

To this end, this proceeding is an appropriate forum for the Commission to exercise its powers under section 211A. The Commission has previously noted that it "does not take the exercise of [its] authority under FPA section 211A lightly."¹¹³ Acknowledging Congress's

¹¹² *Nw. Requirements Utils. v. FERC*, 798 F.3d at 808.

¹¹³ *Iberdrola Renewables, Inc. v. Bonneville Power Admin.*, 137 FERC ¶ 61,185, at P 32 (2011) (*Iberdrola*), *reh'g denied*, 141 FERC ¶ 61,233 (2012).

recognition that “open access is a fundamental tenet of electricity markets” and that “[c]lear and firm principles on open access give industry the confidence to invest in new generation resources,” the Commission explained that section 211A is “one statutory tool that Congress provided to ensure open access to transmission service at comparable and not unduly discriminatory or preferential rates, terms, and conditions.”¹¹⁴ In that proceeding, the Commission found that the Bonneville Power Administration’s (“Bonneville”) practice of favoring its own generators for curtailment purposes resulted in transmission service that was not comparable to the service it provided itself.¹¹⁵ The Commission exercised its statutory authority under section 211A to require Bonneville to revise its safe harbor reciprocity tariff to address the comparability concerns raised by Bonneville’s practices.¹¹⁶

Similar to Bonneville’s Environmental Redispatch Policy, TVA’s policy of denying unbundled transmission access to customers seeking to serve LPC load plainly favors its own generators over the power suppliers that could otherwise serve the LPCs’ supply needs. In fact, it does so to a far greater degree than the Bonneville policy that the Commission found unacceptable under section 211A. By denying this service entirely, TVA demonstrably fails to offer transmission service comparable to that it offers itself, which Congress sought to address in FPA section 211A. Accordingly, as it did in *Iberdrola*, the Commission should direct TVA to revise its formalized policies that deny comparable service to otherwise eligible facilities under section 211A. Doing so would satisfy the open access and competitive principles enshrined by Congress in section 211A and by the Commission in its rules and regulations.¹¹⁷

¹¹⁴ *Id.*

¹¹⁵ *Id.* PP 62-63.

¹¹⁶ *Id.* P 64.

¹¹⁷ *See, e.g.*, Order No. 888; Order No. 890.

C. TVA’s Transmission Service Policies Are Unduly Discriminatory, as Prospective Customers Seeking to Serve LPC Load Are Similarly Situated to TVA’s Transmission Customers.

Contrary to the requirements of section 211A, TVA also fails to offer, let alone provide, transmission service on terms and conditions that are not unduly discriminatory or preferential. TVA formally denies transmission service to prospective customers seeking to serve LPCs even though such customers are similarly situated to other prospective or current TVA transmission customers.¹¹⁸

As noted above, TVA offers transmission service under its Transmission Service Guidelines to Eligible Customers. Excluded from the definition of “Eligible Customers” are those seeking to serve load that will be consumed within the TVA Fence.¹¹⁹ Notably, TVA does not deny transmission service to customers seeking service across TVA facilities if such power originates and will be consumed outside of TVA’s territory. Accordingly, the only difference between eligible transmission customers and ineligible transmission customers is the location of their load. Because TVA is as operationally capable of serving load within its territory—it routinely does so on its own behalf—as it is transferring power across its facilities to and from external points, these transmission customers are similarly situated. TVA’s denial of service to those seeking to serve load in TVA’s territory is unduly discriminatory, unjustified by any material differences between customers, and necessitates remediation under section 211A.

In finding that Bonneville’s Environmental Redispatch Policy unduly discriminated against non-Bonneville generation resources, the Commission found that “non-Federal

¹¹⁸ See, e.g., *Iberdrola*, 137 FERC ¶ 61,185 at P 62 (finding that Bonneville unduly discriminated against similarly situated transmission customers, justifying an order under FPA section 211A).

¹¹⁹ See Exhibit No. LPC-0009 at 10, section 1.15.

renewable resources are similarly situated to Federal hydroelectric and thermal resources for purposes of transmission curtailments because they all take firm transmission service.”¹²⁰ TVA has not allowed entities seeking to serve LPC load to get that far, as it has summarily denied firm transmission service to such entities beyond the bundled service the LPCs currently receive. TVA’s refusal to deal is not transmission cost-related, as it has never engaged any of the Petitioners at any time to initiate discussions regarding potential transmission rates for the unbundled transmission service sought by the Petitioners.

Despite this blanket denial, Petitioners and/or entities seeking to serve their load are similarly situated to any other prospective TVA transmission customers. In establishing its intended approach to section 211A petitions, the Commission found that “[a] *potential customer* may file an application with the Commission seeking an order compelling the unregulated transmitting utility to provide transmission service that meets the standards of FPA section 211A.”¹²¹ In other words, section 211A complainants need not be current transmission customers of the unregulated transmission utility in question. To this end, Petitioners and/or the outside suppliers seeking to serve them are potential customers and have sought unbundled transmission service from TVA at reasonable, negotiated transmission rates. Petitioners are therefore similarly situated to any other potential customers that seek transmission across TVA’s lines. The only difference is the location of Petitioners’ load, which TVA is clearly capable of serving. This distinction does not merit differential treatment, as no operative legislation distinguishes TVA transmission customers on this basis and TVA already serves the LPCs using its extensive transmission facilities.

¹²⁰ *Iberdrola*, 137 FERC ¶ 61,185 at P 62.

¹²¹ Order No. 890 at P 192 (emphasis added).

First, TVA attempts to distinguish Petitioners by excluding from the definition of “Eligible Customer” all prospective customers seeking transmission service to LPC load.¹²² TVA does so by denying service that the Commission cannot order under section 212(j), *i.e.* service to the LPCs under section 211. However, this reference to section 212(j) is untethered to any statutory restriction on TVA. As noted above, section 211 and 211A were enacted by different congressional legislation that provides the Commission distinct sets of authority to compel transmission service. Neither the TVA Act nor the FPA prohibits TVA from providing transmission service to load within the TVA area. Section 212(j) prevents *the Commission* from issuing a wheeling order compelling transmission within the Fence under section 211, but nothing restricts TVA from providing such transmission service on its own initiative. TVA simply chooses not to, in order to maintain its monopoly and avoid competition with other power suppliers. The Transmission Service Guidelines’ definition of “Eligible Customer” is therefore an arbitrary distinction that does not reflect statutorily defined categories of transmission customers.¹²³

Second, TVA’s location-based distinction does not operationally distinguish Petitioners’ potential suppliers from other prospective transmission customers, as TVA is as capable of serving the LPCs as it is serving load external to its system. As noted above, the vast majority of

¹²² Exhibit No. LPC-0009 at 10, section 1.15.

¹²³ By insisting that the Transmission Service Guidelines’ definition of “Eligible Customer” precludes Petitioners’ transmission service requests and that “Section 211A of the FPA does not grant FERC any additional authority to order TVA to wheel power,” Exhibit No. LPC-0007 at 3, 6, 9, TVA impermissibly attempts to deny Petitioners their statutory rights under section 211A. As discussed in greater detail above, *see supra* section IV.B, section 211A is an entirely separate statutory grant of authority from section 211. Accordingly, the Transmission Service Guidelines’ prohibition on the type of service that the Commission is prevented from ordering under section 211 does not extend to section 211A. Nevertheless, by denying unbundled transmission service to Petitioners, TVA attempts to undermine Petitioners’ statutory rights under section 211A and supersede an applicable FPA provision by way of a tariff that is not subject to Commission oversight. The Commission should reject TVA’s attempt to do so.

current transmission activity on TVA's transmission system involves service to the LPCs.¹²⁴ TVA has served the LPCs' power supply and transmission needs for many years, and in furtherance of that relationship, TVA has constructed miles of transmission facilities dedicated to serving the LPCs. Some of these transmission facilities serve only one LPC, and would be rendered superfluous if the LPC were to terminate its Power Contract with TVA. Accordingly, TVA's transmission system is *designed* to serve the LPCs' load. TVA simply cannot justify denying unbundled transmission service to the LPCs on any operational basis.

The only justification TVA has offered for distinguishing between LPC load and external load is commercial. In its responses to certain LPCs' demand letters, TVA claims that it enacted its exclusionary policy to advance the spirit of FPA section 212(j).¹²⁵ TVA asserts that Congress enacted this provision to prevent outside power suppliers from "cherry-picking" TVA's customers by enlisting FERC's help to wheel power across TVA's transmission facilities to LPC load.¹²⁶ TVA states that FPA section 212(j) counteracts the TVA Act's restriction on TVA supplying power outside the Fence, which limits TVA's ability to seek additional load.¹²⁷ Implicit within this concern, however, is the recognition that TVA is charging the LPCs for power supply and transmission at rates that would not stand up to outside competition or Commission scrutiny. TVA's policy is formal acknowledgement that TVA's current rates grossly exceed those the LPCs would pay to outside suppliers and that LPCs would seek alternative suppliers if given the choice.

¹²⁴ See *supra* section V.B.

¹²⁵ Exhibit No. LPC-0007 at 1, 3, 5.

¹²⁶ *Id.*

¹²⁷ *Id.*

However, fear of worthy competition is not an acceptable justification to discriminate among customer classes. Indeed, it is the animating principle of the Commission’s open access policies,¹²⁸ and should apply equally to TVA here. To the extent TVA is correct that FPA section 212(j) operates in conjunction with the TVA Act to insulate TVA from outside competition, that protection is outdated and not reflective of the current industry landscape. The TVA Act was amended in 1959 to restrict TVA’s ability to supply power outside the Fence. FPA section 212(j) was enacted by the EAct 1992. In the intervening years, the Commission instituted open access and non-discriminatory transmission policies that prevent the precise exclusionary conduct TVA has codified in its Transmission Service Guidelines and Board Policy.¹²⁹ TVA now covers the only region of the country in which these open access principles are ignored.¹³⁰ As discussed above, Congress enacted FPA section 211A in the EAct 2005 for this very purpose: to fill in the various gaps created by the FPA’s jurisdictional provisions and extend open access transmission throughout the country.¹³¹

Furthermore, the Commission has implicitly rejected TVA’s claim that it is statutorily insulated from competition with external power suppliers. In the *East Kentucky* line of cases, discussed in greater detail below, an LPC, Warren Rural Electric Cooperative Corporation

¹²⁸ See, e.g., Order No. 888 at 21,541 (“Today the Commission issues three final, interrelated rules designed to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation’s electricity consumers. The legal and policy cornerstone of these rules is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce.”).

¹²⁹ See, e.g., *id.*

¹³⁰ See Exhibit No. LPC-0005, Affidavit of Elaine Johns, at P 17 (Johns Affidavit). Even governmental entities like Bonneville and the Lower Colorado River Authority observe open access policies and engage in partial requirements relationships with customers. *Id.*

¹³¹ See *supra* section IV.B. See also *Nw. Requirements Utils. v. FERC*, 798 F.3d at 808 (“[T]he statutory and historical context of the provision . . . places it as a recent step in the legislative and administrative effort to progressively open energy markets and level the playing field for generators.”).

(“Warren”), coordinated with an external supplier, East Kentucky Power Cooperative (“East Kentucky”), to build transmission facilities connected to East Kentucky’s system.¹³² East Kentucky sought and received a Commission order under section 210 requiring TVA to interconnect with East Kentucky’s planned facilities, over TVA’s objections.¹³³ In granting the interconnection order that would allow Warren to receive its power supply from an external supplier, the Commission found that interconnection “would encourage the conservation of energy and capital by providing Warren with access to more economical sources of power” and enable Warren to “purchase power at lower rates than they pay TVA.”¹³⁴ The Commission has therefore already determined that it has the authority to facilitate an LPC’s access to power supply outside the TVA Fence, despite TVA’s assertions to the contrary. Section 211A simply provides another avenue to this end.

Using that authority to require TVA to join all of its transmission-owning peers and offer unbundled transmission service to entities seeking to serve Petitioners would fulfill Congress’s intent and the Commission’s longstanding policy of encouraging competition in transmission service. It also would not strand transmission costs. Petitioners and/or the external suppliers seeking to serve the LPCs fully intend to pay a non-discriminatory and compensatory rate to utilize TVA’s transmission system. By opening its transmission system to power marketers and external utilities, TVA may significantly increase revenues related to providing distinct transmission service. As discussed in greater detail below, allowing Petitioners to utilize TVA’s transmission capacity to reach outside suppliers would save Petitioners tens of millions to

¹³² *E. Ky. Power Coop.*, 111 FERC ¶ 61,031, at PP 3-5, n.17 (2005) (*East Kentucky I*); *E. Ky. Power Coop.*, 114 FERC ¶ 61,035 (2006) (*East Kentucky II*).

¹³³ *East Kentucky I*, 111 FERC ¶ 61,031 at PP 37-38; *East Kentucky II*, 114 FERC ¶ 61,035 at PP 62-63.

¹³⁴ *East Kentucky II*, 114 FERC ¶ 61,035 at P 62.

hundreds of millions of dollars over a ten-year period.¹³⁵ These savings would be realized entirely by Petitioners' ratepayers, who, as TVA recognizes, inhabit some of "the most economically challenged areas of the country."¹³⁶

Accordingly, Petitioners respectfully request that the Commission utilize its authority under FPA section 211A to require TVA to provide unbundled and non-discriminatory transmission service to Petitioners. Aside from their geographic location, Petitioners and their potential suppliers are similarly situated to prospective and current TVA transmission customers that serve load off the TVA system. TVA's formal policy of denying transmission service to those seeking to serve LPC load is unduly discriminatory and preferential, in contravention of the Commission's open access and non-discrimination policies. Petitioners request that the Commission remedy this undue discrimination by requiring TVA to provide transmission service to Petitioners that is comparable to that which it offers itself.

D. TVA's Blanket Denial of Transmission Service Stifles Competition and Artificially Inflates Wholesale Power Rates in the Region.

By denying LPCs the ability to acquire power from external suppliers, TVA artificially traps LPCs in their existing full-requirements contractual relationships and eliminates any semblance of competition for TVA or bargaining power for the LPCs. As a result, power supply competition is nonexistent in the TVA area, TVA's bundled wholesale power prices continue to rise unchecked, and the LPCs' rights to terminate their Power Contracts are rendered meaningless. An order requiring TVA to provide unbundled transmission service under section 211A would help ameliorate these outdated, systemic issues.

¹³⁵ See *infra* section V.D.

¹³⁶ Exhibit No. LPC-0007 at 2, 4, 6.

TVA frequently advertises the lack of competition within its considerable geographic footprint. In its 2020 Form 10-K, TVA noted that it “provides electricity in a service area that is largely free of competition from other electric power providers.”¹³⁷ This lack of competition owes in part to FPA section 212(j)’s restriction on Commission wheeling orders under FPA section 211, but derives more substantially from the Transmission Service Guidelines’ prohibition on transmission service to LPCs, as reiterated in the Board Policy. As discussed in greater detail below, this lack of competition is reinforced by the lack of any feasible alternatives for LPCs than receiving their full requirements from TVA. In at least one instance, an external power supplier has attempted to build transmission facilities sufficient to serve an individual LPC, but abandoned the effort,¹³⁸ as constructing the necessary facilities is cost prohibitive, especially for LPCs located in the middle of TVA’s territory. This utter lack of competition has significant economic effects in the area. Rates paid by the LPCs to TVA for bundled requirements service have steadily risen in past years. Per the EIA, TVA’s Sales for Resale rate has increased approximately 9.76% from 2010 to 2019.¹³⁹

Given this steady increase, Petitioners have actively sought potential alternatives for more economic sources of power supply. In furtherance of this effort, Petitioners and their consultants at EnerVision, Inc. (“EnerVision”) have conducted analyses of the savings Petitioners could realize by engaging with external power suppliers while paying for unbundled transmission over TVA’s facilities. Using Petitioners’ historical TVA wholesale power invoices, EnerVision created a projected cost for each Petitioner based on the historical rates, TVA’s

¹³⁷ TVA Form 10-K at 21.

¹³⁸ *See E. Ky. Power Coop.*, 121 FERC ¶ 61,255 (2007).

¹³⁹ *See supra* note 5.

historical and projected resource mix, and public statements made by TVA staff regarding rate plans (“TVA Base Case”).¹⁴⁰ Because TVA provides only a bundled rate to the LPCs, this projected TVA rate encompasses costs for power supply, transmission, and ancillary services, along with additional services such as river management, regulatory authority, economic development, and others.¹⁴¹

To properly evaluate alternative wholesale providers’ proposals in an apples-to-apples comparison, EnerVision (1) applied rate reductions to account for the unique services TVA provides and the Power Contracts’ rate discounts, and (2) added specific costs to identify services that Petitioners would lose upon exit from TVA and would not transfer to the new provider, such regulatory compliance responsibilities, additional transmission costs to deliver power to the LPC territory, and payment in lieu of taxes costs that Petitioners would bear.¹⁴² EnerVision applied these changes to derive conservative savings estimates that gave the TVA Base Case as much benefit of the doubt as possible.¹⁴³

After applying these measures, EnerVision compiled an analysis of each available proposal to each individual Petitioner to estimate all-in costs, and ultimately savings, for moving from TVA to an alternate wholesale provider.¹⁴⁴ EnerVision set the term of each analysis at ten years, starting July 1, 2025, and adjusted savings for net present value (“NPV”) to 2025 dollars.¹⁴⁵ The analysis resulted in the following savings ranges, which are driven primarily by

¹⁴⁰ Johns Affidavit at 12.

¹⁴¹ *Id.*

¹⁴² *Id.*; see also Exhibit No. LPC-0005, Att. E-2, at 9 (Att. E-2).

¹⁴³ Att. E-2 at 9.

¹⁴⁴ Johns Affidavit at 3.

¹⁴⁵ *Id.*; see also Att. E-2 at 9. Each Petitioner individually received over ten proposals, and that list has been narrowed to less than five for each. *Id.*

the size and load profile of each Petitioner and its current costs to TVA:¹⁴⁶

Petitioner	Savings Range Low ¹⁴⁷	Savings Range High ¹⁴⁸
Athens Utilities Board	\$25 million	\$45 million
Gibson EMC	\$65 million	\$115 million
Joe Wheeler EMC	\$75 million	\$110 million
Volunteer Energy Cooperative	\$145 million	\$480 million

As these values show, TVA’s refusal to provide unbundled transmission service to Petitioners will cost them tens of millions to hundreds of millions of dollars over the next ten years.

Congress enacted section 211A to address this very problem. The Ninth Circuit has explained that “Section 211A was designed to foster an open and competitive energy market by promoting access to transmission services on equal terms.”¹⁴⁹ The court further noted that “the statutory and historical context of the provision . . . places it as a recent step in the legislative and administrative effort to progressively open energy markets and level the playing field for generators.”¹⁵⁰ Similarly, this exact problem was the impetus for Order No. 888 and the Commission’s requirement that transmission providers provide open access transmission service, because “market power through control of transmission is the single greatest impediment to competition.”¹⁵¹

¹⁴⁶ Att. E-2 at 9.

¹⁴⁷ In NPV 2025 dollars.

¹⁴⁸ In NPV 2025 dollars.

¹⁴⁹ *Nw. Requirements Utils. v. FERC*, 798 F.3d at 808.

¹⁵⁰ *Id.*

¹⁵¹ *New York v. FERC*, 535 U.S. 1, 10 (2002) (citing Notice of Proposed Rulemaking, FERC Stats. & Regs., Proposed Regs., 1988-1999, ¶ 32,514, p. 33,047, 60 Fed. Reg. 17662).

TVA has used its control over transmission service in the TVA region to avoid competing with wholesale power suppliers for decades, and its refusal to deal with the Petitioners' transmission service requests is emblematic of this restrictive policy. As noted above, in its newly reaffirmed Board Policy, TVA states that “[t]he Transmission Service Guidelines do not prevent an LPC from terminating its wholesale power contract with TVA and choosing a new supplier.”¹⁵² While that may be literally true, as the terms of the Transmission Service Guidelines do not explicitly prohibit termination of the Power Contracts, the effect of the Transmission Service Guidelines' blanket denial of unbundled transmission service to LPC load guarantees that LPCs cannot economically contract with external power suppliers.

Denial of access to TVA's transmission facilities leaves very few alternatives for LPCs dissatisfied with TVA's bundled rates. Primary among these is the construction of new transmission facilities from the power supplier directly to the LPC, which in many cases is not economically feasible. Building entirely new transmission facilities can be prohibitively expensive for each of the Petitioners (and the vast majority of LPCs), especially those that are not located near TVA's border with another transmission system. Further, the capital costs required to fund such construction could greatly reduce, if not eliminate the savings created by contracting with an external supplier. Finally, building transmission would result in duplicative transmission facilities, leaving some of TVA's transmission facilities unused or severely underutilized. The Commission has long sought to avoid such unnecessary and wasteful efforts to construct duplicative transmission facilities.¹⁵³ Allowing TVA to effectively require LPCs to

¹⁵² Exhibit No. LPC-0008 at 2.

¹⁵³ See, e.g., *City of Goose Creek, S.C. v. S.C. Pub. Serv. Comm'n*, 172 FERC ¶ 61,165, at PP 113-115 (2019) (agreeing with the applicant's assertion that directing transmission service to the applicant would “avoid the need for duplicative facilities and additional construction projects”); *East Kentucky II.*, 114 FERC ¶ 61,035, at P 33 (“the only alternative in this case appears to be for [applicant] to construct duplicative facilities needed to support voltages

pursue this option if they terminate their Power Contracts would clearly conflict with this longstanding Commission policy, especially when there are usable transmission facilities already in place, and where the transmission facilities' construction and continued operations are subsidized by the LPCs.

Further, even when LPCs *have* attempted to build duplicative transmission facilities despite the many obstacles, TVA has vigorously opposed their efforts. As noted above, one LPC, Warren, attempted to coordinate with an external supplier, East Kentucky, to build transmission facilities to reach East Kentucky's system.¹⁵⁴ In response, TVA opposed all aspects of East Kentucky's requested relief. Although the Commission ordered TVA under FPA section 210 to interconnect to East Kentucky's proposed transmission line to provide coordination and backup service, TVA prolonged the process by insisting upon compensation for inapplicable transmission service.¹⁵⁵ Facing the prospect of additional years of litigation, Warren eventually relented and opted to continue receiving its requirements from TVA.¹⁵⁶ To Petitioners' knowledge, no LPC but the City of Bristol, which is located on the edge of TVA's service territory, has successfully built its own transmission facilities in order to terminate its Power Contract with TVA and access power from an external supplier.

and provide backup power, even when such construction would seem to be inefficient and ignore the ability of EKPC to obtain such services under section 210(a)(1). We find this alternative to be unreasonable.”); *City of Corona, Cal. v. So. Cal. Edison. Co.*, 101 FERC ¶ 61,240, at P 31 (2002) (directing interconnection that would *inter alia* encourage conservation of energy or capital and optimize efficiency of facilities and resources). *See also* Exhibit No. LPC-0009 at 16, section 1.68 (“**Statement of TVA’s voluntary support of the nine transmission planning principles in FERC Order 890.**”) (emphasis added). The nine principles of Order No. 890 include “(1) Coordination – the process for consulting with transmission customers and neighboring transmission providers;...(5) Comparability – transmission plans must meet the specific service requests of transmission customers and otherwise treat similarly-situated customers (*e.g.*, network and retail native load) comparably in transmission system planning;... (8) Economic Planning Studies – study procedures must be provided for economic upgrades to address congestion or the integration of new resources, both locally and regionally...” Order No. 890-A at P 181.

¹⁵⁴ *See E. Ky. Power Coop.*, 121 FERC ¶ 61,255.

¹⁵⁵ *See, e.g., E. Ky. Power Coop.*, 116 FERC ¶ 61,072 (2006).

¹⁵⁶ *E. Ky. Power Coop.*, 121 FERC ¶ 61,255 at P 9.

As such, while TVA claims that LPCs can terminate their Power Contracts and seek outside suppliers, TVA has stymied the only potential alternative available to the LPCs that attempt to do so. TVA's claims are contradicted by both the economics of the alternatives as well as TVA's own actions. LPCs may have the contractual right to terminate their Power Contracts, but TVA's refusal to provide unbundled transmission service eliminates any feasible power supply options if the LPCs elect to do, and TVA has made every effort to thwart the few existing alternatives. In so doing, TVA has entirely frustrated the LPCs' termination rights under the Power Contracts and ensured its monopoly. This right is rendered meaningless without an alternative source of transmission to reach external power suppliers. As such, TVA's efforts have only cemented its control of transmission in the area and artificially increased the power supply prices that the LPCs and ultimately, their ratepayers, must pay.

Because FPA section 211A and the Commission's open access transmission policies were designed to address this scenario, Petitioners request that the Commission issue an order under section 211A to require that TVA provide unbundled transmission service to Petitioners.

E. TVA Must Formalize its Interconnection Arrangements with Petitioners to Facilitate Unbundled Transmission Service.

In order to facilitate the unbundled transmission service requested in this Petition, Petitioners respectfully request that the Commission issue an order under FPA section 210 formalizing the interconnection arrangements between TVA and Petitioners and providing for TVA's provision of interconnection service. While Petitioners' systems are already interconnected to TVA's transmission system, the interconnection/transmission arrangements are embedded in the Power Contracts that the LPCs seek to terminate. Taking unbundled transmission service from TVA will require that Petitioners exercise the termination options in their Power Contracts. Beyond these Power Contracts, Petitioners do not have an agreement

memorializing the details of their interconnections with TVA.

FPA section 210 provides that, upon the application of any “electric utility,”¹⁵⁷ the Commission may issue an order requiring “(A) the physical connection of . . . the transmission facilities of any electric utility, with the facilities of such applicant” and “(C) such sale or exchange of electric energy or other coordination, as may be necessary to carry out the purposes of any order under subparagraph (A).”¹⁵⁸

TVA is an electric utility subject to section 210.¹⁵⁹ Unlike section 211, no provision in the FPA exempts TVA from interconnection orders under section 210.¹⁶⁰ In fact, as noted above, the Commission has previously required interconnections to TVA’s system under section 210.¹⁶¹ Petitioners’ systems are already physically interconnected to TVA’s system and currently receive interconnection service from TVA, but this arrangement must be formalized if Petitioners terminate their Power Contracts. Pursuant to section 210, Petitioners therefore ask the Commission to issue an order under section 210 providing for the “sale or exchange of electric energy or other coordination” required to effectuate the existing physical interconnection between Petitioners’ and TVA’s systems.¹⁶² Doing so would allow Petitioners to avail themselves of the unbundled transmission service requested under section 211A.

¹⁵⁷ The FPA provides that the term “electric utility” “means a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy” 16 U.S.C. § 796(22)(A). Section 824(f) includes “a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year.” 16 U.S.C. § 824(f).

¹⁵⁸ 16 U.S.C. § 824i(a)(1).

¹⁵⁹ The FPA provides that “the term ‘electric utility’ includes the Tennessee Valley Authority.” 16 U.S.C. § 796(22)(B).

¹⁶⁰ *East Kentucky I*, 111 FERC ¶ 61,031, at P 20, n.17.

¹⁶¹ *See East Kentucky II*, 114 FERC ¶ 61,035 (issuing an order under section 210 directing TVA to interconnect its transmission system with an outside power supplier’s transmission system).

¹⁶² 16 U.S.C. § 824i(a)(1).

Section 210(c) outlines certain findings the Commission must make before issuing an interconnection order under section 210. The Commission must determine that any such order

(1) is in the public interest,

(2) would—

(A) encourage overall conservation of energy or capital,

(B) optimize the efficiency of facilities and resources, or

(C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies, and

(3) meets the requirements of section 824k [212] of this title.¹⁶³

Section 212 outlines various procedural requirements that must precede any section 210 order. If the Commission makes the required findings, it must first issue a proposed order setting a reasonable time for the parties to agree to terms and conditions to carry out the order.¹⁶⁴ These include the apportionment of costs between the parties and any compensation or reimbursement reasonably due to either.¹⁶⁵ The terms and conditions agreed to by the parties are then subject to the Commission's approval, and if the parties fail to agree, the Commission will prescribe the applicable terms and conditions in the final order.¹⁶⁶ Finally, section 212 contains additional limitations on section 210 interconnection orders that are not germane to this proceeding.

1. Ordering TVA to Provide Interconnection Service to Facilitate Section 211A Transmission Service Is in the Public Interest.

Issuing an interconnection order to enable section 211A unbundled transmission service serves the public interest by increasing competition, saving Petitioners and their ratepayers

¹⁶³ *Id.*

¹⁶⁴ 16 U.S.C. § 824k(c)(1).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

significant amounts of money, and utilizing existing interconnection and transmission facilities. The Commission has acknowledged that “the availability of transmission service (or increased flexibility to use transmission)” will generally “enhance competition in the market for power supplies over the long run because it will increase both the power supply options available to transmission customers (thereby benefitting their customers) and the sales options available to sellers.”¹⁶⁷ This, in turn, results in lower costs to customers.¹⁶⁸ The Commission accordingly found that “the public interest will be served” in such circumstances.¹⁶⁹ Here, an order requiring TVA to provide interconnection service to Petitioners would facilitate expanded transmission access under section 211A, resulting in the increased competition and lower rates that the Commission has traditionally acknowledged serve the public interest.

The Commission has made similar findings with respect to interconnections to TVA’s transmission system. In *East Kentucky I* and *II*, the Commission ordered TVA to interconnect to proposed East Kentucky transmission lines that would be built to serve Warren, an LPC.¹⁷⁰ As required by section 210(c), the Commission found that the interconnection would be in the public interest.¹⁷¹ More specifically, the Commission determined that “[t]he requested interconnections would encourage the conservation of energy and capital by providing Warren with access to more economical sources of power.”¹⁷² Further, “[a]s a result of the interconnection, Warren and its customers would be able to purchase power at lower rates than

¹⁶⁷ *Fla. Mun. Power Agency v. Fla. Power & Light Co.*, 65 FERC ¶ 61,125 at 61,615, *reh’g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994), *reh’g denied*, 74 FERC ¶ 61,006 (1996).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *East Kentucky I*, 111 FERC ¶ 61,031 at P 38; *East Kentucky II*, 114 FERC ¶ 61,035 at P 62.

¹⁷¹ *East Kentucky I*, 111 FERC ¶ 61,031 at P 38; *East Kentucky II*, 114 FERC ¶ 61,035 at P 62.

¹⁷² *East Kentucky II*, 114 FERC ¶ 61,035 at P 62.

they pay TVA.”¹⁷³ Finally, the Commission explained that an interconnection order “would optimize the use of existing facilities by allowing increased competition.”¹⁷⁴ Taken together, the Commission found that the public interest would be served by requiring TVA to interconnect to East Kentucky’s system.¹⁷⁵

As in the *East Kentucky* cases, Petitioners seek interconnection to TVA’s system in order to “access more economical sources of power” and allow Petitioners and their customers to “purchase power at lower rates than they pay TVA.”¹⁷⁶ As discussed above, Petitioners have determined that that they could collectively save up to \$750 million in NPV 2025 dollars over a ten year period by reaching outside power suppliers.¹⁷⁷ These savings would be realized by Petitioners’ retail customers, given Petitioners’ structure as not-for-profit municipal and cooperative utilities. Further, an interconnection order that facilitates Petitioners’ ability to acquire unbundled transmission service from TVA under section 211A would increase competition by allowing external power suppliers to vie for Petitioners’ business, lowering prices and enhancing services. The increased competition and reduced rates enabled by a section 210 interconnection order and accompanying section 211A order would demonstrably serve the public interest, as the Commission has previously found in a similar context.

2. Ordering TVA to Provide Interconnection Service Will Encourage Conservation of Energy and Capital and Enhance Efficiency.

In addition to serving the public interest, an interconnection order that enables transmission service under section 211A would encourage conservation of energy and capital

¹⁷³ *East Kentucky I*, 111 FERC ¶ 61,031 at P 38.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *East Kentucky II*, 114 FERC ¶ 61,035 at P 62; *East Kentucky I*, 111 FERC ¶ 61,031 at P 38.

¹⁷⁷ *See supra* section V.D.; Att. E-2 at 9.

and optimize efficiency of facilities and resources.

First, an interconnection order would encourage conservation of energy and capital by preserving Petitioners' resources and utilizing existing facilities. In *East Kentucky II*, the Commission found that an interconnection to TVA's system "would encourage the conservation of energy and capital" by providing an LPC "access to more economical sources of power."¹⁷⁸ As a direct result of interconnection, the LPC and its customers would obtain the interconnection services necessary to obtain transmission services over new transmission facilities, as well as purchase power at lower rates than TVA charges.¹⁷⁹ An interconnection order in this proceeding would facilitate Petitioners' ability to attain unbundled transmission services from TVA under section 211A and reach outside power suppliers. Petitioners would acquire power at much lower rates than those charged by TVA, reducing rates for its retail customers and preserving valuable capital.¹⁸⁰ Further, an interconnection order would ensure that Petitioners utilize existing transmission and interconnection facilities, which Petitioners have been paying for during the term of the Power Contracts, rather than wasting the energy and capital that building entirely new interconnection and transmission facilities would require. Accordingly, an interconnection order would encourage conservation of energy and capital.

Second, a section 210 order would optimize efficiency of facilities and resources by ensuring that existing interconnection and transmission facilities are put to use. In this proceeding, an interconnection order would merely formalize the existing interconnection arrangements between TVA and Petitioners that would otherwise terminate along with Petitioners' current Power Contracts. As such, an interconnection order would make use of

¹⁷⁸ *East Kentucky II*, 114 FERC ¶ 61,035 at P 62.

¹⁷⁹ *Id.*

¹⁸⁰ *See supra* section V.D.

physical interconnection facilities that are already in place. The order would avoid the costly construction of new, duplicative interconnection facilities. Further, the order would require that TVA provide interconnection service to Petitioners so that they may avail themselves of the unbundled transmission service required by the Commission under section 211A. This will ensure that service to Petitioners will make use of existing TVA transmission facilities, rather than requiring an external supplier to build its own transmission to reach Petitioners. Finally, as in *East Kentucky II*, “an order directing interconnection would . . . optimize the use of existing facilities by allowing increased competition”¹⁸¹ when Petitioners can satisfy their power supply needs via multiple power suppliers, rather than just TVA.

For these reasons, a section 210 interconnection order that formalizes interconnection arrangements between Petitioners and TVA, provides interconnection service to Petitioners, and facilitates unbundled transmission service under section 211A serves the public interest, encourages conservation of energy and capital, and optimizes efficiency of facilities and resources. Accordingly, Petitioners request that the Commission issue an order under section 210 if it elects to require TVA to provide Petitioners unbundled transmission service under section 211A.

VI. OTHER MATTERS

A. Identification of Violation of Regulatory Requirements (18 C.F.R. § 385.206(b)(1)).

Petitioners have identified the statutory violations committed by TVA in sections V.A., V.B., V.C., V.D., above. Specifically, TVA has violated the provisions of section 211A that prohibit non-comparable, unduly discriminatory or preferential service.

¹⁸¹ *East Kentucky II*, 114 FERC ¶ 61,035 at P 62.

B. Explanation of Violation (18 C.F.R. § 385.206(b)(2)).

Petitioners have explained the statutory violations committed by TVA in sections V.A., V.B., V.C., V.D., above. As described more fully in those sections, TVA, as the only transmission provider within its extensive service territory capable of serving Petitioners, has flatly refused to provide the type of transmission service it provides itself: service to the LPCs. TVA does not only fail to provide comparable service along these lines, it provides *no* service to LPCs or their prospective suppliers. Given its exclusive ownership of the transmission facilities in the area, LPCs are effectively powerless to seek transmission elsewhere.

C. Economic Interest Presented (18 C.F.R. § 385.206(b)(3)).

Absent a Commission order requiring TVA to provide transmission services to Petitioners on terms and conditions that are comparable to those it provides itself and that are not unduly discriminatory or preferential, Petitioners will be forced to pay TVA's excessive bundled full-requirements rates, or construct duplicative transmission facilities of their own, at tremendous cost. These economic impacts are discussed in greater detail in section V.D. of this Petition.

D. Financial Impact (18 C.F.R. § 385.206(b)(4)).

Petitioners have attempted to estimate the financial impact of a Commission order under section 211A versus the status quo in section V.D. above.

E. Practical Impact (18 C.F.R. § 385.206(b)(5)).

Failure to require TVA to provide transmission service to the LPCs and/or their prospective power suppliers would result in the LPCs (1) having to continue under the current arrangements, paying excessive bundled rates; (2) sign the New Power Contracts, whose unconscionable term and termination provisions are discussed in section III.C. above; or (3) build duplicative transmission facilities at great cost.

F. Other Pending Proceedings (18 C.F.R. § 385.206(b)(6)).

The issues presented in this Petition are not pending in any existing Commission proceeding or in any other forum in which Petitioners are parties.

G. Relief Requested (18 C.F.R. § 385.206(b)(7)).

Petitioners have described the relief they are requesting from the Commission in section VIII of this Petition.

H. Attachments (18 C.F.R. § 385.206(b)(8)).

Petitioners have listed the attachments and exhibits to this Petition in section VII of this Petition.

I. Other Processes to Resolve Complaint (18 C.F.R. § 385.206(b)(9)).

Petitioners have sent letters and made overtures to resolve this dispute for over a year. Representatives of each of the Petitioners have spoken to TVA representatives on multiple occasions, but TVA has flatly refused to discuss unbundled transmission service with the Petitioners. Given TVA's refusal to deal and Petitioners' limited statutory recourses, Petitioners did not attempt to use the Commission's Enforcement Hotline, Dispute Resolution Service, or other dispute resolution processes.

J. Notice (18 C.F.R. § 385.206(b)(10)).

A form notice is attached hereto as Exhibit No. LPC-0015.

K. Requests for Fast Track Processing (18 C.F.R. § 385.206(b)(11)).

Petitioners are not requesting Fast Track Processing at this time.

VII. EXHIBITS AND ATTACHMENTS

Exhibit No. LPC-0001 Affidavit of Eric T. Newberry Jr.

Attachment A-1 Resume of Eric T. Newberry Jr.

Exhibit No. LPC-0002 Affidavit of Daniel Rodamaker

Attachment G-1	Resume of Daniel Rodamaker
Exhibit No. LPC-0003	Affidavit of George B. Kitchens
Attachment J-1	Resume of George B. Kitchens
Exhibit No. LPC-0004	Affidavit of Roderick Blevins
Attachment V-1	Resume of Roderick Blevins
Exhibit No. LPC-0005	Affidavit of Elaine Johns
Attachment E-1	Resume of Elaine Johns
Attachment E-2	Supporting Workpaper of Enervision, Inc.
Exhibit No. LPC-0006	Demand Letters of Athens Utilities Board, Joe Wheeler EMC, and Gibson EMC
Exhibit No. LPC-0007	TVA Responses to Demand Letters of Athens Utilities Board, Joe Wheeler EMC, and Gibson EMC
Exhibit No. LPC-0008	TVA Board Policy
Exhibit No. LPC-0009	TVA Transmission Service Guidelines
Exhibit No. LPC-0010	Athens Utilities Board Power Contract
Exhibit No. LPC-0011	Gibson EMC Power Contract
Exhibit No. LPC-0012	Joe Wheeler EMC Power Contract
Exhibit No. LPC-0013	Volunteer Energy Cooperative Power Contract
Exhibit No. LPC-0014	New Power Contracts
Exhibit No. LPC-0015	Form Notice

VIII. RELIEF REQUESTED

For the foregoing reasons, Petitioners request that the Commission issue an order under FPA section 211A requiring TVA to provide unbundled transmission service to Petitioners and/or outside suppliers seeking to serve Petitioners' load at rates and on terms and conditions that are comparable to those under which TVA provides transmission services to itself and that

are not unduly discriminatory or preferential. To facilitate this unbundled transmission service, Petitioners request that the Commission issue an order under FPA section 210 requiring TVA to formalize its interconnection arrangements with Petitioners and providing interconnection service to Petitioners.

IX. CONCLUSION

Based on the foregoing, Petitioners respectfully request that the Commission grant the relief requested above.

Respectfully submitted,

/s/ William D. DeGrandis

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January 11, 2021

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rule of Practice and Procedure, I hereby certify that copies of the petition were served on the contacts for TVA as listed on the Commission's list of Corporate Officials.

Dated at Washington, D.C., this 11th day of January, 2021.

/s/ Nicholas J. Guidi
Nicholas J. Guidi