

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

Athens Utilities Board, <i>et al.</i>)	
Petitioners,)	
)	
v.)	Docket Nos. EL21-40-000
)	TX21-1-000
Tennessee Valley Authority)	
Respondent.)	

Response of Southern Alliance for Clean Energy

In this response, the Southern Alliance for Clean Energy (“SACE”) briefly addresses novel issues raised in the filings made by the Tennessee Valley Authority (“TVA”) on February 22¹ and March 9, 2021² in this proceeding.

I. Section 211A Applies to TVA as Written

In its Protest, TVA deploys various canons of statutory interpretation in an attempt to establish that Section 211A means less than what it says. TVA contends that a plain language reading of Section 211A conflicts with the TVA Act and FPA Sections 211 and 212(j). Because of these conflicts, the argument goes, the Commission should embrace a “harmonized” reading of Section 211A. Under TVA’s “harmonized” reading, Section 211A does not apply to transmission services the utility “has declined to offer,”³ nor to wheeling service at all. But TVA’s creative arguments cannot overcome the plain statutory language. The Supreme Court

¹ Protest, Answer, and Motion to Intervene of the Tennessee Valley Authority (Feb. 22, 2021) (“TVA Protest”).

² The Tennessee Valley Authority’s Response to Environmental Comments and Motion Seeking Leave to File (March 9, 2021) (“TVA Environmental Response”).

³ TVA Protest at 6.

instructs that “in interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . that a legislature says in a statute what it means and means in a statute what it says there.”⁴ When Congress enacted Section 211A, it gave the Commission a broad, discretionary authority to compel comparable and non-discriminatory transmission access from public power utilities. Section 211A does not distinguish between new or old services, and does not exclude wheeling from the scope of transmission services utilities may be required to provide. The Commission need not, and must not, read limitations into Section 211A that do not appear in statutory text.

A. *There is no conflict among the statutes in question*

Section 211A does not conflict with the TVA Act in any respect. TVA is a creature of federal law, and thus only has the authorities granted to it by statute. It is therefore unsurprising that TVA’s organic act gives it explicit authority to lease transmission capacity.⁵ Nor is it surprising that Congress vested TVA’s board with discretion to balance competing priorities. But, by authorizing TVA to lease capacity or vesting the Board with discretion, the TVA Act nowhere suggests that TVA is free to act in a manner that violates other federal laws, including Section 211A. In *Iberdrola*, the Commission rejected the Bonneville Power Administration’s (“Bonneville”) argument that its obligations under its organic acts and certain environmental laws defeated application of Section 211A. The Commission concluded that Section 211A was neither superior nor inferior to such laws but was

⁴ *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 – 54 (1992) (citations omitted).

⁵ 16 U.S.C. § 831k.

simply “among the statutory obligations that Bonneville must meet.”⁶ So here. Section 211A is neither superior nor inferior to the TVA Act but is among the statutory obligations that TVA must meet.

Nor does Section 211A render Section 212(j) superfluous. Section 212(j) applies to proceedings under Section 211, but not to proceedings under Section 211A. Sections 211 and 211A are discrete regulatory pathways. That is clear from the different structures of the two provisions,⁷ as well as the acknowledgement in Section 211A(h) that the two authorities may be separately applied against the same utility.⁸ Were that not clear enough, Section 212 instructs that it “shall not be construed as limiting or impairing any authority of the Commission under any other provision of law.”⁹ And yet, that is precisely what TVA urges the Commission to adopt: a construction of Section 212(j) that would “limit[] or impair[]” the Commission’s authority under Section 211A.

B. *TVA’s “harmonized” interpretation of Section 211A lacks any basis in statutory text*

After claiming that Section 211A conflicts with other statutes, TVA proposes its own “harmonized” interpretation. But like the conflicts it purports to avoid,

⁶ *Iberdrola Renewables et al. v. Bonneville Power Admin.*, 141 FERC ¶ 61,233 at P 31 & n.51 (2012).

⁷ As SACE explained in its initial comment, Sections 211 and 211A differ in material respects because they apply to different entities, employ different procedures, and authorize different remedies. Section 211 is an applicant-driven process in which the Commission acts in an adjudicative capacity, while Section 211A is a discretionary authority that allows the Commission to exempt entities from its scope on public interest grounds. Comment of Southern Alliance for Clean Energy at 7 (Feb. 22, 2021) (“SACE Comment”).

⁸ 16 U.S.C. § 824j-1(h).

⁹ 16 U.S.C. § 824k(e)(1).

TVA's "harmonized" interpretation lacks any basis in the text of the Federal Power Act.

First, TVA argues that Section 211A does not apply to a transmission service when "the public power entity has declined to offer such service."¹⁰ TVA explains that "section 211A authorizes the Commission to regulate rates, terms and conditions of transmission service that the TVA Board has already decided to provide, but does not authorize the Commission to require TVA to offer expanded transmission service."¹¹ But nothing in Section 211A turns on whether the transmission service at issue is one the utility has already chosen to provide to third parties. To the contrary, Section 211A's comparability standard turns on whether the service is provided on terms "comparable to those under which the unregulated transmitting utility provides transmission services *to itself*."¹² All that matters is how the service available to third parties compares to the service the utility provides itself. A hypothetical utility that denied transmission service entirely to third parties would not provide service comparable to what it provides itself and could not thereby exempt itself from Section 211A.

Further, Section 211A would provide the basis for Commission action in this proceeding even under TVA's atextual reading that Section 211A is limited to services "that the TVA Board has already decided to provide." The TVA Board has

¹⁰ TVA Protest at 6.

¹¹ *Id.* at 2.

¹² 16 U.S.C. § 824j-1(b)(2) (emphasis added).

already decided to provide point to point transmission service to third parties.¹³ The issue in this proceeding is that TVA is providing point to point service in a manner that unduly discriminates in favor of its own power marketing interests. Thus, even if it had a basis in the statutory text (which it does not), TVA's "new service" argument would not avoid the application of Section 211A.

TVA also argues that Section 211A does not apply to wheeling service at all.¹⁴ This argument also flies in the face of the statutory text. Had Congress intended to exclude a critical category of transmission service from Section 211A it would have said so. And, it surely would not have written Section 211A to apply broadly to "transmission services" without limitation. TVA's only argument to support its artificially narrow reading of Section 211A is that Section 211 contains several requirements that Section 211A does not.¹⁵ That Congress chose to include certain requirements in the applicant-adjudicative process created by Section 211 that it did not include in the discretionary, policymaking authority of Section 211A is unsurprising in itself, and falls far short of what would be required to impose limits to Section 211A that do not appear in its text.¹⁶

¹³ See Petition at 10 – 11 (*citing* TVA Transmission Guidelines included as Exhibit No. LPC-0009).

¹⁴ SACE addressed this argument in additional depth in its initial comment at 4 – 9.

¹⁵ TVA Protest at 37 – 38.

¹⁶ See also 16 U.S.C. § 824k(e)(1) (instructing that Section 211 "shall not be construed as limiting or impairing any authority of the Commission under any other provision of law").

II. TVA Has Failed to Substantiate the Claim that its Customers Will Be Harmed by Competition

TVA's policy argument rests on the claim that its remaining customers will be harmed by the departure of the petitioner LPCs. TVA asserts that "if the four Petitioners were to obtain wheeling and switch suppliers, over *\$3.3 billion* in costs would be shifted to the remaining LPCs and their retail customers through 2040."¹⁷ This claim directly contradicts recent statements by TVA leadership. TVA leadership stated in the second half of 2019 that it could lose up to 10-12% of load without significant financial impact.¹⁸ Yet now, in the context of litigation, TVA claims that a loss of just 3.6% of its load would entail "very significant cost shifts."¹⁹

Not only do the cost-shifting claims in TVA's Protest contradict these recent public statements, but TVA has provided no way to verify them. TVA Witness Reed explained that his calculations were based on Base Case and Load Loss forecasts performed by TVA.²⁰ But neither TVA's forecasts nor Mr. Reed's calculations based on those forecasts are publicly available. When it comes to cost shifts, TVA is simply asking the Commission to trust what it says now and not what it said eighteen months ago.

¹⁷ TVA Protest at 7 (emphasis in original).

¹⁸ SACE Comment at 21. TVA's CEO and CFO both stated that TVA could lose 10-12% or even up to 15-18% of load before there is a material impact on TVA's financials or a significant risk to the ability of TVA to hold rates flat. These statements were made at the TVA Board of Directors meeting on August 22, 2019 in Knoxville, Tennessee. Playback available online: <https://www.tva.com/about-tva/our-leadership/board-of-directors/meetings-archive/2019/08/22/default-calendar/tva-board-meeting---august-22-2019>.

¹⁹ TVA Protest at 41.

²⁰ TVA Protest, Exhibit TVA-001, Reed Affidavit at 5 – 8 ("Reed Affidavit").

The reason TVA offers for why it should be the lone utility exempt from open access requirements is that it is subject to “the Fence.” To be sure, the Fence has limited the geographic expansion of TVA’s service territory. But TVA has provided no information why the Fence would meaningfully constrain its response to LPCs terminating their full requirement contracts. For one, TVA would have at least five years to prepare for any loss of load. Given the age and inefficiency of its fossil fleet,²¹ five years would give TVA ample time to schedule the orderly retirement of its most inefficient units if necessary to offset lost load.²² Or, at a minimum TVA might reconsider its current proposal to construct 1,500 MW of *new* fossil fuel generation.²³ Second, the Fence does not prevent TVA from selling power to the nine utilities it had arrangements with in 1957. These nine utilities include some of the nation’s largest, including Entergy, Southern Company, Duke and Ameren.²⁴ TVA downplays this fact by observing that sales to these nine companies have comprised only 0.2% of its total power sales.²⁵ But the fact that TVA rarely avails itself of this option does not support its argument. Rather, it suggests that the Fence is not actually an operational constraint on TVA’s current power marketing, and that it cannot justify a departure from the Commission’s longstanding commitment to open access transmission service.

²¹ See SACE Comment at 16 – 18.

²² *Id.*

²³ See TVA, Paradise and Colbert Combustion Turbine Plants Draft Environmental Assessment (Feb. 2021), available at https://tva-azr-eastus-cdn-ep-tvawcm-prd.azureedge.net/cdn-tvawcma/docs/default-source/environment/tva-pct-ctt-draft-ea_012721ce7c1f4b-9224-4685-a17c-84af3ad7568b.pdf?sfvrsn=c0df9d02_5.

²⁴ Reed Affidavit at 3 – 4.

²⁵ *Id.*

III. Open Access Will Provide TVA's Transmission Customers with a Means to Achieve Their Environmental Goals

In Section 211A, Congress gave the Commission authority to require open access transmission service. Open access enables market competition and customer choice in wholesale power purchasing. Some wholesale purchasers may use that choice to lower their costs. Some may use that choice to pursue environmental objectives. And some may seek to do both through the procurement of low-cost renewables. By withholding transmission access, TVA prevents its customers from pursuing their clean energy objectives and exploring innovative market-driven solutions, as many corporate and municipal buyers have across the country.²⁶ That TVA does so is directly relevant to this proceeding, and is a consideration the Commission may weigh (along with other benefits of competition) in the exercise of its discretionary authority under Section 211A. In its March 9 filing, TVA sidesteps this legitimate concern and instead attempts to collapse all of the environmental intervenors' arguments into a single straw man.²⁷ But no one is arguing that the

²⁶ TVA touts its "Green Invest" program. TVA Environmental Response at 8 – 9. But the Green Invest program is not like the "green tariff" options that some utilities offer in regulated states. The Green Invest program does not allow subscribers to purchase renewable energy and therefore to realize the cost savings and price hedging associated with long term power purchasing. Rather, the Green Invest program is a voluntary surcharge program, in which subscribers pay an additional amount above standard TVA rates to fund TVA's own investment in renewable energy. That some companies have chosen to enroll in the program speaks to their commitment to clean energy, but not to the program's efficacy.

²⁷ TVA Environmental Response at 2 – 6.

Commission should act as TVA's environmental regulator or that it should oversee TVA's generation resource decisions.

Petitioners do not express an environmental motivation in their Petition. But that does not constrain what the Commission may consider in the exercise of its authority under Section 211A. Section 211A authorizes the Commission to require a utility to provide open access generally, not just to a requesting party.²⁸ It is therefore appropriate to consider the implications of open access for other customers that may use it to achieve environmental objectives – not just for these Petitioners. Certainly, TVA embraced this principle when it asked the Commission to look beyond the four Petitioners and to consider the economic implications of a broader group of LPCs shifting suppliers.²⁹

Motion for Leave to Respond

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure,³⁰ SACE moves for leave to answer and answers the filings made by the TVA on February 22³¹ and March 9, 2021.³² Although the Commission's procedural rules generally do not allow for answers to answers,³³ the Commission has accepted answers that facilitate the decisional process or aid in the explication of issues, and

²⁸ 16 U.S.C. § 824j-1(b).

²⁹ TVA Protest at 7.

³⁰ 18 C.F.R. §§ 385.212 & 385.213.

³¹ Protest, Answer, and Motion to Intervene of the Tennessee Valley Authority (Feb. 22, 2021) ("TVA Protest").

³² The Tennessee Valley Authority's Response to Environmental Comments and Motion Seeking Leave to File (March 9, 2021) ("TVA Environmental Response").

³³ 18 C.F.R. §§ 385.213(a)(2) & 385.713(d)(1).

has explained that it will accept answers that “assist[] in our decision-making process.”³⁴ SACE requests that the Commission accept this answer to clarify the record and address novel assertions of fact and law contained in TVA’s two recent filings.

Respectfully submitted,

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³⁴ *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116 at P 1 n.3 (2014), *pet. for review denied, Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015); *see also Algonquin Gas Transmission Co.*, 83 FERC ¶ 61,200 at p. 61,893 n.2 (1998) (accepting an answer in order to ensure “a complete and accurate record”), *order amending certificate*, 94 FERC ¶ 61,183 (2001); *Transwestern Pipeline Co.*, 50 FERC ¶ 61,211 at p. 61,672 n.5 (1990) (citing *Buckeye Pipe Line Co.*, 45 FERC ¶ 61,046 (1988)) (accepting answer “where consideration of matters sought [will be] addressed in the answer will facilitate the decisional process or aid in the explication of issues.”).

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a copy of the foregoing upon all parties on the official service list in this proceeding in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Washington, D.C., on this 15th day of March 2021.

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