IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Athens Utilities Board and Gibson Electric Membership Corporation,	)	
Petitioners	)	
v.	)	**Case No. _____**
Federal Energy Regulatory Commission,	)	
Respondent.	)	

PETITION FOR REVIEW

Pursuant to Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b), Rule 15 of the Federal Rules of Appellate Procedure, and Circuit Rule 15, Athens Utilities Board and Gibson Electric Membership Corporation ("Petitioners") hereby petition the Court for review of the following orders issued by the Federal Energy Regulatory Commission ("Commission"):

1. *Athens Utilities Board, et al. v. Tennessee Valley Authority*, Order on Petition, 177 FERC ¶ 61,021 (2021) ("October 21 Order"); and
2. *Athens Utilities Board, et al. v. Tennessee Valley Authority*, Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, 177 FERC ¶ 62,162 (2021) ("December 23 Notice").

Copies of the October 21 Order and December 23 Notice are attached hereto as Exhibit A and Exhibit B, respectively.

On October 21, 2021, the Commission issued the October 21 Order, which denied Petitioners' January 11, 2021 Complaint and Petition for Order under Federal Power Act Sections 210 and 211A Against Tennessee Valley Authority, without reasoned explanation. Petitioners timely sought rehearing of the October 21 Order on November 22, 2021, pursuant to 16 U.S.C. § 825*l*(a). The Commission thereafter issued the December 23 Notice on December 23, 2021, which did not address the substance of Petitioners' request for rehearing or establish additional processes. Pursuant to 16 U.S.C. § 825l(a) and this Court's decision in *Allegheny Defense Project, et al., v. FERC*, 964 F.3d 1 (D.C. Cir. 2020), Petitioners' request for rehearing was therefore deemed denied on December 23, 2021. With this Petition for Review, Petitioners timely seek review of the October 21 Order and December 23 Notice.

In accordance with Circuit Rule 26.1, Petitioners submit their Corporate Disclosure Statements contemporaneously with this Petition for Review.

Respectfully submitted,

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Dated: February 18, 2022

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Athens Utilities Board and Gibson Electric Membership Corporation,	)	
Petitioners	)	
v.	)	**Case No. _____**
Federal Energy Regulatory Commission,	)	
Respondent.	)	

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Athens Utilities Board declares that it is a not-for-profit municipal utility owned by the city of Athens, Tennessee, which provides electric, gas, water, and wastewater services to the cities of Athens, Englewood and Niota, Tennessee, as well as surrounding rural areas. Athens Utilities Board has no parent corporation, no corporation owns any portion of Athens Utilities Board, and Athens Utilities Board is not a subsidiary or affiliate of any publicly owned corporation.

Gibson Electric Membership Corporation ("Gibson EMC") declares that it is a not-for-profit distribution cooperative that provides electric power to Crockett,

Dyer, Gibson, Haywood, Lake, Lauderdale, Obion, and Madison counties in West Tennessee, and Carlisle, Fulton, Graves, and Hickman counties in West Kentucky. Gibson EMC has no parent corporation, no corporation owns any portion of Gibson EMC, and Gibson EMC is not a subsidiary or affiliate of any publicly owned corporation.

Respectfully submitted,

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Counsel for Athens Utilities Board and Gibson Electric Membership Corporation

Dated: February 18, 2022

CERTIFICATE OF SERVICE

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure and Circuit Rule 15, I hereby certify that I have this 18th day of February, 2022, served copies of the foregoing Petition for Review and Corporate Disclosure Statement via email upon the Secretary of the Federal Energy Regulatory Commission ("Commission"), the Solicitor of the Commission:

Robert H. Solomon, Solicitor
Federal Energy Regulatory Commission
Email: Robert.solomon@ferc.gov

and by email on all parties on the Commission's service list in the underlying proceeding in Docket Nos. EL21-40-000 and TX21-1-000. (Service lists are attached as Exhibit C).

/s/ William D. DeGrandis
William D. DeGrandis

EXHIBIT A

177 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION necessarily

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Athens Utilities Board	Docket Nos. EL21-40-000
Gibson Electric Membership Corporation	TX21-1-000
Joe Wheeler Electric Membership Corporation	
Volunteer Energy Cooperative	
v.	
Tennessee Valley Authority	

ORDER ON PETITION

(Issued October 21, 2021)

1. On January 11, 2021, Athens Utilities Board (Athens), Gibson Electric Membership Corporation (Gibson), Joe Wheeler Electric Membership Corporation (Joe Wheeler),[1] and Volunteer Energy Cooperative (Volunteer Energy) (collectively, Petitioners), a group of not-for-profit municipal and cooperative distribution utilities, located in the Tennessee Valley Authority's service territory, filed a request seeking a Commission order requiring TVA to provide transmission service under section 211A[2] of the Federal Power Act (FPA) and interconnection service under section 210 of the FPA.[3] As discussed below, we exercise our discretion under section 211A and decline to order unbundled transmission service to Petitioners. We also dismiss the request for interconnection under section 210 as moot.[4]

[1] On August 30, 2021, Joe Wheeler filed a notice of partial withdrawal of petition, seeking to withdraw its participation from the petition and indicating that it has reached an agreement on a new power supply arrangement with the Tennessee Valley Authority (TVA). Pursuant to Rule 216(b) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.216(b) (2020)), Joe Wheeler is no longer a petitioner in this proceeding.

[2] 16 U.S.C. § 824j-1.

[3] 16 U.S.C. § 824i.

[4] Petitioners also request relief pursuant to 306, 307, 308, and 309 of the FPA, 16 U.S.C. §§ 825e, 825f, 825g, and 825h. As discussed below, we deny these requests.

I. Background

A. Petitioners

2. Athens is a not-for-profit organization owned by the City of Athens, Tennessee, originally incorporated in 1939, that provides electric, gas, water, and wastewater services to the Cities of Athens, Englewood, and Niota, Tennessee as well as surrounding rural areas, serving more than 13,000 commercial and residential customers with over 500 miles of distribution line.[5]

3. Gibson is a member-owned, not-for-profit cooperative that provides electric power to Crockett, Dyer, Gibson, Haywood, Lake, Lauderdale, Obion, and Madison counties in west Tennessee, and Carlisle, Fulton, Graves, and Hickman counties in west Kentucky, and serves approximately 39,000 commercial and residential customers on over 3,500 miles of transmission line.[6]

4. Volunteer Energy 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, providing service to more than 120,000 commercial and residential members on upwards of 10,000 miles of transmission and distribution lines.[7]

B. TVA

5. The Tennessee Valley Authority Act of 1933 (TVA Act)[8] created TVA as a corporate agency and instrumentality of the United States. TVA's duties are broad and "relate to navigability, flood control, reforestation, [the proper use of] marginal lands, and agricultural and industrial development of the whole Tennessee Valley."[9] Among other activities, TVA has been authorized from its inception to produce, distribute, and sell electric power.[10] In furtherance of this function, the TVA Act enables TVA to sell the

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[5] Petition at 7.

[6] *Id.* at 7-8.

[7] *Id*.

[8] 16 U.S.C. § 831 *et seq.*

[9] *See United States ex rel. TVA v. Welch*, 327 U.S. 546, 553 (1946).

[10] 16 U.S.C. § 831d(l).

surplus power not used in its operations[11] and to construct, purchase, and operate transmission lines within transmission distance from the place where generated, and to interconnect with other systems.[12] TVA must give preference to states, counties, municipalities, and cooperative organizations of citizens or farmers organized for the purpose of supplying electricity to their own citizens or members.[13] The TVA Board of Directors (TVA Board) has express authorization to establish the rates for the electricity that TVA will charge.[14] TVA is the third largest generator of electricity and delivers its power over the second largest transmission system in the nation.

6. In 1959, Congress amended the TVA Act to authorize TVA to self-finance its projects through revenue bonds. Congress also included a geographic area limitation (Fence) provision in section 15d(a) of the TVA Act, which precludes TVA from being "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."[15] More specifically, TVA, with very limited exceptions, is prohibited from selling or delivering power to customers outside the area for which TVA was the primary source of power on July 1, 1957.

7. The 1959 amendment authorized TVA to self-finance through revenue bonds, capped at $30 billion.[16] Section 15d(f) of the TVA Act directs TVA to charge rates that will produce gross revenues sufficient to enable it to meet all of its obligations, while at the same time keeping rates as low as feasible.[17] TVA is required to direct all of its activities towards the physical, social, and economic development of the region it

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[11] 16 U.S.C. § 831i.

[12] 16 U.S.C. § 831k.

[13] 16 U.S.C. § 831i. The TVA Act limits the terms of power contracts that TVA may execute with customers to 20 years. *Id*.

[14] 16 U.S.C. § 831c(g)(1)(L).

[15] 16 U.S.C. § 831n-4(a). There are currently nine such exchange partners. A federal Consent Order dictates the particulars of TVA's sales outside of the Fence. *See Alabama Power Co. v. Tenn. Valley Authority*, No. CV-97-C-0885-S (N.D. Ala. 1997).

[16] 16 U.S.C. § 831n-4(a).

[17] 16 U.S.C. § 831n–4(f).

serves,[18] and Congress provided that the TVA Act should be liberally construed to effectuate these purposes.[19]

8. As an instrumentality of the United States, TVA is not a "public utility" under the terms of the FPA and is therefore not subject to Commission regulation under sections 205 or 206 of the FPA.[20] However, TVA is explicitly classified as an "electric utility" under the FPA,[21] and is therefore subject to Commission orders under sections 210, 211,[22] and 212,[23] among others. TVA is also an "unregulated transmitting utility" under section 211A.[24]

C. Relevant Statutes

9. With respect to Commission wheeling orders directed under section 211, the FPA places two limitations on the Commission's ability to order wheeling to or from TVA. First, under section 212(f),[25] Congress prohibited the Commission from ordering wheeling that would allow TVA power to be sold outside the Fence, in violation of TVA Act section 15d(a). Second, section 212(j) provides that:

> With respect to an electric utility which is prohibited by Federal law from being a source of power supply, either

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[18] 16 U.S.C. § 831n-4(h).

[19] 16 U.S.C. § 831dd.

[20] 16 U.S.C. §§'s 824(f), 824d, 824e.

[21] 16 U.S.C. § 796(22)(A) ("The term 'electric utility' means a person or Federal or State agency . . . that sells electric energy"); *see also* 16 U.S.C. § 796(22)(B) ("The term 'electric utility' includes the Tennessee Valley Authority and each Federal power marketing administration.").

[22] 16 U.S.C. § 824j.

[23] 16 U.S.C. § 824k.

[24] Section 211A(a) states that "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." 16 U.S.C. §824j-1(a). Section 824(f) includes the "United States, State, Political Subdivision of a State, or Agency or Instrumentality Thereof." 16 U.S.C. § 824(f).

[25] 16 U.S.C. § 824k(f).

> 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 . . . 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.[26]

Section 212(j) is sometimes referred to as the Anti-Cherry-picking Amendment and provides that the Commission may not compel TVA to wheel power if such power will be consumed within the Fence.

10. Section 211A, titled Open Access by Unregulated Transmitting Utilities**,** was enacted as part of the Energy Policy Act of 2005 (EPAct 2005). Section 211A(b), Transmission Operation Services, provides that:

> Subject to section 212(h), 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.[27]

Commission action under section 211A is discretionary. The Commission has exercised its discretion to invoke section 211A once, in *Iberdrola Renewables, Inc v. Bonneville Power Administration*.[28]

D. Petition

11. Petitioners state that they currently purchase their full power supply and delivery requirements from TVA under bundled full requirements power supply contracts (Power

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[26] 16 U.S.C. § 834k(j).

[27] 16 U.S.C. § 824j-1(b).

[28] 137 FERC ¶ 61,185 (2011), *order on reh'g,* 141 FERC ¶ 61,233 (2012) (*Iberdrola*), *appeal dismissed sub nom. Nw. Requirements Utilities*, 798 F.3d 796 (9th Cir. 2015) (*Nw. Requirements*).

Contracts) signed between 1975 and 1979 and last amended between 1997 and 2000.[29] Petitioners assert that they seek unbundled transmission service from TVA, the only transmission provider that can feasibly serve them, in accordance with the Commission's longstanding open access principles.[30] Petitioners argue that they 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 to their retail members/customers.[31]

12. Petitioners note that the rates they pay under the Power Contracts have steadily risen in past years, approximately 9.76% from 2010 to 2019.[32] Petitioners state that the new power supply contracts TVA has begun to offer to all 153 Local Power Companies (LPC)[33] in its service territory contain rolling 20-year terms that renew each year and permit termination only upon 20 years' notice.[34] Petitioners explain that they have elected not to sign the new power contracts because they are dissatisfied with the excessive bundled rates paid under the existing Power Contracts and are unwilling to submit to the provisions of the new power contracts, which they deem draconian.

13. Petitioners state that, because TVA owns all of the transmission facilities capable of serving their loads, and because no individual Petitioner is particularly close to TVA's interface with another transmission system, no LPC can feasibly reach an external supplier without transmission service across TVA lines short of taking the very expensive and duplicative step of constructing its own transmission lines.[35] Petitioners point out

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[29] Petition at 7-9.

[30] *Id*. at 2. Petitioners state that their existing power contracts have 20-year terms with 5-year evergreen clauses, but permit Petitioners to terminate their contractual relationships with TVA upon 5-year's notice.

[31] Petition at 5. Petitioners argue that allowing Petitioners to utilize TVA's transmission capacity to reach outside suppliers would save them tens of millions to hundreds of millions of dollars over a 10-year period. *Id*. at 38-39. Petitioners state that they and their consultants, EnerVision, Inc., have conducted analyses producing savings ranges of $25 million to $480 million for different Petitioners. *Id*. at 42.

[32] *Id*. at 2-3.

[33] LPCs include Petitioners as well as not-for-profit municipal and cooperative distribution utilities that TVA serves.

[34] Petition at 3.

[35] *Id*.

that TVA has nevertheless made it clear in its Transmission Service Guidelines,[36] in a newly restated TVA Board policy (Board Policy), and in letters directly to Petitioners that it would not provide unbundled transmission service across TVA transmission facilities to enable alternative power suppliers to serve LPC loads under any circumstances.

14. Petitioners argue that TVA's outright refusal to provide unbundled transmission service to Petitioners effectively locks them into TVA's excessive bundled rates and precludes Petitioners' from seeking any meaningful supply alternatives.[37] According to Petitioners, TVA has created a supply monopoly within its considerable footprint that stifles all competition, and 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.[38]

15. Petitioners assert that the spirit and benefit of competitive markets are lost by TVA nominally allowing termination, yet in practice only allowing that termination by the forced duplication of the existing TVA transmission system, whose construction and continued operations Petitioners have subsidized.[39] Moreover, Petitioners argue that, even when LPCs have attempted to build duplicative transmission facilities despite the many obstacles, TVA has vigorously opposed their efforts.[40]

16. Petitioners argue that avoidance of duplicating bulk transmission systems was a fundamental premise to the Commission's promotion of open access policies.[41] Petitioners further argue that granting the petition would satisfy Congress' goal of "foster[ing] an open and competitive energy market by promoting access to transmission

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[36] TVA's Transmission Service Guidelines provide the terms and conditions by which any Eligible Customer can obtain transmission service "determined by TVA to be in excess of its needs to use [the TVA system] to carry out its statutory responsibilities to provide an ample supply of power to the TVA area at the lowest feasible cost in accordance with the TVA Act." Petition at Ex. No. LPC-0009 at 9.

[37] *Id*. at 3-4.

[38] *Id*. at 4.

[39] *Id*. at 12.

[40] *Id*. at 44.

[41] *Id*. at 4.

services on equal terms,"[42] and align with the Commission's traditional promotion of open access and robust competition.[43]

17. Petitioners state that they are not seeking free access to TVA's transmission system but merely comparable transmission service to that which TVA offers itself, from the only transmission provider that is capable of serving Petitioners' loads. They explain that the requested service would allow Petitioners to manage their own power supply while avoiding stranded transmission costs to TVA, as Petitioners would remain TVA customers.[44] Petitioners add that they 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 that 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.[45] Petitioners add that, because TVA is as operationally capable of serving load within its territory as it is transferring power across its facilities to and from external points, these transmission customers are similarly situated and 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.[46]

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[42] *Id*. at 4 n.9 (citing *Nw. Requirements*, 798 F.3d 796, 808).

[43] *Id*. at 4 n.10 (citing *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 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)).

[44] *Id*. at 5-6.

[45] *Id*. at 6. Petitioners further state that, on the map of the country's open access territories, the only "white space" (i.e., no open access) is the TVA footprint. *Id*. at 30.

[46] *Id*. at 33.

18. Petitioners argue that, by failing to offer any rate for transmission service to LPCs and thereby not offering rates, terms, or conditions that are comparable to that which TVA provides to itself, TVA has failed to abide by the statutory standards of section 211A.[47]

19. Petitioners argue that the essence of their claim is that the predominant existing use of TVA's transmission system is delivery from TVA's generation resources or contracted outside suppliers to the LPCs but that TVA denies this service to LPCs.[48] Citing to *Iberdrola*, Petitioners argue that, similar to Bonneville's Environmental Redispatch Policy, which the Commission found favored Bonneville's own generators for curtailment purposes and resulted in transmission service that was not comparable to the service it provided itself, TVA's policy of denying unbundled transmission access to customers seeking to serve LPC load favors its own generators over the power suppliers that could otherwise serve the LPCs' supply needs.[49]

20. Petitioners argue that *Iberdrola* also supports their argument that Petitioners are similarly-situated to external transmission customers that TVA serves. As in *Iberdrola*, where the Commission found that non-Federal renewable resources are similarly situated to Federal hydroelectric and thermal resources for purposes of transmission curtailments because they all take firm transmission service,[50] Petitioners argue that they and/or entities seeking to serve their load are similarly situated to any other prospective TVA

[47] *Id*. at 26. Petitioners further argue that in prohibiting customers, pursuant to its Transmission Service Guidelines, from acquiring transmission service if the transmitted power would be consumer within TVA's territory, TVA 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. *Id*. at 29.

[48] *Id*. at 30. Petitioners add that TVA unjustifiably prohibits service to LPCs even though TVA derives approximately 92% of its total operating revenues from service to the LPCs, compared to the approximately 1% TVA earns from charges under the Transmission Service Guidelines and other sources. *Id*. at 28 n.102.

[49] *Id*. at 32.

[50] *Iberdrola*, 137 FERC ¶ 61,185 at P 62.

transmission customers.[51] Petitioners further argue that *East Kentucky* demonstrates that TVA is not statutorily insulated from competition with external power suppliers.[52] Petitioners state that, in that case, the Commission granted an interconnection order under section 210 that would allow an LPC to receive its power supply from an external supplier, and that, in doing so, the Commission has already determined that it has the authority to facilitate an LPC's access to power supply outside the TVA Fence and that section 211A simply provides another avenue to this end.[53]

21. Petitioners state that it is notable that, although the TVA Act clearly prohibits TVA and LPCs from serving as power supplier 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.[54]

22. Petitioners argue that Congress enacted section 211A to fill in the various gaps created by the FPA's jurisdictional provisions and extend open access transmission throughout the country. Petitioners assert that the legislative history of EPAct 2005 demonstrates that section 211A's open access provisions were meant to include TVA.[55] In support, Petitioners point to statements made in the Congressional Record.[56]

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[51] Petition at 34.

[52] *Id*. at 37-38 (citing *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*) (jointly, *East Kentucky*)).

[53] *Id*. at 38.

[54] *Id*. at 15.

[55] *Id*. at 23-25 (citing H. Rep. No. 108-65 (2003) at 171. Petitioners state that the House of Representatives Report on the bill that would become the EPAct 2005 explained that section 7021—the future 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" and that the report proceeded to identify the federal electric utilities as "Bonneville Power Administration, other Power Marketing Administrations, and the Tennessee Valley Authority").

[56] Petition at 18 n.67 (citing S. Rep. No. 109-78, at 49 (June 9, 2005) (asserting that Congress' intent was "to authorize FERC to require unregulated transmitting utilities to provide open access to their transmission systems.") and 151 Cong. Rec. S7465 (daily ed. June 28, 2005) (statement of Sen. Kyl); *see also* statement of Sen. Kyl submitted Nov. 25, 2003, S15903 ("the Energy bill expands jurisdiction over those stakeholders in

Petitioners also point to the United States Court of Appeals for the Ninth Circuit's (Ninth Circuit) statement in *Nw. Requirements* that "[s]ection 211A extended FERC's jurisdiction over discrimination in electricity transmission to 'unregulated transmitting utilities,' including government agencies."[57]

23. Petitioners argue that the Commission is not precluded from issuing an order under section 211A by section 212(j),[58] which Petitioners deem inapplicable, asserting that it only restricts Commission wheeling orders issued under section 211,[59] and they do not seek a Commission order under section 211.[60] In support, Petitioners note that section 211 was amended in its current form as part of the Energy Policy Act of 1992 (EPAct 1992) and that Congress simultaneously included section 212(j) in EPAct 1992 to limit the Commission's authority to order wheeling under section 211, while section 211A was enacted later, as part of EPAct 2005.[61] Petitioners argue that Congress intentionally did not amend section 212(j) to extend its limitations to section 211A orders when it could have done so[62] and that section 212(j) states that it applies only to "order[s] issued under section 211 of this title."[63]

24. Petitioners also argue that sections 211 and 211A should be interpreted separately because they are procedurally and substantively distinct.[64] According to Petitioners, section 211 permits an applicant to petition the Commission to compel a transmitting

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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")).

[57] *Nw. Requirements,* 798 F.3d 796 at 808.

[58] 16 U.S.C. 824k(j).

[59] Petition at 5.

[60] *Id*. at 16.

[61] *Id*. at 16 n.59 (citing Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified at 15 U.S.C. § 717c-1).

[62] *Id*. at 18-19. Petitioners add that, when Congress enacted section 211A, it made no changes to section 212(j) to reference section 211A in EPAct 2005, leaving section 212(j) as it stood in 1992. *Id*. at 19.

[63] Petition at 19-20 (citing 16 U.S.C. § 824k(j)).

[64] *Id*. at 21.

utility to provide wheeling services to the applicant; the Commission must afford parties a hearing and make certain substantive findings; the Commission may require enlargement of facilities to provide such services; and thus, section 211 applications are considered on a case-by-case basis.[65] Petitioners state that, in contrast, section 211A permits the Commission to compel an unregulated transmitting utility to provide transmission services; that such applications are not limited to the entity bringing the action such that the Commission may either require such services by rule or by order; and further, that the Commission's authority under section 211A is entirely discretionary, and does not dictate any specific procedures. Petitioners further argue that, whereas section 211 orders must set a just and reasonable rate akin to the section 205 standard, 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.[66]

25. Additionally, Petitioners argue that Congress intended for section 211A to be interpreted as an entirely separate section from section 211 because Congress did not place the text of section 211A within section 211, such as in a new subsection 211(a) or something similar.[67] Petitioners also reference section 201(b)(2) of the FPA,[68] which 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." Petitioners argue that, if section 211A were subsumed within section 211, there would be no need to list that section separately and that Congress clearly knew to list both sections 211 and 211A when a given provision applied to both.[69]

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[65] *Id*. at 22.

[66] *Id*. Petitioners add that the proximity of the two sections is based on similar, but not identical, subject matter, and point to a similar dynamic between sections 215 (16 U.S.C. § 824o) and 215A (16 U.S.C. § 824o-1), where section 215 establishes the Commission's jurisdiction over electric reliability matters and section 215A establishes protections for critical electric infrastructure security, but they carry out distinct functions and operate independently of one another. *Id*. at 22-23.

[67] Petition at 20.

[68] 16 U.S.C. § 824(b)(2).

[69] Petition at 20.

26. Petitioners also note that section 211A(h) states that the provision of services under section 211A "does not preclude a request for transmission services under section 211."[70] Petitioners argue that Congress's decision to preserve an entity's right to bring both section 211 and 211A actions shows that Congress considered them to be separate grants of power.[71] Petitioners also argue that, when Congress intended to restrict Commission orders under section 211A, it expressly did so by referencing section 212(h) in section 211A(b);[72] if Congress had 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). Therefore, Petitioners argue that the plain language of section 211A confirms that it is distinct from section 211.[73]

27. Finally, Petitioners request that, to enable the unbundled transmission service they request under section 211A, the Commission issue an order under section 210 that (1) formalizes the interconnection arrangements between Petitioners' and TVA's transmission systems, and (2) provides for interconnection service across existing facilities. Petitioners state that they make this request because any outside supply arrangements would require Petitioners to serve notices of termination under their Power Contracts.[74]

II. Notice of Filing and Responsive Pleadings

A. Notice of Filings

28. Notice of the petition was published in the *Federal Register*, 86 Fed. Reg. 7089 (January 26, 2021) with answers, interventions, and comments due on February 1, 2021.

29. The following entities filed motions to intervene in Docket Nos. EL21-40-000 and TX21-1-000: Alabama Municipal Electric Authority; American Public Power Association; Brownsville Utilities; City of Clarksville, Tennessee (Clarksville); City of Memphis, Tennessee; Cooperative Energy; Entergy Services, LLC, on behalf of Entergy Arkansas, LLC, Entergy Louisiana, LLC, Entergy Mississippi, LLC, Entergy New Orleans, LLC, and Entergy Texas, Inc.; Georgia Transmission Corporation; International Brotherhood of Electrical Workers, AFL-CIO, and North America's Building Traders

[70] *Id.* (citing 16 U.S.C. § 824j-1(h)).

[71] *Id*. at 20-21.

[72] *Id*. at 21 (citing 16 U.S.C. §824j-1(b)).

[73] *Id*. at 20.

[74] Petition at 5, 45-46.

Unions; Jackson Energy Authority; Kentucky Municipal Energy Agency; Knoxville Utilities Board; Large Public Power Council; Protect Our Aquifer; Southern Company Services, Inc.; and Tennessee Municipal Electric Power Association. The State of Tennessee filed a Notice of Intervention in Docket Nos. EL21-40-000 and TX21-1-000.

30. Four hundred fifty million for Memphis ($450M) and PowerSouth Energy Cooperative (PowerSouth) filed motions to intervene and comments in support of the petition in Docket Nos. EL21-40-000 and TX21-1-000. The following entities filed comments in support in Docket Nos. EL21-40-000 and TX21-1-000: Dyersberg Municipal Electric System (Dyersberg); Pietsweet Company (Pietsweet); Southern Environmental Law Center;[75] Southern Alliance for Clean Energy; and Williams Sausage Company, Inc. (Williams).

31. The following entities filed protests in Docket Nos. EL21-40-000 and TX21-1-000: Association of Tennessee Valley Governments (ATVG); City of Columbia Board of Public Utilities (Columbia BPU); Tennessee Chamber of Commerce & Industry (Tennessee Chamber); and Tennessee Valley Corridor, Inc. (TVC). Local Power Companies Coalition (LPC Coalition) and Tennessee Valley Public Power Association, Inc. (TVPPA) filed a motion to intervene and protests.[76] Mr. Robert Rutkowski filed a correspondence in Docket Nos. EL21-40-000 and TX21-1-000. TVA filed a motion to intervene, protest and an answer to Petitioners.

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[75] Southern Environmental Law Center's comment was filed on behalf of itself, Protect Our Aquifer, Energy Alabama, and Appalachian Voices.

[76] The LPC Coalition includes: Alcorn County Electric Power Association; Appalachian Electric Cooperative; Bowling Green Municipal Utilities; BrightRidge; Central Electric Power Association; City of Alcoa Electric Department; City of LaFollette Board of Public Utilities; Clinton Utilities Board; Covington Electric System; Decatur Utilities; Electric Board of Guntersville; Erwin Utilities Authority; Fort Payne Improvement Authority; Franklin Electric Plant Board; Harriman Utility Board; Hartselle Utilities; Hopkinsville Electric System and EnergyNet; Jellico Utilities; Lenoir City Utilities Board; Middle Tennessee Electric Member Corporation; Milan Public Utilities; Morristown Utilities Commission; Municipal Utilities Board of the City of Albertville; Muscle Shoals Electric Board; North East Mississippi Electric Power Association; Pennyrile Electric Cooperative; Russellville Electric Plant Board; Scottsboro Electric Power Board; Sevier County Electric System; Sheffield Utilities; Tippah Electric Power Association; Tombigbee Electric Power Association; Tullahoma Utilities Authority; Tuscumbia Utilities; Union City Energy Authority; Upper Cumberland Electric Membership Corporation; Warren Rural Electric Cooperative Corporation; and West Kentucky Rural Electric Cooperative Corporation.

32. The following entities filed motions to intervene only in Docket No. EL21-40-000: Advanced Energy Economy; American Clean Power Association; Center for Biological Diversity; Electric Power Board of Chattanooga; GridLiance HighPlains LLC; Memphis Light, Gas & Water Division (Memphis Light, Gas & Water); NextEra Energy Resources, LLC; Nuclear Development, LLC (Nuclear Development); Public Citizen, Inc.; Sierra Club; Solar Energy Industries Association; Southern Alliance for Clean Energy; Southern Renewable Energy Association; and Trades and Labor Council for Annual Employees of the Tennessee Valley Authority and International Brotherhood of Teamsters. Center for Biological Diversity, Nuclear Development, and Southern Renewable Energy Association also filed comments in support of Petitioners in Docket No. EL21-40-000. Tennessee Valley Industrial Corporation (TVIC) filed a motion to intervene and protest in Docket No. EL21-40-000. Bicentennial Volunteers Inc. (Bicentennial), Mt. Pleasant Power System (Mt. Pleasant), and Tennessee Valley Retirees Association (TVRA) filed protests in Docket No. EL21-40-000.

33. GridLiance HighPlains LLC and Trades and Labor Council for Annual Employees of the Tennessee Valley Authority and International Brotherhood of Teamsters filed motions to intervene only in Docket No. TX21-1-000.

34. On January 21, 2021, TVA filed a motion for extension of time of 21 days, to February 22, 2021, for motions to intervene, answers, comments, and protests in response to the petition. On January 22, 2021, Petitioners filed an answer in response to TVA's motion requesting that the Commission deny the extension. On January 26, 2021 Clarksville filed comments in support of the extension of comment period. On January 26, 2021, the Commission granted the motion and extended the comment deadline to and including February 22, 2021.

35. On March 8, 2021, 4 County Electric Power Association; Bolivar Energy Authority; Carroll County Electric Department; City of Maryville, Tennessee; Cumberland Electric Membership Corporation; Lexington Electric System; Newport Utilities; Paris Board of Public Utilities; Pickwick Electric Cooperative; Ripley Power & Light Company; Starkville Utilities; Tallahatchie Valley Electric Power Association; Trenton Light & Water Department; and the Weakley County Municipal Electric System filed a Motion to Intervene Out of Time. On March 9, 2021, LPC Coalition filed a motion to answer and answer in response to Environmental Intervenors[77] and TVA filed a motion to answer and answer to Environmental Commenters (TVA Answer

[77] LPC Coalition's designation of Environmental Interveners includes Center for Biological Diversity and Southern Environmental Law Center.

to Environmental Commenters).[78] On March 10, 2021, Electric Power Board of Chattanooga (Chattanooga) filed a protest out of time in Docket No. EL21-40-000. On March 15, Upper Cumberland Development District (Cumberland) filed a protest out of time and Southern Alliance for Clean Energy filed an untimely answer in Docket No. EL21-40-000.

36. On March 16, 2021, Petitioners filed an answer (Petitioners' Answer). On March 31, 2021, LPC Coalition filed an answer in response to Petitioners' answer (LPC Coalition Answer). Also, on March 31, 2021, TVA filed an answer in response to Petitioners' answer (TVA Answer).

37. On May 17, 2021, the State of Tennessee filed a motion for leave to file comments out of time and comments. On June 1, 2021, Petitioners filed an answer in opposition to the State of Tennessee's out of time comments (Petitioners' Answer to Tennessee). On June 4, 2021, the State of Tennessee filed an answer in response to Petitioners Answer to Tennessee.

38. On October 15, 2021, Petitioners filed a motion for leave to supplement the record and supplement (Petitioners' Motion), alleging that TVA had engaged in retaliatory conduct against Volunteer Energy. On October 19, 2021, TVA filed a letter (TVA Letter) responding that, by rule, the Commission must provide parties 15 days to file an answer before it can rule on the motion; that TVA is honoring all of its commitments under its power contract with Volunteer Energy; and that it denies any allegations of seeking to penalize Volunteer Energy for filing the Petition. TVA states that it plans to file a timely answer unless Commission action before the due date makes the motion moot.

B. TVA Protest

1. TVA's Section 211A Arguments

a. Statutory Arguments

39. TVA states that one of its core statutory objectives is to provide reliable electricity at rates as low as feasible to the 10 million people in TVA's 80,000-square-mile, seven-state service area.[79] TVA further states that, since 1959, TVA has not received federal

[78] TVA's designation of Environmental Commentators includes Center for Biological Diversity, Southern Alliance for Clean Energy, Southern Environmental Law Center, and Southern Renewable Energy Association.

[79] TVA Protest at 11 (citing 16 U.S.C. §§ 831j, 831n-4(f), 831n-4(h), and 831d). TVA states that the LPCs it serves are municipalities, other local government entities,

appropriations in support of its power program, and instead derives nearly all of its revenue from power sales to the LPCs.[80]

40. TVA explains that it provides transmission service under the TVA Transmission Service Guidelines, which were first approved by the TVA Board in 1996, and are based on the Commission's *pro forma* Open Access Transmission Tariff to the extent consistent with TVA's obligations under the TVA Act.[81] TVA states that the Transmission Guidelines are publicly posted on TVA's Open Access Same-Time Information System, but they have not been filed with the Commission as a reciprocity tariff.

41. TVA argues that Congress treated the TVA region differently from the rest of the country for purposes of wheeling and that Congress added section 212(j), which together with section 212(f) and TVA Act section 15d(a), works to ensure that the TVA Fence remains an equitable two-way barrier.[82] TVA asserts that the Commission has consistently adhered to section 212(j) and ruled that it prohibits the Commission from ordering TVA to wheel another supplier's power to load within the Fence.[83]

42. TVA states that Congress considered several bills that would have given the Commission full jurisdiction over TVA's transmission system under sections 205 and 206 and would have opened the TVA system to wholesale competition.[84] TVA adds that, at one point, proposals were made to repeal the prohibition against selling TVA power outside the Fence and the prohibition against wheeling alternative power supplies to TVA customers inside the Fence but that, instead, Congress added section 211A, which gave

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and consumer-owned cooperatives, which are "preference" customers under the TVA Act. *Id*. at 12.

[80] *Id*. at 9-10.

[81] *Id.* at 23. TVA is governed by the TVA Board which is composed of nine members appointed by the President and confirmed by the Senate who serve 5-year terms. *Id*. at 9.

[82] TVA Protest at 19.

[83] *Id*. (citing *Tenn. Power Co*., 100 FERC ¶ 61,092 (2002) (denying request for an order compelling TVA to provide transmission service to a customer inside the TVA Fence in light of section 212(j)); *AES Power, Inc*., 69 FERC ¶ 61,345 (1994) (granting request to require TVA to wheel power across its system but emphasizing that the Commission is prohibited under section 212(j) from ordering TVA to wheel power to a customer inside the Fence)).

[84] *Id*. at 20.

the Commission more limited discretionary authority to order "unregulated transmission utilities" to satisfy comparability and nondiscrimination principles in the rates, terms, and conditions for transmission service.[85] Additionally, TVA states that, in EPAct 2005, Congress did not repeal the prohibitions contained in sections 212(f) and 212(j) nor did Congress add to new section 211A any references to TVA Act section 15d(a), or FPA sections 212(f) and 212(j).[86]

43. TVA argues that the Commission lacks statutory authority under section 211A to grant Petitioners' request.[87] TVA states that, while section 211A authorizes the Commission to require government-owned utilities to provide the type of service Petitioners seek, section 211A is limited by section 212(j).

44. TVA further argues that section 211A gives the Commission discretionary authority to oversee the rates and non-rate terms and conditions for transmission service that is already being provided, but not to order new wheeling service.[88] TVA asserts that Petitioners' interpretation of section 211A fails because it conflicts with the TVA Act.[89] According to TVA, accepting Petitioners' interpretation of section 211A would violate principles of statutory construction by creating a direct conflict between section 211A and the TVA Act—a conflict that would not exist if section 211A were properly interpreted not to grant separate authority to order wheeling in violation of section 212(j).[90]

45. TVA adds that Petitioners' interpretation of section 211A would destroy TVA's ability to meet its broad statutory mandate to support the physical, economic, and social welfare of the TVA region and balance its varied missions to achieve that mandate.[91] TVA states that it must strike a balance between its various statutory missions. TVA cites to the TVA Act and court precedent to argue that the TVA Act directs TVA to set

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[85] *Id*. at 20-22.

[86] *Id*. at 21-22.

[87] *Id*. at 26.

[88] *Id*. at 26-27.

[89] *Id*. at 27.

[90] *Id*. (citing *Kapela v. Newman*, 649 F.2d 887, 891 (1st Cir. 1981) (Breyer, J.) ("[I]t is important to interpret the two statutes in a way that minimizes . . . conflicts and harmonizes the policies that underlie them.")).

[91] *Id*. at 28.

rates for the sale of power to the LPCs on terms that "hav[e] due regard for the primary objectives of the Act"[92] and that "[t]he fixing of rates which will balance and achieve all of these different objectives is a matter which Congress has entrusted to the judgment of the TVA Board, and which involves the clearest sort of commitment to agency discretion."[93] TVA asserts that Congress authorized the TVA Board to choose how to prioritize and pursue its different statutory goals, and argues that Congress intended that the TVA Board have authority to exercise discretion to discharge its responsibilities[94] and mandated that the TVA Act "shall be liberally construed to carry out" its purposes.[95]

46. TVA further argues that, if the Commission could order TVA to take actions that would substantially reduce TVA's revenue, it would destroy TVA's ability to self-finance its operations and usurp the TVA Board's authority to balance its varied responsibilities.[96] TVA also argues that the Petitioners' argument that section 211A authorized the Commission to order TVA to wheel to load inside the Fence directly conflicts with the authority Congress gave to the TVA Board over TVA's transmission system under section 12 of the TVA Act.[97] According to TVA, Petitioners' interpretation not only would strip the Board of discretion to decide to whom and under what circumstances to grant use of TVA's transmission system—which is in direct conflict with section 12 of the TVA Act—but it also would interfere with TVA's operation of its integrated system.[98]

47. TVA disputes Petitioners' characterization of 211A, stating that Petitioners' interpretation would amount to Congress casually and silently authorizing the Commission to take down the Fence in only one direction and giving the Commission the discretion to deconstruct the TVA model.[99] TVA asserts that this is not how Congress operates; rather, Congress would have explicitly granted the Commission authority to

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[92] *Id*. (citing 16 U.S.C. § 831n-4 (f)).

[93] *Id*. (citing *Mobil Oil Corp*., 387 F. Supp. 498, 506 (N.D. Ala. 1974)).

[94] *Id*. at 29 (citing 16 U.S.C. § 831c(g)).

[95] *Id*. (citing 16 U.S.C. § 831dd).

[96] *Id*.

[97] *Id*. (citing 16 U.S.C. § 831k (authorizing the TVA Board to construct, lease, or purchase transmission lines and to interconnect with other systems)).

[98] *Id*. at 30.

[99] *Id*.

order wheeling within the Fence as Congress had contemplated in 1992. TVA also argues that section 211A's silence on section 212(j) does not mean that Congress meant to eliminate that restriction on the Commission's wheeling authority, as demonstrated by the numerous other restrictions on the Commission's wheeling authority that Congress did not attempt to exhaustively list in section 211A, but which would nevertheless still apply to any order issued under section 211A.[100]

48. TVA also argues that Petitioners' interpretation of section 211A would render other sections of the FPA superfluous.[101] TVA argues that Petitioners' claim that section 212(j) applies only to the Commission's authority to order wheeling under section 211 and is inapplicable to a wheeling order under section 211A would result in section 212(j) no longer serving any purpose.[102] TVA asserts that such implicit repeals are disfavored and that statutes should be construed to avoid interpretations that render a provision a nullity.[103]

49. TVA further contends that Petitioners' interpretation would also reduce the utility and purpose of section 211 because, whereas section 211 contains standards to guide the Commission's exercise of its wheeling authority, section 211A does not.[104] TVA adds that sections 211 and 211A are distinguishable because sections 211A(b)(1) and (2) articulate standards for the Commission to apply in evaluating rates, terms, and conditions for transmission services, not standards for the Commission to apply in determining whether to order wheeling.[105] TVA argues that the absence in section 211A of any standards to be applied in evaluating a request for transmission service shows that

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[100] *Id*. at 34. TVA argues for example that, while section 211A does not mention section 212(f)'s prohibition against wheeling TVA power outside the Fence, Congress' silence does not mean that this restriction is inapplicable to orders issued under section 211A, leaving the Commission free to order wheeling of TVA power to markets outside the Fence. TVA further argues that section 211A also does not mention section 211(b) which prohibits the Commission from issuing a wheeling order that unreasonably impairs the reliability of the transmission system, but that this cannot mean that section 211A authorizes the Commission to issue wheeling orders that impair reliability.

[101] *Id*. at 31.

[102] *Id*.

[103] *Id*. (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (courts disfavor interpretations that render language superfluous)).

[104] *Id*. at 37.

[105] *Id*. at 38.

Congress did not intend the provision to be used as a substitute for the Commission's authority under section 211 to order transmitting utilities, including unregulated transmitting utilities, to provide wheeling services.

50. TVA further argues that section 211A is not a separate grant of authority to order wheeling; instead, TVA asserts that section 211A(b) gives the Commission discretionary authority to oversee the rates, terms, and conditions for transmission services provided by an unregulated transmission utility—either voluntarily or because the Commission has required the provision of that service under section 211.[106] TVA also distinguishes *Iberdrola,* arguing that that decision turned on whether the new Bonneville tariff provisions on curtailment were comparable to the transmission service Bonneville provided to itself, and that the Commission has not used section 211A to order an unregulated transmitting utility to provide transmission service. TVA also argues that Petitioners' reliance on *East Kentucky* misses the mark, because there the Commission concluded that section 212(j) does not bar an interconnection order under section 210 and relied on the fact that section 212(j) did not mention orders under section 210.[107]

51. Additionally, TVA argues that the Commission should reject Petitioners' request for wheeling under section 211A because Petitioners have not shown that TVA's transmission service is inconsistent with the prerequisites of sections 211A(b)(1) and (2).[108] TVA asserts that its Transmission Service Guidelines are not inconsistent with the comparability principles, which it characterizes as flexible and as not in all cases requiring a utility to provide the same service to others that it provides to itself. TVA adds that, in Order No. 888, the Commission noted that analyzing the comparability standard includes considering whether there are any potential impediments or consequences to providing comparable services to third parties.[109] TVA reiterates that the impediments and adverse consequences of allowing alternative power supplies to be

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[106] *Id*. at 36.

[107] *Id*. at 35.

[108] *Id*. at 49-50 (citing *Preventing Undue Discrimination & Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 at P 216 (2007) ("Treating similarly-situated resources on a comparable basis does not necessarily mean that the resources are treated the same"), *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).

[109] *Id*. at 50 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,647 and n.73).

delivered to LPCs inside the Fence would harm TVA's remaining customers, increase residential and commercial rates, reduce environmental stewardship and recreational budgets, and have a deleterious impact on TVA's ability to achieve its statutory mission.[110]

52. Moreover, TVA maintains that Petitioners are not similarly-situated to through-and-out customers located outside the Fence, and that Petitioners ignore the Fence and its impacts when arguing that they are similarly situated to customers outside the Fence. [111] TVA reiterates that the Fence creates significant differences in transmission service to load inside and outside the Fence, as it bars TVA from selling power to customers outside the Fence and therefore prevents TVA from mitigating lost revenues that would result from allowing the TVA transmission system to be used to deliver alternative supplies to customers inside the Fence.

53. TVA requests that, if the Commission does not deny the petition on legal or discretionary grounds, it should order an evidentiary hearing to address the disputed issues of material fact.[112] TVA includes as examples of issues of material fact: (1) Petitioners' claim that TVA violated the comparability principle; (2) Petitioners' contention that they are similarly situated to TVA's transmission customers outside the Fence; and (3) Petitioners' statement that electric rates in the TVA region have become excessive and unreasonable. TVA asserts that Petitioners have not presented sufficient evidence for the Commission to resolve these disputed factual issues without a hearing.

b. Discretionary Arguments

54. TVA argues that the Commission's exercise of its authority under section 211A is discretionary, extremely rare, and must advance the public interest; therefore, TVA asserts that there is no basis for exercising any such authority here.[113] TVA argues that the Commission has declined to exercise its discretionary authority under section 211A on a number of occasions and, in the one instance that the Commission did exercise its discretion under section 211A, it stated that it expects use of that authority to be rare.[114]

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[110] *Id*. at 51.

[111] *Id*. at 52.

[112] *Id*. at 53-55.

[113] *Id*.

[114] *Id*. at 39 (citing *Iberdrola*, 141 FERC ¶ 61,233 at P 32).

55. TVA further argues that the Commission may not exercise its discretion under section 211A if doing so would be against the public interest.[115] In considering the public interest, TVA argues that, due to the statutory Fence, stranded costs resulting from the loss of LPC load could not be mitigated and would shift to remaining LPCs.[116] TVA asserts that it would be inequitable and contrary to the public interest, given the statutory restriction of the Fence, for the Commission to order TVA to wheel non-TVA power to load inside the Fence and allow other suppliers to cherry-pick customers in the TVA service area.[117]

56. According to TVA, another factor weighing against the Commission exercising its discretionary authority is TVA's broad set of responsibilities assigned to it by Congress.[118] TVA reiterates that it provides flood control, land management, recreational facilities, and support for economic development, in accordance with the TVA Act and the TVA mission of service.[119] TVA also reiterates that it does not receive any annual appropriation to cover the costs of these non-power obligations and responsibilities, and that, instead, such costs are recovered primarily in electricity rates. TVA emphasizes that loss of load would create a free rider problem because the costs of non-power operations,

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[115] *Id*. at 38-39 (citing 16 U.S.C. § 824j-1(c)(3) ("The Commission shall exempt from any rule or order under this section any unregulated transmitting utility that . . . meets other criteria the Commission determines to be in the public interest.").

[116] *Id*. at 40.

[117] *Id*. at 41. TVA offers the affidavit of its expert Mr. John Reed who analyzes a scenario where the departure of Petitioners would increase rates for other customers by approximately $3.3 billion through 2040; and a second scenario where TVA lost the load of the 11 LPCs that have not yet executed long-term contract amendments, which would increase rates for the remaining LPCs by approximately $14.9 billion from the years 2027 through 2040. TVA states that, without such rate increases, it would not be able to maintain its outstanding debt balance under the statutory $30 billion cap. TVA further states that, given the limited information Petitioners provided regarding their cost savings, Mr. Reed was not able to conduct a detailed apples-to-apples comparison of the possible savings for the Petitioners vis-a-vis the rate increases for the other LPCs; however, Mr. Reed concludes that the economic costs shifted to remaining customers are projected to substantially exceed any savings that may be achieved by the Petitioners, thus resulting in a net economic harm to TVA's customers overall.

[118] TVA Protest at 43.

[119] *Id*. at 44.

which benefit the region as a whole, would be borne by only some of the region's ratepayers.

57. TVA also asserts that the Commission should give deference to the public interest judgments of the TVA Board. TVA argues that the Commission should not disregard the public interest determination made by the Presidentially-appointed and Senate-confirmed members of the TVA Board in adopting their Board Policy Statement.[120]

58. Finally, TVA argues that Petitioners basing their request for wheeling on general policies favoring competition in electric markets is not compelling.[121] This is because, according to TVA, Congress chose not to mandate open access transmission policies for all non-jurisdictional transmission owners, as one would expect if competitive electricity markets were the only relevant policy factor. Instead, TVA asserts, Congress provided the Commission with discretionary authority, and mandated that exemptions be provided as required by the public interest. TVA adds that, contrary to Petitioners' assertions, there is no longstanding policy favoring competition in the Tennessee Valley. TVA argues that, instead, the restrictions of the TVA Act and sections 212(f) and 212(j) disfavor competition, and notes that an order requiring wheeling to load inside the Fence will not result in true competition.[122]

2. TVA's Section 210 Arguments

59. In response to Petitioners' request for an order formalizing the existing interconnections between Petitioners' and TVA's systems, TVA asserts that, if the Commission declines to grant the Petitioners' wheeling request, then the Petitioners' request for interconnection service would be moot, premature, and unripe.[123] TVA argues, therefore, that Petitioners section 210 request should be dismissed.

60. Additionally, TVA asserts that section 210 does not give the Commission authority to compel interconnections with distribution facilities, nor do Petitioners identify any transmission or generation facilities that they intend to interconnect to

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[120] *Id*. at 45 (citing *N.Y. Shipping Ass'n*, 854 F.2d 1338, 1367-68 (D.C. Cir. 1988) (holding that an agency's obligation to regulate in the public interest "incorporates an obligation to consult those aspects of the public interest reflected in statutes administered by others")).

[121] *Id*. at 46.

[122] *Id*. at 48.

[123] TVA Protest at 55.

TVA's transmission system.[124] TVA also argues that Petitioners did not provide enough information to evaluate their section 210 request and fails to meet the requirements of section 210(c).[125] TVA further asserts that, absent an order directing physical interconnection—which the Petitioners do not seek—section 210 does not give the Commission authority to compel the terms under which TVA will provide interconnection service.[126]

C. Petitioners and TVA Answers

1. Petitioners' Answer

61. Petitioners dispute TVA's claim that the Commission lacks the authority and jurisdiction to grant Petitioners' request for comparable and non-discriminatory transmission services under section 211A.[127] Petitioners assert that the TVA Board is not entitled to absolute deference in carrying out its obligations, especially when its chosen course conflicts with the Commission's statutory authority.[128] Petitioners also urge the Commission to reject TVA's claims that the departure of LPCs will cripple TVA and saddle the remaining LPCs with excessive costs.[129] Petitioners counter that TVA's own statements to its Board and the fact that 142 of the 153 LPCs have executed new contracts with rolling 20-year terms and termination clauses contradict TVA's exaggerated statement.

62. Regarding TVA's public interest and cost shift arguments, Petitioners respond that TVA expressly waived any rights to seek recovery of stranded investment costs upon

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[124] *Id*. at 56.

[125] *Id*. at 60-63. Section 210(c) provides that "[n]o order may be issued by the Commission under subsection (a) unless the Commission determines that such order . . . is in the public interest." In addition, the Commission must find that the order would "(A) encourage overall conservation of energy or capital, (B) optimize the efficiency of use of facilities and resources, or (C) improve the reliability of any electric utility system or Federal power marketing agency to which the order applies." 16 U.S.C. § 824i(c).

[126] TVA Protest at 57.

[127] Petitioners' Answer at 4. Petitioners argue that TVA improperly attempts to tie the Commission's hands and place the Commission in a subordinate position to the TVA Board. *Id*. at 10.

[128] *Id*. at 5.

[129] *Id*. at 7.

contract termination in Petitioners' Power Contracts.[130] In addition to arguing that they are not contractually responsible for any cost shifts due to their departure from TVA, Petitioners argue that TVA's stranded cost claims are contradicted by its own statements and are misleading and overstated.[131] Petitioners assert that, contrary to TVA's assertions, granting the requested transmission service serves the public interest by reducing supply costs that Petitioners must pass down to their members/customers.[132]

63. Petitioners further argue that TVA overstates the barriers preventing TVA from selling power to entities located outside of its Fence.[133] Petitioners assert that the 1959 amendments to the TVA Act allowed TVA to make exchange power arrangements with other power-generating organizations with which TVA had such arrangements on July 1, 1957, and that the nine entities that currently qualify as exchange partners with TVA comprise most of the major utilities operating in the southeastern United States and extend deep into the Midwest.[134]

64. Petitioners further argue that TVA does not have *carte blanche* authority to take any action that may advance its general responsibilities even where that action may conflict with another federal agency's statutory authority, nor is TVA insulated from any

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[130] *Id*. Petitioners state that their Power Contracts permit termination of the contracts and, upon such termination, provide that "TVA will neither charge nor impose upon Distributor (or any retail customer of Distributor) charges for unrecovered fixed costs (commonly referred to as 'stranded investment')." *Id*. at 7 n.17.

[131] *Id*. at 31-37. Petitioners cite to a statement from TVA Chief Executive Officer Jeff Lyash's indicating that 10-12% of TVA's load does not "create a significant financial impact" to TVA. Petitioners argue that therefore the loss of the Petitioners' load accounting for 3.6% of TVA's load cannot be nearly as significant as TVA claims. *Id*. at 33. Petitioners also argue that TVA has subsidized the legal costs of LPCs willing to protest the petition, and that, in doing so, TVA has turned such LPCs into the type of "unreliable litigants" that the Ninth Circuit found serve only to "frustrate . . . the statutory objectives" of section 211A. *Id*. at 31 (citing *Nw. Requirements*, 798 F.3d at 809). To demonstrate that TVA can in fact mitigate stranded costs, Petitioners cite to a statement by John Thomas, TVA's Executive Vice President and Chief Financial Officer, who stated that loss of the Petitioners load would allow TVA to (1) avoid major capital expenditures, and (2) reduce fuel purchases to reflect decreased dispatch. *Id*. at 34.

[132] *Id*. at 9.

[133] *Id*. at 35.

[134] *Id*. at 35-36.

federal agency action simply because it would affect TVA's revenue.[135] Petitioners argue that TVA is still subject to the Clean Air Act[136] and North American Electric Reliability Corporation Standards, even though such regulations may increase TVA's costs, and add that TVA is not empowered to pick and choose which Federal statutes or standards it will follow.[137] Citing to the *Iberdrola* rehearing order, where the Commission stated that requiring Bonneville to provide comparable transmission service under section 211A "did not direct Bonneville to act in a manner inconsistent with its other statutory obligations,"[138] Petitioners argue that the Commission's specific section 211A authority is not subordinate to TVA's general obligations under the TVA Act. Petitioners further assert that there is no irreconcilable conflict between the requested relief under section 211A and any provision in the TVA Act.[139]

65. Finally, Petitioners argue that TVA has subsidized the legal costs of any LPCs willing to protest Petitioners' petition, and that in doing so, TVA has turned such LPCs into "unreliable litigants."[140] Petitioners further argue that the LPC Coalition's contention that TVA's strong credit ratings will fall if the Commission grants Petitioner's request is predicated on Fitch Ratings' "incorrect belief" that TVA is completely insulated from all competition in the TVA area."[141]

2. TVA Answer

66. TVA reiterates that the general powers granted TVA under the TVA Act should not be subordinated to the Commission's specific section 211A authority.[142] TVA asserts that, when Congress enacted the TVA Act, it was focused on the particularized problems facing the Tennessee Valley but, when Congress enacted section 211A, it enacted a general provision applicable to a large number of unregulated transmitting utilities. TVA

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[135] *Id*. at 11.

[136] Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

[137] Petitioners' Answer at 11-12.

[138] *Id*. at 13 (citing *Iberdrola*, 141 FERC ¶ 61,233, at P 32).

[139] *Id*. at 15.

[140] *Id*. at 31.

[141] *Id*. at 41.

[142] TVA Answer at 6.

asserts that there is no indication that Congress intended, by enacting section 211A, to unravel the long-established public power model in the Tennessee Valley.

67. TVA criticizes Petitioners for ignoring the *N.Y. Shipping Ass'n* line of cases, which holds that an agency's obligation to regulate in the public interest "incorporates an obligation to consult those aspects of the public interest reflected in statutes administered by others."[143] TVA explains that section 211A does not appoint the Commission as the predominant agency on whether TVA should provide open access transmission service to its LPCs.[144]

68. TVA also urges the Commission to reject Petitioners' expanded view of *Iberdrola.*[145] TVA states that *Iberdrola* addressed comparability in the context of Bonneville's transmission curtailment policies applicable to certain existing generator customers, but did not address whether section 211A allows the Commission to order an unregulated transmitting utility to wheel power or the eligibility of a party to receive transmission service. TVA notes that it and Bonneville are different in how their rates are regulated, how their boards are selected, and in their respective responsibilities, and thus, that the *Iberdrola* precedent should not apply to TVA.[146]

69. TVA highlights Petitioners' inability to explain why any party would request wheeling under the strict and fulsome requirements of section 211 when it could easily avoid them by seeking wheeling under the more limited requirements of section 211A.[147] TVA asserts that, under Petitioner's flawed reasoning, because section 212(e)(2), which prohibits impairment of antitrust laws, does not expressly mention section 211A, the Commission should be allowed to issue wheeling orders under section 211A that modify, impair, or supersede the antitrust laws.[148] TVA asserts that the correct interpretation of both sections 212(j) and 212(e)(2) is that Congress intended to include section 211A within their scope even though it did not revise section 212 to state so expressly. TVA also faults Petitioners for failing to explain why they believe that section 211A lacks the

[143] *Id*. at 8 (citing *N.Y. Shipping Ass'n*, 854 F.2d at 1367- 68).

[144] *Id*. at 8-9.

[145] *Id*. at 10.

[146] *Id*. at 10-11.

[147] *Id*. at 13.

[148] *Id.* at 14.

standards contained in section 211, arguing that the comparability standard contained in section 211A also applies to section 211.[149]

70. TVA also disagrees with Petitioner's public interest arguments. In response to Petitioners' argument that the Power Contracts do not assign any stranded costs to Petitioners, TVA states that the Power Contract language does not eliminate the stranding of fixed costs or prevent TVA from recovering those costs through rate increases for remaining LPCs, but simply provides that stranded costs will not be recovered from an LPC after the LPC terminates its power contract.[150] TVA further asserts that the contracts contain no terms limiting the Commission's ability to consider the impacts of cost shifts to other remaining LPCs in its section 211A public-interest inquiry.

71. TVA also disputes Petitioner's argument that TVA's stranded costs due to LPC departure can be mitigated, noting that its contracts with generation owners cannot be modified or terminated without substantial damages.[151] TVA further rejects Petitioners' argument that the Fence is not as significant a barrier as TVA argues, stating that, in addition to being limited to sell power to only nine potential counterparties outside the Fence pursuant to the 1959 TVA Act amendments, the TVA Act also includes limitations on TVA's sale of surplus power under section 12 of the TVA Act.[152]

D. Other Comments and Protests

72. PowerSouth, Williams, Pietsweet, Dyersberg, Nuclear Development, $450M, Southern Renewable Energy Association, and Southern Alliance for Clean Energy support Petitioner's requested relief under section 211A.[153]

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[149] *Id*. at 15-16.

[150] *Id*. at 18.

[151] *Id*. at 19.

[152] *Id*. at 20. TVA also responds to Petitioners' references to certain TVA executives concerning the loss of TVA load by explaining that those statements address questions concerning TVA's 2020-2030 financial plan, not the longer 20-year time frame analyzed by Mr. Reed, and therefore do not address the cost shifting that Mr. Reed analyzed. *Id*. at 21.

[153] PowerSouth Comment at 4; Williams Sausage Comment at 2; Pietsweet Comment at 1-2; Dyersberg Comment at 1; Nuclear Development Comment at 2-3 Southern Renewable Energy Association Comment at 9; Southern Alliance for Clean Energy Comment at 2.

73. Nuclear Development alleges that TVA's existing transmission service monopoly contravenes statutory provisions in the FPA, the Commission's open access transmission policies, and the tenets of competitive energy markets.[154] Nuclear Development contends that open access to TVA's transmission system would level the playing field for outside power suppliers like Nuclear Development.[155]

74. Southern Renewable Energy Association argues that Petitioners' requests underscore the benefits of competition and value of better transmission access in the southeast. Southern Renewable Energy Association requests that the Commission host a technical conference regarding broader southeastern market reform issues, beyond the issues raised in this proceeding.[156]

75. Southern Environmental Law Center and Center for Biological Diversity do not take a position on the particular merits of Petitioners' request.[157] Southern Environmental Law Center argues that the Commission should give considerable weight to the statutory goals of the FPA and TVA Act including fair competition, sustainable economic development, and local democratic decision-making.[158] Center for Biological Diversity contends that the Commission should reject as erroneous TVA's claim that the Commission is toothless to provide oversight where TVA engages in anti-competitive practices antithetical to the purposes of the FPA.[159] Center for Biological Diversity asserts that the Commissions has the power to issue an order against TVA, and should exercise that authority where an order under section 211A will further public interest objectives, including increasing effective competition and advancing the clean energy transition.[160]

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[154] Nuclear Development Comment at 4.

[155] *Id.* at 7.

[156] Southern Renewable Energy Association Comment at 9.

[157] Southern Environmental Law Center Comment at 2. Center for Biological Diversity Comment at 1.

[158] Southern Environmental Law Center Comment at 2.

[159] Center for Biological Diversity Comment at 1.

[160] *Id.* at 1-2.

76. Center for Biological Diversity urges that, in considering whether a section 210 or 211A order against TVA is in the public interest, the Commission consider whether the requested relief will lead to more clean energy development in the region.[161]

77. Mt. Pleasant, Columbia BPU, Tennessee Chamber, TVIC, BVI, TVAR, ATVG, TVC, LPCs Coalition, Chattanooga, Cumberland, and the State of Tennessee urge the Commission to deny the petition.[162] Mt. Pleasant, Columbia BPU, TVIC, BVI, ATVG, TVC, and Cumberland argue that the requested relief will harm TVA ratepayers by shifting costs and increasing rates for the LPCs remaining in TVA.[163] Mt. Pleasant, Columbia BPU, TVIC, BVI, LPC Coalition, and Chattanooga contend that Congress rather than the Commission is the proper forum for consideration of changes to the current power model in the Tennessee Valley.[164]

78. TVAR argues that Petitioners do not provide comparable data to evaluate their assertion that TVA charges unreasonably high bundled rates or the assumptions and projections of rates from purchasing power from non-TVA sources.[165] TVAR contends that Petitioners focus solely on rates and wholly ignore electric system reliability.[166] TVAR argues that facilitating Petitioners' purchase of non-TVA power would lead to

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[161] *Id.* at 12.

[162] Mt. Pleasant Protest at 3; Columbia BPU Protest at 2-3; Tennessee Chamber Protest at 1; TVIC Protest at 3; BVI Protest at 2; TVI Retirees Protest 6; Association of Tennessee Valley Governments Protest at 1; TVC Protest at 1; LPCs Coalition Protest at 2; Electric Power Board of Chattanooga Protest at 3; Upper Cumberland Development District Protest at 1; The State of Tennessee Protest at 10.

[163] Mt. Pleasant Protest at 3; Columbia BPU Protest at 3; Tennessee Chamber Protest at 1; TVIC Protest at 3; BVI Protest at 2; Association of Tennessee Valley Governments Protest at 1; TVC Protest at 1; Upper Cumberland Development District Protest at 1.

[164] Mt. Pleasant Protest at 5; Columbia BPU Protest at 5; TVIC Protest at 2; BVI Protest at 3; LPC Coalition Protest at 39, Electric Power Board of Chattanooga Protest at 2; Upper Cumberland Development District Protest at 3.

[165] TVA Retirees Protest at 2-3.

[166] *Id.* at 4.

avoidance of Petitioners' equitable obligations and the transferring of those financial obligations to other LPCs, which is not in the public interest.[167]

79. TVPPA argues that a Commission order requiring TVA to provide the transmission service sought in the petition, by application of section 211A(f), would subject TVA's rates to the rate changing procedures set forth in sections 205(c) and (d) of the FPA in direct conflict with sections 10 and 14 of the TVA Act.[168]

80. The State of Tennessee argues that granting the Petitioners relief under section 211A without addressing the impact on the non-jurisdictional aspects of TVA's unique statutory mission may create unanticipated and consequential impacts for the entire TVA region.[169] The State of Tennessee contends that the precedential impact of this decision may significantly disrupt the health of TVA because if the Commission approves the Petition, other LPCs may reconsider their long-term relationship to TVA.[170]

E. Other Answers

81. LPC Coalition argues that the Commission should reject Center for Biological Diversity's suggestion that the Commission make its determination in this case based on whether the requested relief will lead to more clean energy because such an approach redefines the public interest standard and asks the Commission to determine the generation mix.[171] LPC Coalition argues that decisions regarding the sources of generation are outside of the Commission's primary jurisdiction under the FPA.[172] LPC Coalition further responds to Petitioners' claim that LPCs that support TVA's position in this case are unreliable litigants, asserting that Petitioners' reliance on *Nw. Requirements* to make this argument is misplaced. LPC Coalition also assert that Petitioners' characterization of the FitchRatings Report regarding TVA's credit quality if Petitioners

[167] *Id.* at 5-6.

[168] TVPPA Motion to Intervene at 6-7 (citing 16 U.S.C. § 831i and 16 U.S.C. § 831m).

[169] The State of Tennessee Protest at 6-7.

[170] *Id*. at 7.

[171] LPC Coalition Answer at 3-4.

[172] *Id*. at 4.

were to leave TVA obfuscates the fact that the existence of the TVA Fence and section 212(j) inform opinions on the financial health of TVA.[173]

82. Petitioners respond that, despite LPC Coalition's claims to the contrary, the FitchRatings Report on TVA's financial health appears to agree with Petitioners' assessment, and states that the loss of Memphis Light, Gas & Water, TVA's largest customer, would not "impair TVA's credit quality, as the costs would be redistributed to the other customers."[174] In response to TVPPA's argument that an order under section 211A would apply the rate changing procedures of section 205 under section 211A(f), Petitioners argue that such procedures would only apply to TVA's transmission rates, not its wholesale power rates and, further, that section 211A(g) permits the Commission to remand transmission rates to the unregulated transmission utility for review and revision, ensuring that TVA retains the right to set its transmission rates, so long as they meet section 211A(b)'s comparability standard.[175]

83. Southern Alliance for Clean Energy argues that, when Congress enacted section 211A, it gave the Commission broad, discretionary authority to compel comparable and non-discriminatory transmission access from public power utilities.[176] Southern Alliance for Clean Energy further argues that TVA has failed to demonstrate that its customers would be harmed by competition and that open access will enable TVA's transmission customers to meet their environmental goals.[177]

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[173] *Id*. at 7 n.19 (citing *Fitch Rates Tennessee Valley Authority's (TN) Global Power Bonds 'AAA'; Outlook Stable*, FitchRatings (May 6, 2020), https://www.fitchratings.com/research/us-public-finance/fitch-rates-tennessee-valleyauthority-tn-global-power-bonds-aaa-outlook-stable-06-05-2020).

[174] Petitioners' Answer at 42.

[175] *Id*. at 15.

[176] Southern Alliance for Clean Energy Answer at 2.

[177] *Id*. at 4, 8.

84. Petitioners oppose the State of Tennessee's motion to file comments out of time and comments, arguing that the State of Tennessee failed to demonstrate good cause for filing substantive comments at this late stage.[178] Petitioners argue that the State of Tennessee does not assert an unrepresented interest, that it submitted comments over three months late with no justification, and that its comments would be unduly burdensome to the parties and delay the proceedings.

85. The State of Tennessee responds to Petitioners that its comments do not impose an undue burden on the Petitioners, any other party, or the Commission, and that any potential burden on the parties or the Commission is *de minimis*.[179] The State of Tennessee argues that it justified its late-filed comments and that it presents a unique view on issues not fully addressed by other parties.[180] The State of Tennessee contends that, as a sovereign state government of the state that is the physical location of much of TVA's infrastructure, its comments should not be disregarded simply because it took Tennessee additional time to ensure that its comments represented the views of its many stakeholders.[181]

86. In its answer to Environmental Commenters, TVA argues that Petitioners did not initiate this proceeding to address the environmental characteristics of electric generation, and that the petition does not mention the environment, clean energy, climate change, or renewables.[182] TVA argues that, because the Environmental Commenters seek Commission action on matters the Petitioners never raised and over which the Commission has no jurisdiction, the Commission should not address Environmental Commenters arguments.[183]

III. Discussion

A. Procedural Matters

87. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2020), all timely filed notices of interventions and motions to

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[178] Petitioners Answer to The State of Tennessee Protest at 2.

[179] The State of Tennessee Answer to Petitioners Answer at 2-3.

[180] *Id.* at 2.

[181] *Id.* at 4-5.

[182] TVA Answer to Environmental Comments at 1.

[183] *Id*. at 2.

intervene serve to make the entities that filed them parties to this proceeding. We also grant any motions to intervene out-of-time and late-filed comments filed before the issuance date of this order. Granting late intervention and accepting comments at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

88. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2020), prohibits answers to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers filed in this proceeding because they have provided information that assisted us in the decision-making process.

B. Substantive Matters

89. Section 211A provides that "the Commission *may*, by rule or order, require an unregulated transmitting utility to provide transmission services."[184] Thus, our authority under section 211A is discretionary.[185] In this case, we decline to issue a rule or order requiring TVA to offer unbundled transmission service to Petitioners or to outside power suppliers to serve load within the TVA Fence under section 211A, and thus we deny the petition.

90. We clarify here for the benefit of all parties, as we did in *Quincy-Columbia Basin Irrigation District*,[186] that, contrary to claims that unregulated transmitting utilities must "abide by" section 211A, there are no established requirements under section 211A

[184] 16 U.S.C. § 824j-1(b) (emphasis added).

[185] *See S.C. Pub. Serv. Authority v. FERC*, 762 F.3d 41, 92-93 (D.C. Cir. 2014) ("Section 211A does not require the Commission to mandate non-public utility participation in planning and cost allocation, and the Commission reasonably declined to invoke its Section 211A authority to adopt such a mandate in favor of the order's incremental and incentive-based approach."); *id.* at 95-96 ("Congress' use of the word "may" in section 211A[(b)] plainly permits, but does not mandate, the Commission to require a nonpublic utility to provide transmission service on given terms."); *see also Town of Edinburgh v. Ind. Mun. Power Agency,* 132 FERC ¶ 61,102, at P 20 (2010).

[186] 176 FERC ¶ 61,010, at P 25 n.42 (2021).

that an unregulated transmitting utility must meet,[187] so there can be no "violation" of section 211A by an unregulated transmitting utility.[188] The Commission's jurisdiction under section 211A(b)(1) is not invoked automatically upon action by an unregulated transmitting utility; rather the Commission has the discretion to choose to exercise, or as relevant here to instead choose to not exercise, this authority.

91. The arguments presented by Environmental Commenters, which do not pertain to the statutory or discretionary arguments raised in the petition, are beyond the scope of this proceeding and therefore we do not address them here.[189] In addition, because we do not order TVA to provide unbundled transmission service to LPCs under section 211A, Petitioners' section 210 application is moot and is accordingly dismissed.

92. Finally, Petitioners' Motion alleges that TVA has made statements that it is refusing to perform needed reliability upgrades due to Petitioners' participation in the Petition. The Commission takes seriously allegations concerning retaliatory conduct.[190] However, Petitioners' allegations are beyond the scope of this proceeding.

The Commission orders:

(A) The request for transmission service under section 211A is hereby denied, as discussed in the body of this order.

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[187] While section 211A authorizes the Commission, at its discretion, to act to achieve certain results should the Commission choose to do so (e.g., to require an unregulated transmitting utility to provide transmission service at "comparable" rates), section 211A does not require the Commission to do so nor does it require the unregulated transmitting utility to refrain from, e.g., providing transmission at rates that are not "comparable." *Cf. infra* note 190 (comparing section 205 with section 211A).

[188] Petition at 26, 27. While section 205(a), for example, provides an express direction that jurisdictional rates and charges "shall be just and reasonable" and that "any such rate or charge that is not just and reasonable is hereby declared to be unlawful," *see* 16 U.S.C. § 824d(a), section 211A contains no such similar directive. For this reason, we also deny Petitioners' requests under sections 306, 307, 308, and 309 of the FPA.

[189] *See, e.g., Monongahela Power Co.,* 39 FERC ¶ 61,350, at 62,096 ("Congress has not granted the Commission authority to reject rate filings on environmental grounds"), *order on reh'g,* 40 FERC ¶ 61,256 (1987).

[190] The Chairman has asked the Office of Enforcement to consider whether this is a matter to be investigated.

(B) The request for interconnection service under section 210 is hereby dismissed as moot, as discussed in the body of this order.

By the Commission. Chairman Glick is concurring with a separate statement attached.
Commissioner Danly is concurring with a separate statement attached.
Commissioner Clements is dissenting with a separate statement attached.
Commissioner Christie is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Athens Utilities Board	Docket Nos. EL21-40-000
Gibson Electric Membership Corporation	TX21-1-000
Joe Wheeler Electric Membership Corporation	
Volunteer Energy Cooperative	

v.

Tennessee Valley Authority

(Issued October 21, 2021)

GLICK, Chairman, *concurring*:

1. I support today's order exercising the Commission's discretion under section 211A of the Federal Power Act[1] by declining to order the Tennessee Valley Authority (TVA) to provide unbundled transmission service to a group of not-for-profit municipal and cooperative distribution utilities located in TVA's service territory. Simply put, I do not believe that Congress intended to give this Commission the authority to ignore the "TVA Fence"—the non-physical boundary Congress placed around TVA's service territory in 1959[2]—when it enacted the Energy Policy Act of 2005.

2. Much has happened since 1959 and the grid has evolved in many ways since Congress established the TVA Fence. In my view, the Fence is a vestige of a bygone era and the region, and particularly its ratepayers, would be far better served by having access to alternative power supplies on a competitive and non-discriminatory basis. The benefits of competition and consumer choice far outweigh whatever benefits the region once derived from the current model. Accordingly, I urge Congress to consider enacting legislation to eliminate the Fence and enable utilities in the region to access alternative sources of supply and likewise to allow TVA to make wholesale sales to new customers.

For these reasons, I respectfully concur.

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Richard Glick
Chairman

[1] 16 U.S.C. § 824j-1.

[2] 16 U.S.C. § 831n-4(a).

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Tennessee Valley Authority

(Issued October 21, 2021)

DANLY, Commissioner, *concurring*:

1. I concur in today's order because it reaches the right result.[1] The Commission declines to issue a rule or order requiring the Tennessee Valley Authority (TVA) to offer unbundled transmission service to petitioners or to outside power suppliers to serve load within the TVA Fence under section 211A[2] of the Federal Power Act (FPA).[3] The Commission also denies petitioners' request for relief pursuant to sections 306, 307, 308, and 309 of the FPA.[4]

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[1] *Athens Utils. Bd.*, 177 FERC ¶ 61,021 (2021).

[2] 16 U.S.C. § 824j-1. FPA section 211A authorizes the Commission to require an "unregulated transmitting utility" to provide transmission services at rates that are comparable to those it charges itself, and on terms and conditions that are comparable and are not unduly discriminatory or preferential. *Id.* § 824j-1(b).

[3] Athens Utilities Board, Gibson Electric Membership Corporation, Joe Wheeler Electric Membership Corporation (Joe Wheeler), and Volunteer Energy Cooperative filed a petition (collectively, petitioners) seeking a Commission order requiring TVA to provide transmission service under FPA section 211A, 16 U.S.C. § 824j-1, and interconnection service under section 210 of the FPA, 16 U.S.C. § 824i. Joe Wheeler is no longer a petitioner in this proceeding. *See* Petitioners January 1, 2021 Complaint and Petition for Order, Docket Nos. EL21-40-000, et al., at 1-2; Petitioners October 15, 2021 Motion for Leave to Supplement the Record and Supplement of Petitioners, Docket Nos. EL20-40-000, et al., at 2, n.1.

[4] 16 U.S.C. §§ 825e, 825f, 825g, and 825h.

2. While this was the right outcome, the Commission probably does not have the authority under FPA section 211A to issue such an order. As stated by TVA, while FPA section 211A authorizes the Commission to require government-owned utilities to provide the type of service petitioners seek, FPA section 211A is limited by FPA section 212(j),[5] which prohibits the Commission from ordering TVA to deliver non-TVA power to load inside the TVA Fence.[6] TVA also asserts that FPA section 211A conflicts with TVA Act,[7] which precludes TVA from selling or delivering power to customers outside the TVA Fence.[8]

3. It should be evident that granting this petition would have significantly altered the TVA system established by Congress. When possible, conflicting statutory provisions must be interpreted in harmony with one another.[9] In my view, this order arrives at the right result in this regard.

For these reasons, I respectfully concur.

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[5] 16 U.S.C. § 824k(j).

[6] TVA February 22, 2021 Protest, Answer and Motion to Intervene, Docket Nos. EL21-40-000, et al., at 17. Congress included a geographic area limitation (Fence) provision in section 15d(a) of the Tennessee Valley Authority Act of 1933 (TVA Act). 16 U.S.C. § 831n-4(a). A federal Consent Order dictates the particulars of TVA's sales outside of the Fence. *See Ala. Power Co., et al. v. TVA*, No. CV-97-C-0885-S (N.D. Ala. 1997).

[7] 16 U.S.C. § 831, *et seq.*

[8] TVA February 22, 2021 Protest, Answer and Motion to Intervene, Docket Nos. EL21-40-000, et al., at 40.

[9] *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a 'clearly expressed congressional intention' that such a result should follow.") (quoting *Vimar Seguros y Reaseguros. S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)); *Kapela v. Newman*, 649 F.2d 887, 891 (1st Cir. 1981) (Breyer, J.) ("[I]t is important to interpret the two statutes in a way that minimizes . . . conflicts and harmonizes the policies that underlie them."); *see also N.Y. Shipping Ass'n, Inc. v. Fed. Maritime Comm'n*, 854 F.2d 1338, 1367-68 (D.C. Cir. 1988) (holding that an agency's obligation to regulate in the public interest "incorporates an obligation to consult those aspects of the public interest reflected in statutes administered by others").

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James P. Danly
Commissioner

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CLEMENTS, Commissioner, *dissenting*:

1. I dissent because the Commission has the authority to grant Petitioners' request for transmission service under section 211A, and because granting their request would be in the public interest.

2. Section 211A of the Federal Power Act, entitled "Open access by unregulated transmitting utilities,"[1] states that the "Commission may . . . require an unregulated transmitting utility to provide transmission services . . . at rates that are comparable to those that [it] charges itself; and . . . on terms and conditions . . . that are comparable to those under which [it] provides transmission services to itself and that are not unduly discriminatory or preferential."[2] As the U.S. Court of Appeals for the 9th Circuit recently explained in *Northwest Requirements Utilities*, "Section 211A was designed to foster an open and competitive energy market by promoting access to transmission services on equal terms."[3] As "evident from the section's title, which mentions 'open access,'" section 211A "prevents anticompetitive behavior by utilities that seek to stifle competitors' generation through control over transmission," and represents a further "step in the legislative and administrative effort to progressively open energy markets."[4]

[1] 16 U.S.C. § 824j-1.

[2] 16 U.S.C. § 824j-1(b).

[3] 798 F.3d 796, 808 (9th Cir. 2015).

[4] *Id.*

3. TVA's preferred interpretation, that section 211A applies only to "give FERC discretionary authority to oversee the rates, terms and conditions for transmission service" where such service is already "provided by an unregulated transmitting entity,"[5] would read open access out of the statute. It runs directly contrary to section 211A's express statement that "the Commission may . . . require an unregulated transmitting utility to provide transmission services."[6] This is further confirmed by section 211A(h), which states that "[t]he provision of transmission services under [211A](b) does not preclude a request for transmission services under section 211."[7] As commenters explain, were wheeling service not available under 211A, this provision "would be rendered not only superfluous, but nonsensical."[8]

4. Nor does anything in the Federal Power Act or the TVA Act compel a result contrary to this plain meaning. Protestors' principal argument appears to be that section 212(j) of the FPA prohibits a section 211A order requiring TVA to provide service into what has become known as the "Fence." But section 212(j), by its terms, clearly applies only to "order[s] **issued under section 824j [211]** of" the Federal Power Act.[9] As the Commission's decision in *East Kentucky* makes clear, section 212(j) does not apply to orders issued under other parts of the FPA.[10] Far from the impenetrable barrier that TVA suggests, section 212(j) is more akin to a cattle fence that lets wildlife enter and exit unimpeded. In *East Kentucky*, the Commission ordered TVA to provide interconnection pursuant to section 210 of the FPA, emphasizing that "section 212(j) makes no prohibition upon the Commission ordering such coordination services to be provided by

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[5] TVA Protest at 36.

[6] 16 U.S.C. 824j-1. As the United States Supreme Court has observed, "[w]hen the statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241 (1989)). Nothing that TVA or any other protestor has raised comes close to demonstrating that the plain textual meaning of section 211A leads to absurd results.

[7] 16 U.S.C. § 824j-1(h).

[8] Southern Alliance for Clean Energy Comment at 5.

[9] 16 U.S.C. § 834k(j) (emphasis added).

[10] *See E. Ky. Power Coop.*, 111 FERC ¶ 61,031, at PP 37-40 (2005) (*East Kentucky I*)); *E. Ky. Power Coop.*, 114 FERC ¶ 61,035, at P 33 (2006) (*East Kentucky II*) (jointly, *East Kentucky*)).

TVA."[11] The Commission stated that section 212(j) was limited to section 211 and explained that "TVA has no statutory basis for objecting to provide [services] under" the other sections at issue.[12]

5. TVA suggests that Congress may have intended section 212(j) to apply to section 211A orders as well as those issued under section 211,[13] but this alternative is also contrary to the express words of the statute. Congress enacted section 211A after 212(j) was in place, and chose not to amend 212(j) to make it apply to 211A as well as 211. By contrast, Congress *did* amend section 201(b) to reference section 211A,[14] making clear that Congress understood that, consistent with standard principles of statutory interpretation, an additional statutory reference was necessary where it wanted a clause to apply to section 211A alongside section 211. In other words, understanding that the TVA Fence only blocks section 211 orders and nothing more, Congress chose not to build a new fence, or strengthen the existing one, to block section 211A orders as well.

6. TVA's suggestion that the Commission's ability to grant Petitioners' requested relief under section 211A is constrained by the TVA Act is weaker still. As petitioners explain, the TVA Act prohibits TVA from serving electricity to entities outside the Fence, but it contains nothing to prohibit TVA from transmitting power from outside the Fence to serve customers within.[15] While TVA asserts a "direct conflict," it relies instead on implausible extrapolations of very general provisions such as the TVA Act's

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[11] *East Kentucky II*, at P 33.

[12] *Id.*; *East Kentucky I*, at n. 17 ("Section 212(j), on the other hand, provides that 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 211* may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such federal law, unless the order is in furtherance of a sale of electric energy to that electric utility.") (emphasis in original).

[13] *See* TVA Protest at 27 ("[A] conflict . . . would not exist if section 211A were properly interpreted not to grant separate authority to order wheeling (or, in any event, not to violate section 212(j))").

[14] *See* 16 U.S.C. § 824(b)(2) ("Notwithstanding subsection (f), the provisions of sections 824b(a)(2), 824e(e), 824i, 824j [section 211], **824j-1 [section 211A]**, 824k, 824o, 824o-1, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions . . .) (emphasis added).

[15] Petition at 15.

authorization for the TVA Board to "establish[] the broad goals, objectives and policies of [TVA]" and "to construct, lease, or purchase transmission lines."[16] As Petitioners observe, to read such general grants of authority as exempting TVA from plainly applicable statutes would give TVA "*carte blanche* authority to take any action that may advance its general responsibilities even where that action may conflict with another federal agency's statutory authority."[17] The far more logical proposition is that the TVA Board must carry out its statutory mission within the confines of applicable law, such as the Clean Air Act, standards set by the North American Electric Reliability Corporation, and yes, Commission orders under section 211A.[18]

7. Nor should we interpret more generally applicable statutes such as section 211A in a manner contrary to their express terms, as TVA suggests, simply to avoid an asserted conflict with a policy adopted by the TVA Board. To compromise section 211A's mandate with regard to *all* nonregulated transmitting utilities based on the unique determinations of the TVA Board would amount to declaring a new canon of tail wagging the dog statutory interpretation.

8. In *Iberdrola*, the Commission wisely rejected similar suggestions to subordinate section 211A's mandate to another unregulated transmitting utility's organic statute due to an asserted conflict. In that case, the Bonneville Power Administration (Bonneville) and its supporters argued that a straightforward application of section 211A conflicted with Bonneville's Environmental Redispatch Policy, which they characterized as "a reasonable and non-discriminatory means for Bonneville to maintain reliability while complying with its environmental responsibilities."[19] But the Commission explained that Bonneville's responsibilities to comply with "numerous other environmental rules and regulations, including those promulgated under the Endangered Species Act and the Clean Water Act" must be reconciled with its duty to comply with Commission orders under section 211A.[20] Nor did the Commission suggest that FPA section 212(i) limitations on the Commission's authority with regard to Bonneville under sections 210,

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[16] TVA Protest at 28, 29, 30 (citing 16 U.S.C. §§ 831a(g)(1)(A), 831k).

[17] Petitioners' Answer at 11 (emphasis in original).

[18] *See id.*

[19] *Iberdrola*, 137 FERC ¶ 61,185, at P 26 (2011), *order on reh'g*, *Iberdrola*, 151 FERC ¶ 61,233 (2012) (*Iberdrola II)*.

[20] *Iberdrola II*, 141 FERC ¶ 61,233, at P 31 (2012), *appeal dismissed sub nom. Nw. Requirements Utilities*, 798 F.3d 796 (9th Cir. 2015). *See also id.*, at n.51 ("[W]e equally did not find that section 211A and our authority therein, is inferior to, or can be subordinated to, Bonneville's other statutory obligations.").

211, and 213, should be read to apply to section 211A, as protestors would have 212(j) application be extended beyond section 211 in this circumstance.[21]

9. Here, just as Bonneville was required to formulate a dispatch policy consistent with the terms of Section 211A while also meeting its responsibilities under its governing statutes, the TVA Board must adopt policies that follow its mandate to uphold the broad goals of the TVA Act in a manner that complies with any orders the Commission may issue under section 211A, which may include requirements that it provide comparable transmission service.

10. Finally, TVA suggests that the Commission must invent new statutory language while ignoring the words on the page because a more straightforward approach would render section 211 of the Federal Power Act a nullity. But while overcoming the plain text of sections 211, 211A, and 212 is already an extremely high bar that is not met here, section 212(e) specifically instructs readers of the FPA *not* to take this approach. It states: "Except as provided in section 824i [210], 824j [211], 824m [214] of this title, or this section, such sections *shall not be construed as limiting or impairing any authority of the Commission under any other provision of law*."[22]

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[21] As Petitioners explain,

> the Commission did not suggest that section 212(i) applied to section 211A orders or even mention section 212(i). Rather, the Commission simply noted that requiring Bonneville to provide comparable and non-discriminatory transmission service did not conflict with Bonneville's other statutory responsibilities. Accordingly, TVA is wrong to suggest that the Commission implied section 212(i) applied to the section 211A analysis in that case and that, by extension, section 212(j) similarly applies to 211A in this case.

Petitioners' Answer at 13, n. 37.

[22] 16 U.S.C. § 824k(e)(1) (emphasis added). Note that this instruction also applies to section 212, meaning that the Commission should also not read section 212(j) beyond its plain terms to restrict the Commission's authority elsewhere. The Commission has previously placed great weight on the savings clause contained in 212(e). In adopting Order No. 888, the Commission rejected a very similar argument that the Commission did not have authority pursuant to section 206 of the FPA to order open access because "'mandatory wheeling is to be governed exclusively by section 211.'" Southern Alliance for Clean Energy Comment at 5 (quoting Order No. 888, 61 Fed. Reg. 21,540, 21,569 (1996)). In doing so, the Commission reasoned that reading section 211 to impliedly restrict the Commission's authority under sections 205 and 206 "would make the savings provision [of section 212(e)] meaningless." Order No. 888, 61 Fed. Reg. at 21,570. That

11. Moreover, interpreting section 211A in a straightforward manner does not render section 211 a nullity. As the Southern Alliance for Clean Energy explains, "Sections 211 and 211A are discrete grants of authority that employ different procedures, apply to different entities, and carry different remedies."[23] Numerous features render each path distinct from the other, suggesting that different petitioners may under different circumstances pursue their remedies under one option or the other. For starters, section 211 is not restricted to unregulated transmitting utilities.[24] Further, section 211, unlike section 211A, authorizes the Commission to set rates according to a prescribed standard that resembles the just and reasonable standard codified in sections 205 and 206.[25] Section 211A, by contrast, provides no such authority for the Commission, and states instead that rates shall be "comparable to those that the unregulated transmitting utility charges itself."[26] Accordingly, an entity seeking a type or rate of service that the transmitting utility does not charge itself may seek an order under section 211 despite the availability of section 211A. Moreover, section 211A and 211 have unique procedures and exceptions. For example, section 211A, unlike 211, authorizes the Commission to categorically exempt from section 211A's reach unregulated transmitting utilities that fit "criteria the Commission determines to be in the public interest."[27]

12. These are but a sampling of the distinctions between the statutory sections that give each one continuing relevance. Petitioners and parties supporting them offer several more.[28] What is clear is that there is no "positive repugnancy" between the sections that

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is true here as well.

[23] Southern Alliance for Clean Energy Comment at 5.

[24] *See* 16 U.S.C. § 824j(a) (authorizing the Commission to issue orders with regard to any "transmitting utility").

[25] 16 U.S.C. § 824k(a) ("An order under section 824j of this title shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which . . . shall be just and reasonable, and not unduly discriminatory or preferential.").

[26] 16 U.S.C. § 824j-1(b)(1).

[27] 16 U.S.C. § 824j-1(c)(3). By contrast, section 211 provides only for case by case determinations. *See* 16 U.S.C. § 824j(a) (providing that the Commission may issue an order in an individual case if it finds that such order "would otherwise be in the public interest").

[28] *See* Petitioners' Answer at 23-26; Southern Alliance for Clean Energy Comment at 5-9.

would render section 211 "wholly superfluous."[29] Instead, as Petitioners aptly put it, section 211A "is simply a different tool in the Commission's toolbox."[30] Accordingly, we must read sections 211A, 212(j), and the other relevant provisions of the FPA as they are written.

13. Having concluded that the Commission has authority to require comparable service under 211A, I also believe that the Commission should exercise that authority here. Granting the petition would provide the customers of the relevant not-for-profit cooperative and municipal utilities access to lower cost power than TVA currently provides them with, supplying a modicum of competition and its associated benefits to the region.

14. Dissenting is not a decision I take lightly, considering the potential for impacts to TVA's other customers. But while Petitioners have demonstrated the public interest benefits of granting their request, TVA has failed to persuasively show that granting the petitions would significantly impact its existing customers.[31] To the contrary, granting the Petition could benefit customers beyond those of the local power cooperatives who filed the Petition by providing impetus for TVA to more efficiently serve customers. Under these circumstances, the public interest warrants an order granting the Petitioners' request.

For these reasons, I respectfully dissent.

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Allison Clements
Commissioner

[29] *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992).

[30] Petitioners' Answer at 27.

[31] *See* Petitioners' Answer at 32-37 (detailing inconsistency between TVA's assertion that the loss of 3.6% of TVA's total load would cost its other customers $3.3 billion through 2040, and the statements of its CEO and other executive officers elsewhere that *10%* loss of load would "not really [cause] a material impact" and wouldn't "create a significant financial impact for us [or] create a significant rate issue for our customers").

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Athens Utilities Board
Gibson Electric Membership Corporation
Joe Wheeler Electric Membership Corporation
Volunteer Energy Cooperative

Nos. EL21-40-000
TX21-1-000

v.

Tennessee Valley Authority

(Issued October 21, 2021)

CHRISTIE, Commissioner, *concurring*:

1. I concur and write separately to offer the following.

2. Changing the basic statutes governing the Tennessee Valley Authority[1] is the prerogative of Congress, not this Commission. If Congress should choose, however, to consider changes to those statutes, with the goal of ensuring that power costs to TVA's consumers are as *"low as feasible,"*[2] as intended by statute, then Congress may wish to consider requiring TVA to increase the amount of power supply it procures on a *competitive, least-cost, non-discriminatory* basis. Competitive procurements of power supply – versus allowing some customers, often the largest, simply to leave load and shop elsewhere – avoid the potential of cost-shifting to remaining customers, most of whom are small businesses and residential customers who do not have the bargaining power of very large customers. Every LSE has fixed costs, and when large customers leave load, those fixed costs must still be paid, with remaining customers as the obvious source from which the LSE could seek to recover its fixed costs. Competitive procurements hold the promise of reducing power supply costs to *all* customers, large and small, while avoiding the threat of potential cost-shifting to small customers.

I respectfully concur.

_____
Mark C. Christie
Commissioner

[1] 16 U.S.C. § 831 *et seq.*

[2] 16 U.S.C. § 831n–4(f).

EXHIBIT B

177 FERC ¶ 62,162
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Athens Utilities Board
Gibson Electric Membership Corporation
Joe Wheeler Electric Membership Corporation
Volunteer Energy Cooperative
v.
Tennessee Valley Authority

Docket Nos. EL21-40-001
TX21-1-001

NOTICE OF DENIAL OF REHEARING BY OPERATION OF LAW AND PROVIDING FOR FURTHER CONSIDERATION

(December 23, 2021)

Rehearing has been timely requested of the Commission's order issued on October 21, 2021, in this proceeding. *Athens Utilities Board v. Tennessee Valley Authority*, 177 FERC ¶ 61,021 (2021). In the absence of Commission action on the request for rehearing within 30 days from the date the request was filed, the request for rehearing (and any timely requests for rehearing filed subsequently)[1] may be deemed denied. 16 U.S.C. § 825*l*(a); 18 C.F.R. § 385.713 (2021); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

As provided in 16 U.S.C. § 825*l*(a), the rehearing request of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 16 U.S.C. § 825*l*(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing request will be entertained.

Kimberly D. Bose,
Secretary.

[1] *See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. Into Mkts. Operated by Cal. Indep. Sys. Operator & Cal. Power Exch.*, 95 FERC ¶ 61,173 (2001).

EXHIBIT C

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