

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

<b>Athens Utilities Board;</b>	)	
<b>Gibson Electric Membership</b>	)	
<b>Corporation; Joe Wheeler Electric</b>	)	<b>Docket Nos. EL21-40-000</b>
<b>Membership Corporation; and</b>	)	<b>TX21-1-000</b>
<b>Volunteer Energy Cooperative</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>Tennessee Valley Authority</b>	)	

**MOTION FOR LEAVE TO FILE COMMENTS OUT OF TIME AND  
COMMENTS OF THE STATE OF TENNESSEE**

Pursuant to Rules 206 and 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),<sup>1</sup> the State of Tennessee (“State” or “Tennessee”)<sup>2</sup> submits this motion for leave to comment out-of-time and comments (“Comments”) to the Complaint and Petition for Order Under Federal Power Act Sections 210 and 211A Against Tennessee Valley Authority (“TVA”) filed in the above-captioned proceedings on January 11, 2021 (“Petition”).<sup>3</sup> In support hereof, Tennessee states as follows:

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<sup>1</sup> 18 C.F.R. §§ 385.206, 385.212 (2020).

<sup>2</sup> The interests of Tennessee in this matter are represented by the Office of the Tennessee Attorney General. This case may have implications for the Tennessee Public Utility Commission, Tennessee’s Utility Management Review Board, the Tennessee Department of Environment and Conservation, and the Tennessee Department of Economic and Community Development.

<sup>3</sup> The Petitioners are Athens Utilities Board (“Athens”), Gibson Electric Membership Corporation (“Gibson EMC”), Joe Wheeler Electric Membership Corporation (“Joe Wheeler EMC”), and Volunteer Energy Cooperative (“Volunteer”). Petition at 1.

## I. Motion for Leave to Comment Out-of-Time

Tennessee moves for leave to comment out-of-time in the above-captioned proceedings. On January 26, 2021, the Commission extended the comment deadline to February 22, 2021.<sup>4</sup> Tennessee timely intervened on that date.<sup>5</sup> After reviewing the comments and protests filed by other parties and in light of the evolving developments resulting from the electricity crisis in Texas, Tennessee believes that, as a sovereign state government of the state that is the physical location of much of TVA's infrastructure, it needs to elaborate on several points that have not yet been fully addressed by other parties.

The Commission has permitted late-filed comments given the movant's "interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay."<sup>6</sup> As a sovereign state government that is a customer of TVA or is served by utilities that are TVA customers, Tennessee has a unique vested interest in this proceeding. Additionally, the Commission has not issued an order in the proceeding, thus, accepting Tennessee's late Comments

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<sup>4</sup> *Athens Util. Bd. v. TVA*, Notice of Extension of Time, Docket Nos. EL21-40 and TX21-1 (issued Jan. 26, 2021).

<sup>5</sup> *Athens Util. Bd. v. TVA*, Motion to Intervene of State of Tennessee, Docket Nos. EL21-40 and TX21-1 (filed Feb. 22, 2021).

<sup>6</sup> See, e.g., *S. Star Cent. Gas Pipeline, Inc.*, 175 FERC ¶ 61,015, at P 9 (2021) (accepting late comments given movants' "interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay"); *N.Y. Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,159, at P 13 (2020) (accepting a city's late comments "given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay"); *Trunkline Gas Co.*, 145 FERC ¶ 61,087, at P 6 (2013) (accepting late comments because doing so would "not cause prejudice against the parties or undue delay."); *Enbridge Energy, Ltd. P'ship*, 141 FERC ¶ 61,246, at P 4 (2012) (accepting late comments because doing so would "not disrupt the proceeding or place additional burdens on existing parties"); *Rockies Express Pipeline LLC*, 135 FERC ¶ 61,253, at P 6 (2011) (accepting late comments due to the movant's "interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay").

will not prejudice any party or cause any undue delay. Accordingly, good cause exists to grant Tennessee's motion for leave to comment out-of-time.

## II. Statutory and Regulatory Background

### A. The TVA Act and TVA

Electricity in Tennessee is primarily generated by TVA, which was established by statute in 1933 as a federal agency and a public corporation wholly owned by the United States.<sup>7</sup> TVA has a broad statutory mandate to advance “the national defense and the physical, social and economic development” of citizens within the seven states that comprise the Tennessee Valley.<sup>8</sup> These statutory duties include, among other things, maintaining and operating certain federal property for national-defense purposes, promoting agricultural and industrial development, improving navigation in the Tennessee River, flood control, and rendering substitute funding for local governments in lieu of taxes.<sup>9</sup> Most relevant here, TVA is directed by statute to maintain “adequate authority and administrative flexibility to obtain the *necessary funds with which to assure an ample supply of electric power* for such purposes by issuance of bonds . . . .”<sup>10</sup> There are two significant limits on this statutory authority: first, Congress imposed a debt ceiling on the bonds issued to finance TVA's power program; and second, Congress created a “fence” that prohibits TVA from selling power directly or indirectly to customers outside of its historic service area as of July 1, 1957.<sup>11</sup>

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<sup>7</sup> Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58 (May 18, 1933) (codified as amended at 16 U.S.C.A. §§ 831-831ee (2020)).

<sup>8</sup> 16 U.S.C. § 831n-4(h).

<sup>9</sup> See 16 U.S.C. § 831.

<sup>10</sup> 16 U.S.C. § 831n-4(h) (emphasis added).

<sup>11</sup> 16 U.S.C. §§ 831n-4(a), (h). (“Unless otherwise specifically authorized by Act of Congress [TVA] shall make no contracts for the sale or delivery of power which would have the effect of

Although TVA serves electric customers in seven states, TVA employs many Tennesseans, and two-thirds of TVA's annual electricity sales are to Tennessee consumers.<sup>12</sup> Tennessee and its communities host 20 of TVA's 32 coal and nuclear plants on the TVA system.

TVA maintains a 25% winter reserve margin,<sup>13</sup> which protects public health and safety in Tennessee as well as the economic interests of the State during extreme cold periods. TVA is nationally exceptional in the diversity of its power-generation fleet, with nearly 60% of its power generation coming from nuclear, hydro, or renewable sources.<sup>14</sup> TVA's diverse generation fleet represents over 80% of TVA plant assets. Its generation investment includes \$64.97 billion in gross completed plant cost, including \$25.74 billion for nuclear assets, \$18.61 billion for coal assets, \$6.01 billion for natural gas assets, and \$3.41 billion for hydroelectric assets.<sup>15</sup> Transmission plant is approximately \$8.28 billion, a little over 12% of TVA's plant assets.<sup>16</sup>

#### **B. Wheeling Authority Under the Federal Power Act**

Although TVA is generally exempt from Commission regulation under Federal Power Act ("FPA") section 201(f),<sup>17</sup> Petitioners here seek relief under FPA section 211A, which provides

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making [TVA] or its distributors, directly or indirectly, a source of power supply outside the area for which [TVA] or its distributors were the primary source of power supply on July 1, 1957, and such additional area extending not more than five miles around the periphery of such area as may be necessary to care for the growth of [TVA] and its distributors within said area . . . .").

<sup>12</sup> Tennessee Valley Auth., Annual Report (Form 10-K), at 127 (Nov. 17, 2020).

<sup>13</sup> Tennessee Valley Auth., 2019 Integrated Resource Plan, Volume 1 – Final Resource Plan, at 4-12, <https://www.tva.com/environment/environmental-stewardship/integrated-resource-plan>.

<sup>14</sup> Tennessee Valley Auth., Annual Report (Form 10-K), at 12 (Nov. 17, 2020).

<sup>15</sup> *Id.* at 98.

<sup>16</sup> *Id.*

<sup>17</sup> 16 U.S.C. § 824(f) ("No provision in this subchapter shall apply to, or be deemed to include, the United States, . . . or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the

that “the Commission may, by rule or order, require an unregulated transmitting utility to provide transmission services” at rates, terms, and conditions “that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential.”<sup>18</sup>

However, FPA section 212(j), entitled “Equitability within territory restricted electric systems,” prohibits the Commission from ordering TVA to deliver electricity that was not generated by TVA to load inside the statutory “fence” created by the TVA Act. This provision, commonly known as the “anti-cherry-picking amendment,” 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 824j of this title may require such electric utility (or a distributor of such electric utility) to provide transmission services to another entity if the electric energy to be transmitted will be consumed within the area set forth in such Federal law, unless the order is in furtherance of a sale of electric energy to that electric utility[.]<sup>19</sup>

The legislative history for this “anti-cherry-picking amendment” indicates that the purpose of this provision was to ensure an equitable balance with the “fence” provision in the TVA Act.<sup>20</sup>

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foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.”).

<sup>18</sup> 16 U.S.C. § 824j-1(b).

<sup>19</sup> 16 U.S.C. § 824k(j). The section continues “Provided, however, That the foregoing provision shall not apply to any area served at retail by an electric transmission system which was such a distributor on October 24, 1992, and which before October 1, 1991, gave its notice of termination under its power supply contract with such electric utility.” *Id.* However, no one in this proceeding suggests that limitation is relevant.

<sup>20</sup> *See* H.R. Rep. No. 102-474, pt. 3, at 38 (1991) (“By law, TVA is prohibited from providing electricity outside of its boundaries. Because of this inability to compete, TVA is not required by the amendment to provide transmission services into the TVA service area to another entity if the electric energy to be transmitted would be consumed within the TVA operating area. This provision protects the status quo for TVA’s operation. If TVA is required to transmit power from an outside agency to a retail customer, TVA will lose the ability to provide an economic source of electric power to all of its customers, both rural and urban.’ The Committee supports this provision applicable to TVA and has not amended it.”).

### **III. The Commission Should Deny the Petition**

Under the TVA Act, Tennessee historically has had a limited role in defining electricity public policy for the state. This proceeding may change that. Additionally, the electricity crisis in Texas a little over two months ago sounded alarm bells around the country on the need for region-specific policy planning for electricity. In this proceeding, entities serving some Tennessee service areas seek to leave the umbrella of the TVA system. Should they do so, a regulatory gap may develop between citizens served by those entities and the generators outside the TVA territory providing them electricity service.

Electricity service for all customers centers on matters of safety, reliability, and cost. But TVA is much more than an electric utility. As described above, the TVA Act requires TVA to perform a significant number of public services—including flood control, employment objectives, economic development support, and rendering substitute funding for local governments in lieu of taxes.<sup>21</sup> Tennessee works in partnership with TVA on many of these matters, all of which depend on TVA's financial health.

#### **A. Granting the Petition Would Create Unnecessary Risks of Significant Harm to TVA and the Citizens TVA Serves**

Certain Petitioners seek to reduce electricity costs by purchasing electricity generated by power generators outside of the TVA region by seeking a Commission order under FPA section 211A. Because the ultimate delivery of TVA's broad mandate is principally established under the TVA Act, Tennessee strongly cautions the Commission to carefully consider the interrelated manner in which service in the TVA region is delivered. An order by the Commission that narrowly grants the Petitioners relief under FPA section 211A without addressing the impact on

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<sup>21</sup> See 16 U.S.C. §§ 831, 831n-4(h).

the non-jurisdictional aspects of TVA's unique statutory missions may create unanticipated, unintended, and consequential impacts for the entire TVA region.

The TVA revenue-loss impact from an unbundling of its services will likely be a significant multiple of the new transmission revenues received for the electricity transmission service the Petitioners request, which service would have been purchased in a bundled fashion from TVA by the departing local power companies. The precedential impact of this decision may significantly disrupt the health of TVA. Memphis Light, Gas and Water, the largest electricity distributor in Tennessee, is considering whether to extend its TVA contract or contract with other power generation suppliers.<sup>22</sup> If the Commission approves the Petition, other local power companies on the TVA system may reconsider their long-term relationship to TVA.

Reduced aggregate TVA revenues may shift the burden of cost recovery to a smaller pool of Tennesseans, raising costs to consumers and adversely affecting economic and community development. As a result of reduced revenue, future TVA integrated-resource plans may diminish the reserve margin or substitute lower cost generation to avoid further revenue losses at a cost to reliability. Or future plans may extend the operating life of generation facilities TVA would otherwise retire, either reducing supply diversity or delaying replacement of aged plant. The February electricity crisis in Texas and the surrounding area shows that transmission-grid operating capabilities alone are inadequate without operationally available and diverse generation inventory.

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<sup>22</sup> Samuel Hardiman, *With council vote, Memphis decides to get bids on its electricity supply, a key step to leaving TVA*, (Apr. 8, 2021, 12:52 PM), <https://www.commercialappeal.com/story/news/2021/04/06/mlgw-memphis-bid-out-its-power-supply-look-leaving-tva/7104288002/>.

The Petition, though labeled as a limited transmission issue, predominantly affects the recovery of costs related to other TVA Act–mandated missions,<sup>23</sup> especially the recovery of generation costs for large past investment decisions. These past investment decisions have benefitted *all* current TVA customers, but granting the instant Petition would put the recovery of those costs in unnecessary jeopardy. For example, Tennessee and its communities host 20 of TVA’s 32 coal and nuclear plants on the TVA system.<sup>24</sup> Managing the retirement cost of those plants is a significant TVA responsibility. TVA estimates that over \$6 billion is required to retire its existing facilities and the costs of retiring coal and nuclear facilities represent significant portions of those costs.<sup>25</sup> Moreover, some of those costs have not been definitively determined. For instance, the Tennessee Department of Environmental Conservation requires the monitoring and reporting on Coal Combustion Residual Facilities in Tennessee for 50 years after plant retirement. The future impact on the State and its citizens may be material if the funding of these plant retirements is inadequate.

**B. Granting the Petition Conflicts with a Carefully Constructed Statutory Scheme**

TVA operates under a patchwork of intertwined statutory obligations, including the TVA Act, the FPA, and other statutes. The Petition, if granted, will effectively result in a wholesale

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<sup>23</sup> See 16 U.S.C. §§ 831, 831n-4(h). TVA is required to direct all of its activities toward the physical, social and economic development of the Tennessee Valley. These include providing power, environmental protection, flood control, and river and land management, assisting agriculture, promoting regional economic development and supporting national defense. See *Athens Util. Bd. v. TVA*, Protest, Answer, and Motion to Intervene of the Tennessee Valley Authority, Docket Nos. EL21-40 and TX21-1, at 1-2, 8-15 (filed Feb. 22, 2021).

<sup>24</sup> Tennessee Valley Auth., Annual Report (Form 10-K), at 46 (Nov. 17, 2020).

<sup>25</sup> *Id.* at 146.



restructuring of service by TVA, even though the predominant governing authority for delivering both electricity and other service mandates is the TVA Board.

The Petitioners' requested relief would change the balance of obligations and benefits on which TVA has built its service and reliability framework and create a troubling precedent. Granting the Petition would directly contravene the "anti-cherry-picking" protection for TVA in section 212(j) of the FPA,<sup>26</sup> which counterbalances the "fencing" limitations on TVA service under the TVA Act.<sup>27</sup> The Petition centers on the Commission granting the request for transmission access to generation outside the TVA service area, but the disproportionate effect on TVA-generation cost recovery, which is governed by the TVA Board, exemplifies the inability of the requested relief to be fairly considered or appropriately implemented solely under the Commission's authority.

The leveraged impact on TVA generation revenues and other TVA mission objectives relative to the benefits of the transmission-service access requested can only reasonably be implemented through the concurrent elimination of these two central statutory balancing requirements—anti-cherry-picking and fencing—and would require federal legislative action. Otherwise, the fair balance between limitation of electricity service into and out of the TVA region will be broken.

Granting the Petition, in this limited venue, would create a patently unfair competitive environment between TVA and electricity providers outside of the TVA service territory with the concomitant, destructive impact on Tennessee markets, citizens, and economic-development opportunities. The Commission lacks the authority to implement a one-sided, unbalanced

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<sup>26</sup> See 16 U.S.C. § 824k(j).

<sup>27</sup> See 16 U.S.C. § 831n-4(a).

amendment of federal statutes in such an indirect manner. The relief requested in the Petition should be effectuated only through amendments to applicable federal statutes that fully affect these service issues within TVA.

Accordingly, Tennessee believes that granting the Petition cannot reasonably be deemed to be within the Commission's authority and, thus, the Petition cannot be granted since a majority of the resulting impacts would be on issues governed by the TVA Act, which commits substantial rate-related decisions within the domain of the TVA Board. This is a common-sense conclusion, and it strongly suggests that the Commission decline to act on the Petition.

Even if the Commission has discretion in this matter and disagrees with Tennessee's view, it is reasonable for the Commission to use its discretion not to act on the Petition. This will avoid imposing a disproportionate cost on TVA's non-transmission mandates, avoid protracted court proceedings, and avoid creating a costly period of uncertainty over who has what rights for service in the TVA region. If the Commission grants the Petition, it should recognize in its order that it can only approve limited portions of the request and that the proposed interconnecting facilities cannot be effectuated without amendments to the TVA Act and the FPA.

#### **IV. Conclusion**

For the reasons set forth above, Tennessee respectfully submits that granting the Petition will have profoundly negative consequences on the delicate regulatory and economic balance between Tennessee and TVA, thus, the Commission should deny the Petition.

Respectfully submitted,

/s/ Sarah A. Hiestand

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Dated: May 17, 2021

**CERTIFICATE OF SERVICE**

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

Dated this 17th day of May, 2021.

/s/ Sarah A. Hiestand

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