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UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

Applications of the	)	
Chicago Board of Trade	)	
for Designation as a Contract	)	
Market in TVA Hub Electricity	)	Docket No. ________
Futures and Options,	)	
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DEPARTMENT OF JUSTICE

STATEMENT

of

A. DOUGLAS MELAMED
Principal Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the

Committee on the Judiciary
United States House of Representatives

LEGISLATIVE AND OVERSIGHT HEARING ON ANTITRUST ASPECTS OF ELECTRICITY DEREGULATION

Washington, D.C.
June 4, 1997

Good morning, Mr. Chairman and Members of the Committee. I appreciate the opportunity to speak to you about some of the competition issues involved in restructuring the electric power industry.

It would be hard to overstate the importance of electric power to the American economy and to American families. Sales of electricity in the U.S. totaled more than $207 billion in 1995, the last year for which final figures

are available. All of us have a stake in eliminating obstacles to efficient generation and transmission of electric power.

I believe that bringing competitive market forces more fully to bear in the electric power industry will enable more efficient use of electric power resources, resulting in important benefits for consumers and the economy. Experience has shown that truly competitive markets, when they are achievable, invariably surpass regulation in efficiently allocating resources and maximizing consumer welfare.

Congress has begun looking at what can be done at the federal level to encourage competition in the electric power industry. While I am generally supportive of these efforts, I think it is appropriate to sound a note of caution at the outset. The fact is that there are unique attributes to this

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industry that will likely make successful competitive restructuring more difficult than might appear at first glance.

In my remarks today, I do not intend to outline a program or offer definitive answers. At this point, the Antitrust Division is actively working with other interested agencies in the Administration to develop the Administration's position on key restructuring issues. So, today, I will simply highlight what I believe are some important issues that will have to be dealt with if we are to have a successful restructuring effort. After I give a brief overview of our enforcement activity in this industry and the industry's evolution, I will discuss two potential areas for increased competitive benefits: open access transmission and time-of-use pricing. I will also address two potential impediments to effective competitive restructuring: potential market power problems and the matter of stranded costs.

Historical Role of the Antitrust Division

The Antitrust Division has long played an important role in protecting and promoting free and open markets in the electric power industry. A seminal antitrust case in this industry was an enforcement action brought by

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the Antitrust Division under the Sherman Act to stop the Otter Tail Power Company from monopolizing the retail distribution of electric power in its service area in Minnesota, North Dakota, and South Dakota. Otter Tail owned the transmission lines in its service area, and one of the means it employed to monopolize the market was to refuse to transmit, or "wheel," power over its lines to municipal utilities competing with it for local distribution. In 1973, the Supreme Court upheld a lower court order requiring Otter Tail to wheel power to the municipal utilities, ruling that the electric power industry was subject to the antitrust laws even though it was also subject to regulation by the Federal Power Commission.

Since that time, now more than two decades ago, we have worked to ensure that the antitrust laws protect consumers of electricity. We have conducted many merger reviews, helped FERC develop its new merger review standards, which now are closely patterned on the joint DOJ-FTC merger guidelines, and been active participants in major FERC rulemaking proceedings involving competition issues. Through these activities, I believe the Division has developed a good understanding of the competitive

issues in the electric power industry.

As we move to a competitive generation market, antitrust enforcement will play an even larger role. As our experience with deregulation in a variety of industries over the past two decades shows, when we seek to narrow government regulation and make room for competitive market forces, the industry involved typically responds with a major restructuring of its own. If history is any guide, we could see a wave of electric utility mergers and acquisitions. And we would also anticipate increased temptation -- at a minimum -- on the part of utilities to resort to anticompetitive schemes to ease the competitive pressures of the new market-based environment. It is critically important to have an active and sound antitrust enforcement policy to help ensure a successful transition to competition. The Antitrust Division intends to remain vigilant and active.

The Electric Power Industry

The electric power industry developed historically from a patchwork of isolated and vertically integrated electric utilities, each generating and distributing electric energy to consumers in relatively compact service areas.

Each service area was regarded as a "natural monopoly," because under the existing technology it did not appear economically justifiable to invest in more than one distribution system in each local service area or to construct more generators than necessary to provide full capacity and reliability to that area. Because of these natural monopoly characteristics, state regulators typically required the local utility to supply all consumers in its area, at regulated rates.

Advances in technology over time made power generation more efficient at a larger scale and made transmission of electric energy possible over long distances. These advances encouraged interconnection among utility transmission networks, initially for enhanced reliability and then for improved economy of service.

More recently, it has become possible, with improved technology, to generate electric power at efficient cost levels with much smaller generating plants. There is now a growing consensus that the generation segment of electric power supply could become more efficient and economical under competitive market forces. The transmission and distribution segments, on the other hand, will likely retain their natural monopoly characteristics for the

foreseeable future. The challenge, then, is to foster vigorously competitive generation markets within the context of regulated transmission and distribution monopolies.

In thinking about restructuring, it is important to remember that the electric power industry has a number of unique characteristics that distinguish it not only from basic manufactured goods markets, but also from other network industries such as telecommunications. The product -- electric energy -- cannot be stored, and consumer demand for it varies widely from season-to-season, from day-to-day, and from hour-to-hour. Actual quantities

generated must continuously and instantaneously match widely varying consumer demand.

In addition, the flow of energy over an electric power network cannot economically be switched to follow a particular path, so in the power grid of today and the immediate future, energy will flow along the path of least resistance. Therefore, the actual physical delivery patterns for electricity may not match the contractual arrangements for sale of electricity, and successful transmission will depend on the relative output levels of all generators on the

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power grid.

Increasing Wholesale Competition

Much of the discussion about restructuring the electric power industry has centered around introducing retail competition. That is certainly a desirable goal, but it will not be easy to achieve. Indeed, an essential first step toward achieving competitive retail prices for electricity will be to ensure that we have a well-functioning wholesale market. Although considerable progress has been made toward this objective, we are not there yet.

We believe that the wholesale market can be made to function even more efficiently than it is currently functioning. Doing so would benefit both wholesale and retail purchasers of electric power, including households and small businesses that use relatively small amounts of power.

Open Access to Transmission

Competition can be most effective to the extent that low-cost generators are able to compete for sales to all potential customers that they can economically serve given available technology. When electric power is supplied by the least costly generators running to full efficient capacity, the

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overall cost of generating the power is minimized, and prices can be lowered. Such competition by low-cost generators requires open and non-discriminatory access to transmission.

Vertical integration in the same utility of generation and regulated monopoly transmission, however, creates an incentive and ability to impede open access. Because competing generators of electricity will need to use the local utility's transmission facilities in order to supply customers in that utility's service area, the vertically-integrated utility has the ability and incentive to impede competition by favoring its own generators and otherwise restricting competitors' access.

Last year, the Federal Energy Regulatory Commission (FERC) issued Orders 888 and 889, designed to prevent such discriminatory practices. FERC ordered utilities to separate their generation and transmission businesses functionally, and to abide by a Code of Conduct. FERC's order, which relies on the integrated utilities to engage in conduct that may be inconsistent with their economic interests, may prove insufficient to ensure open access.

Turning over operation and control of transmission facilities to

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Independent Systems Operators ("ISOs") is potentially a more promising solution for preventing anticompetitive, discriminatory behavior by the owners of transmission facilities. ISOs are regional entities that assume operational control of transmission facilities. Although the current utility transmission owners could retain ownership of their transmission facilities, the ISOs, if governed in a manner that renders them truly independent of the parochial interests of the owning utilities, could ensure comparable and non-discriminatory access to the transmission grid by competing power suppliers. Congress should consider whether FERC needs additional regulatory authority to promote the creation of ISOs.

Open transmission access alone will not guarantee competition in the wholesale market. As long as the transmission segment of the industry remains a monopoly, there will be regulatory issues to deal with regarding transmission rates and rate structures. It is important that transmission prices not be so high as to distort competitive decisions for purchasing power from the most efficient suppliers, and not be so low as to discourage investment in major new transmission projects to eliminate bottlenecks in the transmission

system. The industry and regulators will undoubtedly also face other important issues regarding how to promote expansion of transmission systems to sustain and nurture competitive wholesale markets.

Time-of-Use Pricing

One obvious benefit of increased competition is that it allows consumers to choose a lower-cost electricity supplier. In addition, increased competition can enable certain purchasers to benefit by adjusting their time of consumption in response to price signals. If these purchasers shift some of their use of electricity from peak to non-peak periods, they will reduce the overall costs of acquiring electricity. Lower total demand during peak periods will require less investment in generating facilities and will lower overall system costs.

Congress may want to consider whether current regulation unnecessarily prevents end-users from purchasing electric power directly from a supplier other than their local utility. If end-users are required to purchase power in the retail market at rates based on averaged costs of providing electricity -- which do not fluctuate to reflect the actual cost of producing electricity at different points in time -- end-users lose an important economic incentive to make more

efficient purchases of power.

Market Power

It is crucial to address possible market power problems in the generation market. Historically, of course, vertically integrated electric utilities have typically had monopoly power in their distribution area, and we anticipate that significant pockets of market power may remain even after wholesale competition is widely introduced. This market power stems not only from transmission constraints, but also from high levels of concentration in the generation market. If competition is to take hold in this industry, restructuring of the generation market may be necessary.

Because of the complexities I described earlier in the physics of transmitting electric power through a shared network, market power is maintained and exercised in the electric power industry in complex ways,

which may change as we move from a regulated environment to a competitive one.

As a first step, we urge Congress to consider giving FERC the authorization and resources to undertake a thorough study of market power in

this industry. FERC not only is the agency most familiar with the industry; it also offers a suitable public forum in which all interested parties may present their views. We would, of course, be pleased to participate in any such study.

We also believe that the federal tools to remedy market power problems where they are found may need to be augmented. The antitrust laws do not outlaw the mere possession of monopoly power. The exercise of market power can be addressed only if an entity is attempting to monopolize, or if two or more entities are acting in concert in restraint of trade or are proposing to merge. With an industry emerging from decades of government-sanctioned monopoly, we anticipate that there may well be market power problems that do not fit neatly into these categories but are nonetheless serious impediments to competition. Congress should carefully consider whether regulators have sufficient authority to remedy any market power problems, or if federal legislation should further enhance regulatory tools in this area.

Competitively Neutral Recovery of Stranded Costs

Let me now turn to what have been referred to as "stranded costs." As competition lowers prices for electricity, it will become increasingly difficult for

utilities to recover all of the capital investments they made under regulation. The historical costs on which utilities will not be able to earn a reasonable return in a competitive market are known as "stranded costs."

There may be many billions of dollars of potential stranded costs at stake here. Not surprisingly, the question of what to do about stranded costs has emerged as one of the major points of controversy in the electric power restructuring debate. There are strong differences of opinion, not only about who should absorb these costs -- the shareholders, the ratepayers, or some broader segment of society -- but also about how to measure them. Should all construction costs incurred during the regulated monopoly era be counted, or only costs that are shown to meet a standard of prudence? How great an effort to mitigate the costs should the utility be required to undertake before the remaining costs are deemed to be truly stranded? These, and probably others, are important questions.

We are not here to give an Administration position on either how stranded costs should be measured or how they should be allocated. But however stranded costs are measured and allocated, we believe it is important

that they be assessed on a competitively neutral basis. By this we mean that they should be recovered in a way that minimizes distortions of competitive choices by wholesale and retail customers. Otherwise, customers could be artificially induced to choose less efficient suppliers, or less efficient sources

of energy.

Conclusion

On a final note, I would like to thank you, Mr. Chairman, and this Committee for the important role you played during consideration of the Telecommunications Act, in ensuring that the importance of preserving full applicability of the antitrust laws was not overlooked in the dramatic deregulatory restructuring of an industry occasioned by that legislation. It is equally important that the antitrust laws remain fully applicable to the electric power industry. Any restructuring of an industry is by nature an experiment -- even when it is a carefully considered one. It is thus important to maintain the backstop of the antitrust laws and their 100-year history of preserving and fostering competition.

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"UNLEASHING POTENTIAL: TVA IN FREE-MARKET COMPETITION"
REMARKS BY CRAVEN CROWELL, CHAIRMAN
TENNESSEE VALLEY AUTHORITY
TO THE AMERICAN PUBLIC POWER ASSOCIATION BOARD OF DIRECTORS
FEBRUARY 2, 1995 -- WASHINGTON, D.C.

INTRODUCTION

Thank you for that kind introduction, Don. We in the Tennessee Valley are especially proud that one of our own was elected by his peers to serve as president of APPA.

Don is joined on the APPA Board by two other Valley residents, Bill Moss, Executive Director of TMEPA, and Mike Browder, General Manager of the Bristol Tennessee Electric System. I congratulate them, and I congratulate each of you for your service and leadership on behalf of public power.

Of course, no one has worked harder for public power than Larry Hobart. I understand Larry will be retiring in July after 35 years of service to APPA. And though he's still got five months on the job, I would like to be among the first to say that we will miss his leadership in our industry.

THE NEW COMPETITIVE LANDSCAPE

With the passage of the Energy Policy Act of 1992, Congress sounded the trumpet for the electric power industry, and now the walls of industry regulation are beginning to tumble down. Deregulation is no longer a specter, hovering on the horizon. It is a rapidly approaching reality.

Just as the collapse of communism in eastern Europe brought about a new world order, just as the dismantling of trade barriers opened new frontiers in global commerce--now the deregulation of public power is breaking down the barriers to open competition and giving rise to a new competitive landscape. It's a landscape in which retail wheeling, open access, co-generators, and IPP's will be prominent features, and efficient generation, creative marketing, and sensitivity to financial markets will be more important than ever.

While some in our industry are concerned about the future, we at TVA are excited by it, and we're ready for it.

WHAT TVA HAS DONE TO GET READY FOR COMPETITION

Since July of 1993, we've pulled out all the stops to ensure that no utility in America is better prepared for a fully competitive marketplace.

We've dramatically reduced our personnel costs and streamlined our management. We've significantly improved our productivity and efficiency in every conceivable area.

We've reduced our overhead for operations and maintenance and announced our intention to get out of the nuclear construction business. We've reduced the cost of our debt, and we're making plans for a self-imposed limit on future borrowing.

We've accelerated our compliance with the provisions of the Clean Air Act and made environmental quality a measure of our efficiency. We've made a major commitment to integrated resource planning and begun a comprehensive strategy development process, and we've developed a management team whose members are flexible, innovative, and visionary--managers who have demonstrated the ability and the willingness to let go of traditional roles and outmoded ways of thinking, managers who thrive on the challenges of competition.

As a result of our efforts in these areas and more, TVA is at

the forefront of change and innovation in meeting customer needs, preparing for industry change, and pursuing new market opportunities. Our residential rates are already among the lowest in the nation and lower than 80 percent of the utilities bordering our service area. Our commercial and industrial rates are well below the median for our region, and we've held our rates constant since 1987.

These are indisputable facts that prove how competitive TVA is today, and we're well-prepared to take our place among the lowest-cost, highest-value energy suppliers in the nation.

EVEN GREATER CHALLENGES AHEAD

Since I became Chairman, we've taken bold steps to unleash TVA's raw potential as a competitive utility and to cast off the financial burdens of our recent history. But we cannot thrive unless we are free to compete beyond the statutory confines of our existing service area.

To achieve our full potential in a fully deregulated environment, we face a two-fold challenge: We must expand the services we offer and broaden the area we serve.

In the competitive world of tomorrow, I don't believe TVA can thrive without expanding its product base or its customer base.

BROADENING OUR CUSTOMER BASE

You all know the complex history of the fence that has surrounded TVA's service area since 1959. Many of you have similar territorial boundaries, with equally complex histories. These boundaries are part of a system of regulation that's governed our business for more than 30 years.

The fence around TVA's service area was put up at the insistence of private power companies when the TVA power system became self-financing. The fence was intended to be a bulletproof vest for our competitors. It has become a straitjacket for TVA.

There was a time when the fence was a source of security for TVA. But there can be no security in a one-way fence that allows our competitors to come in but keeps us from going out. The fence is an artificial barrier that gives our competitors an unfair advantage, a means to whittle away at our territory.

We simply say that if others have the right to come after our customers, we should have the right to go after theirs. That's just fundamental fairness.

You may have heard the poem that says, "Before you go putting up fences, you should think about what you're fencing in and what you're fencing out." I think that what we're fencing out are the competitive opportunities of a free market, and what we're fencing in is the competitive potential of our employees.

The TVA Board has commissioned Palmer Bellevue, a division of Coopers and Lybrand--one of the major accounting firms--to take a look at the facts pertaining to the fence. We'll examine that study very carefully before we go to our Congressional delegation and propose specific legislation to take down the fence.

We are waiting for verification, but in my own judgment the outcome is all but preordained: The fence should come down. As we look toward an era of open-market competition, the fence no longer makes sense. And when it does come down, competition will be a two-way street and TVA will once again have the freedom to compete anywhere in the country.

We had that freedom until 1959. It's time we had it again. It's time to set TVA free.

EXPANDING OUR RANGE OF SERVICES

Besides expanding our customer base, we and other successful

utilities must expand the range of services we offer our customers. Right now, TVA is meeting the needs that our customers say are important to them, namely, economical and reliable energy. But beyond these "articulated needs" is a much larger field of "unarticulated needs"--needs that our customers haven't even thought of. This field represents a broad range of possibilities for new products and services that are compatible with our current business.

Utility companies of the future will deliver more than energy. They will deliver a complete package of energy, information, and communication products, and only the most productive and resourceful companies will survive.

This is where big utilities will have an advantage, because only they will have the information resources, the marketing prowess, and the financial strength to assemble a complete energy package. For TVA, the revolution in computer and communications technology opens up new possibilities for the real-time pricing, transmission, and distribution of energy.

TVA already has one of the nation's largest transmission and distribution networks, and we're looking for ways to piggy-back other communications products onto these networks. We've already linked our facilities with an internal fiber-optic network, and I can see a time when our internal network will merge with external networks to bring additional communications possibilities to our customers. I am giving TVA employees the mission of identifying these and other possibilities, and developing ways to transform promising possibilities into concrete demand for new products and services.

As Chairman, I am turning TVA loose to be a pacesetter in free-market competition, and I'm empowering our employees to seek out new opportunities for TVA.

CONTINUING TO FOCUS ON THE BASICS

I believe it's essential for TVA to go beyond the fundamentals of sound business practices and explore new ways to expand our markets and services. TVA intends to be at the forefront of change--an engine for driving change and a model for defining change.

We will continue to emphasize lower costs, market-driven pricing, and innovative value-adds in quality, reliability, and services. We will redouble our efforts to make the most of our unique expertise in generation, transmission, and retail pricing and policy making. And we will continue to work in partnership with our distributors to offer reliable, high-quality power that's competitively priced.

We look forward to a continuing, cooperative relationship with our distributors, and I'm glad to see that Jerry Campbell and others are here representing members of TVPPA. Just as they now benefit from a TVA that is nationally competitive, community-owned electric systems like yours will benefit when our industry as a whole is deregulated.

PUBLIC POWER WILL BENEFIT FROM OPEN COMPETITION

Chances are you'll have more suppliers to choose from and more products and services to offer your customers. But I know there are those in our industry who would like to hold off open-market competition for as long as possible. There are those who would like to slow the pace of change.

But I believe open-market competition is inevitable, and when it arrives it'll come as a tidal wave of change. TVA is poised to catch the crest of that wave, but those who hesitate may find themselves swamped by the wave instead of riding it.

Deregulation revamped the airline and banking industries. It

retooled railroads and telecommunications. It redesigned the natural gas industry. And now, it's our turn.

The role of public power as a benchmark and yardstick for private utilities doesn't have to be compromised by a deregulated environment. Our role can be enhanced. We are the utility sector with the most experience in responding to the needs of our customers.

Our customers are our shareholders, and we have a long history of knowing how to provide them with reliable, low-cost power. If customer satisfaction is the standard, we can compete with anyone, and we shouldn't hide our light under a bushel basket.

CONCLUSION

That's why I believe the coming competitive market isn't the beginning of our eclipse. It is our moment in the sun. I believe that a deregulated public-power market is good news for public power and a welcome opportunity for strong, successful power producers like TVA. That's why I look forward to the freedom and exhilaration of a deregulated market.

So, to the uncertainties of deregulation, I say, "Bring them on." To the challenges of competition, I say, "Let's test ourselves against them."

I want to be the TVA Chairman who turned TVA loose, and I want public power to be an integral part of the information and electricity gridwork that will light and enlighten the 21st century.

Thank you.

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"TAILORING THE SEAMLESS ENTERPRISE:
AN INTEGRATED APPROACH TO THE CHALLENGE OF DEREGULATION."
REMARKS BY CRAVEN CROWELL, CHAIRMAN
TENNESSEE VALLEY AUTHORITY
TO THE INDUSTRYWEEK CONFERENCE ON
"BUILDING THE SEAMLESS ENTERPRISE"
SEPTEMBER 19, 1995 -- CHICAGO, ILLINOIS

INTRODUCTION

Thank you for that kind introduction, and good morning. It's an honor to have this opportunity to share our experience at TVA with such a prestigious group of corporate leaders from across the Nation.

When I first read the conference theme, "Building the Seamless Enterprise," I thought, "What an appropriate metaphor for the things we're doing at TVA." It reminded me of something former TVA Chairman David Lilienthal once wrote. Lilienthal was one of the original TVA Board members, and he was later appointed by President Truman to be the first chairman of the Atomic Energy Commission.

More than 50 years ago, Lilienthal described TVA's responsibilities as "a seamless web, of which one strand cannot be touched without affecting every other strand." I think he had the same thing in mind that many of us are talking about here today.

"Seamless" can mean many things, but for TVA it means "without walls" within the corporation, and "without boundaries" beyond the corporation." Within TVA, we are breaking down organizational walls and transforming our corporate culture. Outside TVA, we are accepting new challenges and exploring new opportunities, and moving well beyond our traditional role as a regional resource management agency and one of the nation's leading wholesale electric utilities. Indeed, after six decades of service, during which TVA has had few peers and no competitors, we now face the greatest challenge in the history of our corporation--the challenge of competition in a deregulated marketplace.

For some in our industry, competition is a destination they would rather avoid. For others, it's a monster from which they've always been protected by government regulation. But the electric utility industry can no longer take refuge from the challenge of competition, and we at TVA--unlike many others in our industry--look forward to competition. We are excited by the prospect, and we are confident of the steps we have taken to continue our position of leadership in our industry. We are confident of our understanding of what lies ahead, and we are confident of the steps we are taking to tailor a seamless approach to the challenges of the future.

A BRIEF HISTORY OF TVA

Now I know that you may not be that familiar with TVA or the history of the electric utility industry, so I'd like to devote the first part of my remarks to providing some background on TVA and the industry we are part of.

TVA is a unique federal corporation created by Congress in 1933 to fulfill an important mission. For the biggest part of our mission, which is generating electric power, we are financially self-supporting and receive no taxpayer support.

We are also involved in other activities for which we do receive tax dollars. These activities include controlling floods and improving navigation on the Tennessee River system, which is the Nation's 5th-largest. Our hydroelectric system helped us bring electric power to remote rural areas of the

Tennessee Valley, and our technical expertise has been used to improve agriculture, reclaim farmlands and forests, and promote economic development in a region that was once impoverished.

Today we can proudly say that our mission in these areas has been accomplished--and continues with the help of an annual appropriation from Congress that in recent years has been about $140 million a year. Still, that's only about 2 percent of our overall budget and covers our work in three major areas:

1. Economic development,
2. Environmental research, and
3. Resource management.

Clearly, these responsibilities can only be performed by an organization with interstate jurisdiction and decades of experience. We are gratified by the support of those on Capitol Hill who understand the importance of our mission, who believe that we can fulfill it more efficiently than anyone else, and who this year voted for appropriations that ensure TVA's non-power activities will continue.

In this era of tighter budgets everywhere in government, we are proud that TVA has been singled out by Vice President Gore's National Performance Review as a model for reinventing government. Earlier this year, Vice President Gore presented TVA with the Hammer Award, recognizing our employees' success at creating government that works better and costs less.

TVA'S SELF-SUPPORTING POWER PROGRAM

So far I've been talking about activities that consume only 2 percent of our budget. Now let me talk about the other 98 percent that represents our core business, which is generating electric power. It's this part of our business that is financially self-supporting and receives no taxpayer dollars.

We supply power for nearly eight million consumers spread across 80,000 square-miles and parts of seven states. We own 17,000 miles of transmission lines, employ 16,500 people, and serve 160 wholesale distributors and 62 large-industrial customers to whom we supply power directly. All this activity produces $5.4 billion in annual revenues.

THE CHANGING ELECTRIC UTILITY INDUSTRY

In summary, you can see that we have a broad range of power-generating and non-power-generating responsibilities, and we think we've done a pretty good job of weaving them into a focused effort--that strong and "seamless web" that David Lilienthal referred to. But now change is afoot in our industry in the form of deregulation and open competition.

It began with the passage in 1992 of the National Energy Policy Act, which opened the door to new opportunities like retail wheeling and open access--opportunities that make it possible for utilities to expand their markets beyond the reach of their own transmission network and which give their customers the option of shopping around for the best deal on power.

Under NEPA, as it's known, industrial customers in California can buy their power from anybody by 1996. Other experiments are underway in 12 other states.

Recently, the Federal Energy Regulatory Commission issued a Notice of Proposed Rulemaking that will accelerate the implementation of NEPA. Currently, TVA isn't subject to the provisions of the Notice, but since we intend to be a key player in the deregulated industry of the future, we filed comments anyway because we wanted to have a say in what the new rules will be.

HOW DEREGULATION WILL AFFECT POWER RATES

It is useful to see how others have fared when the rules of their game changed. In general, when other industries have been deregulated, prices go down--in many cases, way down. Since the deregulation of the airline industry, fares have gone down an average of 22 percent. Since the natural gas industry was deregulated, rates have decreased 33 percent. And since the telephone industry was deregulated, long-distance rates have declined 66 percent.

How low will electric rates go? Nobody knows, but any decline at all is going to put tremendous pressure on everybody's margins. As a result, those who survive the initial shakeout will be those who are the most efficient and who work to become even more efficient. As the shakeout continues, stronger companies will buy out weaker ones. Non-traditional companies, like independent power producers, will enter the market more strongly, and those who are left will shift with the industry to align with new opportunities, which I'll talk about in a moment.

Clearly, deregulation and free-market competition will set into motion forces that we cannot control but with which we must contend. Which is why, "When you teach a bear to dance, you'd better be prepared to keep dancing until the bear wants to stop." No utility will be able to ignore the forces of open-market competition, any more than dancers can ignore the fact that they're dancing with a bear. But the utilities who succeed at dancing with the bear will be those who can turn market forces to their advantage and make the bear their partner. Those who don't succeed may find themselves at the mercy of the bear, and that will lead to a repeat of what's happened with earlier deregulations, where industries consolidate into three or four key competitors.

With long-distance companies, it's now mainly a three-way fight between AT&T, MCI, and Sprint. With the airlines, it's mainly American, Delta, United, and perhaps USAir.

We expect the deregulation of the electric utility industry to proceed in much the same way, only this time it won't be phone bills or airline tickets we're talking about. It will be something far more fundamental and essential to our quality of life. This time, it will be electricity that becomes a commodity, and people like me will be out there looking for your business.

MERGERS, UNBUNDLING, & CONVERGENCE OF TECHNOLOGIES

How else will deregulation affect our industry? As I've already mentioned, there will be a number of mergers and acquisitions as utilities expand their markets. In fact, it's already begun. For instance, I recently saw in the trade press that Southern Company bid $1.6 billion in a hostile takeover of South Western Electricity of England.

We'll also start to see utilities "unbundle" their products and allow customers to choose and pay for only those products and services they want. That's an area that we ourselves are looking at.

Utilities will also begin to realize there's more capacity out there than we realized, including areas that support our core business. For example, I read recently that Entergy wants to sell its excess fiber-optic capacity to phone companies. This, too, is an area TVA is looking at, because we have a lot of fiber-optic capacity.

A related trend is that of wire-based industries--like utilities, cable-TV, and phone companies--joining forces to share line costs and create new sources of revenue. In this way, we'll see a convergence of technologies, where computers, communications, and content begin to merge into a single package-

product, and where competitors will converge to supply that product.

This will give rise to a lot of strange bedfellows, with wire-based companies forming alliances with electric utilities and computer companies. TCI, Microsoft, and PG&E are already partners, and Time-Warner cable put in a bid to get into the phone market in Memphis.

Again, these are areas that TVA will be exploring, and you'll be seeing a lot more of it as the Securities and Exchange Commission allows utilities to go into other fields. One federal regulator summed it up this way: "We want everybody to be in everybody else's business."

HOW TVA IS RESPONDING TO THE CHALLENGES OF COMPETITION

So here's where the electric utility industry is headed: Free-market competition is inevitable. Competition will drive down prices. As prices drop, so will the number of utilities. A handful of the biggest and most successful will control the market. Aand TVA intends to be one of the successful few.

- Our philosophy is: Deregulation is here.
- TVA will compete.
- TVA will be a leader in price, service, and environmental stewardship.

The question is, how?

Well, it's been said that winners will be those who spend the least to reach the future fastest. Or as a Southern general said when asked about his strategy for battle, "I just get there fustest with the mostest."

For us, that means driving down costs and picking up speed, and those are the first two-elements of our seamless strategy for meeting the challenge of competition. Let me talk first about costs, of which some of the most significant are payroll and interest.

STRATEGY 1: LOWERING COSTS

This year TVA completed a voluntary downsizing that reduced our headcount to 16,500. That's about half what it used to be. And though we have far fewer employees, our workforce productivity has tripled, thanks to improvements in our work processes.

We've reduced our annual expenses by $800 million, and our operating costs per kilowatt-hour generated were the lowest in a survey of 1993-94 annual reports.

In recent years we have refinanced more than 80 percent of our long-term debt, reducing our interest costs by $86 million since July of 1993, and we have adopted new debt strategies for broadening our financing base.

In the past year alone, we introduced three brand-new securities that were eagerly snapped up by corporate and private investors. Historically, TVA has used large Wall Street investment firms to market our bonds, but recently we launched a $200 million bond sale marketed exclusively by regional investment firms. That was a first for us.

In April, we offered our first issue aimed at small retail investors, an offering that was so successful we had to increase it from $500 million to $600 million. Not long after that we offered our first-ever global bond offering. That $2 billion sale was the largest international offering ever by a government-owned corporation.

Another way we're driving down costs is by focusing our attention on operating excellence rather than building new power generating facilities, especially nuclear plants, which are cost-effective to operate but very expensive to build. We reversed

our long-standing commitment to capital expenditures for nuclear power construction because we believe there are better ways to get the capacity we need in the marketplace. Of course, low costs usually reflect high efficiency, and we've taken significant strides to improve our overall plant efficiency. In fact, we have improved the reliability of our coal-fired plants so much that we have gained the equivalent capacity of two to three new generating units.

We're pushing for even more improvements, and we're looking to our employees for ideas on other ways we can drive down costs and boost productivity. Drawing in our employees and soliciting their input is a big change in our culture, and it's an important part of our seamless strategy for breaking down internal barriers to change.

STRATEGY 2: CREATING A SENSE OF URGENCY

Our second major strategy is to cultivate in our managers and employees a sense of urgency and to enable them and TVA to move quickly on new opportunities. Companies gain a tremendous advantage by getting to the future first because those who are first on the scene set the pace that others must follow. By our being first, would-be competitors must struggle to keep up.

Just consider how Chrysler defined the minivan, how Motorola established dominance with pagers, or how Microsoft set the standard for personal computer software. At TVA, I meet regularly with managers and employees to communicate my sense of urgency about being first on the scene with superior products and new ideas and being customer-driven in our approach to our core business.

STRATEGY 3: COMPETITIVE RATES & CUSTOMER FOCUS

We recognize that stable, competitive rates are the single-most important products we can offer our customers. Electricity is a part of the price of every product and service and it's a core contributor to the overall quality of life in industrialized nations. It's also a key factor in determining the overall competitiveness of energy-intensive industries.

We've been totally successful at holding TVA's rates stable for the past nine years, and on that basis we have moved from 48th to 30th best among 130 utilities nationwide. Our rates are now lower than 80 percent of neighboring utilities, and a recent New York Times comparison showed that our rates are among the most competitive in the nation.

STRATEGY 4: COMMITMENT TO QUALITY

Of course, having the best prices isn't enough if you can't reliably deliver, which is why we're also focusing on quality. Here, too, we've made great strides in recognizing that price may be primary, but quality must be assured.

Currently, we have more than 500 employee-led quality-improvement teams whose members are directly supporting our strategic goals and business plans. Team members volunteer their time and expertise to help identify and solve quality-related problems. As executives, you know there's just no substitute for having team members who are actively involved in the work being studied, and we're proud that our teams have earned significant recognition for TVA's achievements in quality-improvement.

We've received several Tennessee Quality Awards, which are state-wide awards based on the Malcolm Baldrige National Quality Award criteria. And this year TVA was a finalist for the Presidential Award for Quality, which is the federal government's

equivalent of the Baldrige Award. This was our first year to compete for the award, and we already have benefited from the evaluation feedback.

We also are very proud that a team of steamfitters from one of our power plants was recognized in Washington earlier this year as a finalist for the RIT/USA Today Quality Cup. As you may know, this award commends teams who are empowered to get business results using a fact-based problem-solving process.

TVA's team-based drive for continuous improvement is locally based, action-oriented, and spreading throughout the corporation. Our teams integrate problem-solving into their daily work and confirm that their solutions produce the expected results. Then they look for ways to standardize work processes to incorporate the improvements and replicate solutions throughout TVA.

To us, this is the essence of continuous improvement, and we're sharing our knowledge and experience with our business partners. We've begun a Quality Alliance with our distributors and a quality-certification program for suppliers to assure that they understand and share our commitment to quality.

SEAMLESSLY INTEGRATING FOUR KEY STRATEGIES

Low costs, high speed, customer focus, and quality orientation--we believe these are the keys for succeeding in our market, and by coordinating them as part of our overall strategy we're able to apply them in ways that interact and reinforce each other. That's what we mean by "seamless integration," and at TVA the key to seamless integration is strategic planning, because without a strong and well-thought-out strategic plan you may wind up going in circles.

Our plan will enable us to turn this, the greatest challenge in our history, into what we believe is the greatest opportunity in our history. It's a seamless approach that integrates our employees, our capital assets, our business partners, and our customers into a low-cost, high-productivity approach to maintaining superior performance in our core business. This strategy is our new "seamless web," updated for the Nineties and the 21st century. It also allows us to honor our non-power mission while we explore opportunities to expand our business in ways that would not have been possible before deregulation.

THE FOUNDATION OF OUR STRATEGY

Our strategy is a structure, and like any structure it needs a solid foundation. That foundation is our corporate vision, values, and goals.

Our vision is to be the recognized world leader in providing energy and related services, independently and in alliances with others, for society's global needs. In support of our vision, we have declared corporate values that include integrity, respect for the individual, teamwork, innovation and continuous improvement, honest communication, leadership, and flexibility.

Our vision and values, in turn, are the foundation of our goals, without which you can rumble ahead like a herd of stampeding buffalo, and like them, be in danger of going extinct.

Our first goal is to be customer-driven, which means being recognized by our customers as the best and easiest corporation with which to do business. It also means anticipating the needs of our customers and continuing to offer competitive prices.

Our second goal is to be employee-sensitive. We do that by continually training our employees to meet the challenges of the future and providing opportunities for employee career growth. This year we created our in-house learning environment, called TVA University, for the sole purpose of keeping our employees current on the competitive issues we face and teaching them the

skills they will need to help us meet them. We also created TVA Services to provide new outlets for employees whose jobs are no longer needed but whose skills are still valued by the company.

Being employee-sensitive also means that we are committed to attracting and retaining the most qualified employees--employees who will take initiative and who accept responsibility and accountability for exceeding customer expectations.

Our third goal is to be environmentally responsible, which means being a recognized leader in environmental stewardship, in the interests of our customers, our employees, and the other publics we serve.

Our fourth goal is to be growth-oriented. That means aggressively and sensibly pursuing growth and alliances that will add value to society, provide opportunities for our employees, and ensure the future success of the corporation.

Vision, values, and goals--_these are our foundation, the three anchors upon which we are basing our strategy development process. Our strategy integrates our vision, values, and goals. It builds on our technological advantages, like our state-of-the-art fiber-optic network. It incorporates our competitive advantages, like our accelerated compliance with Clean Air requirements. And it gives important consideration to feedback we've received from those with a stake in our future.

THE IMPORTANCE OF CUSTOMER FEEDBACK

Much of that feedback is included in our integrated resource plan, which we call Energy Vision 2020. This plan is an assessment of the resources TVA will need and those we will use to meet projected power demand well into the 21st century. It is based on input from extensive public hearings and consultations with our wholesale distributors, large industrial customers, and others.

This unprecedented degree of input makes Energy Vision 2020 our best-possible assessment of the resources we will need to deploy over the next 25 years, and this assessment is another part of our seamless strategy for the future. Our strategy also takes into account our main competitive disadvantage, and that is a territorial restriction we call "The Fence."

This territorial restriction was established by Congress in 1959, primarily to protect our competitors. It forbids us from going after their customers while giving them the freedom to come after ours. When deregulation fully arrives, this restriction will be a serious impediment to our ability to compete.

OVERCOMING A COMPETITIVE DISADVANTAGE

TVA recently commissioned a highly regarded utility consulting firm to conduct a study of the fence and recommend a course of action for removing it. The firm--Palmer Bellevue, a division of Coopers and Lybrand--concluded that TVA is competitive enough now to compete without the fence. But rather than seek legislation to remove it immediately, we have decided on a phased approach, timed to match the pace at which deregulation proceeds.

That decision is also being incorporated into our strategy-development process by our employee-led strategy-development teams. These teams are assessing current customer needs, potential customers needs, and new business opportunities that will be made possible by deregulation. By next spring, they will identify the opportunities we will pursue, decide how we can best leverage our strengths, and determine which steps we should take to align our resources to assure success.

ADVANTAGES OF A SEAMLESS APPROACH

Now what are the advantages of a seamless approach? First, by ensuring that all your resources are focused in the same direction you maximize your corporate effectiveness. If your resources aren't pointed in the same direction, you'll find yourself at a standstill, or perhaps split down the middle. With a seamless, integrated approach, internal barriers to change are free to dissolve. Otherwise, you're stuck with a standoff.

The seamless approach leads to higher morale, improved effectiveness, and greater employee confidence in the company's ability to meet the future. The seamless approach also offers greater corporate opportunities for expanding your markets, entering into joint ventures, and exploring new business opportunities. It enables you to take advantage of economies of scale in things like fuel and materials, thereby reinforcing your competitive advantage. And by integrating lots of customer feedback, the seamless approach lets you offer customers more options, in our case:

- The ability to pick just the services they need,
- The ability to take advantage of innovations in user-friendly energy management systems,
- And the ability to acquire a complete package of communications, energy, information, and entertainment products--all from one source.

CONCLUSION

Our way of custom-tailoring a seamless approach to the challenges of competition and deregulation are based on the core strengths that have made TVA successful for more than 60 years. Our approach is a seamless web, integrating our broad strengths in energy and resource management.

To the challenge of competition, we say bring it on, because TVA is strong and competitive today, TVA is taking steps to stay competitive tomorrow, and TVA is taking a seamless approach to being one of the leading utilities of the future.

As the great "business philosopher" Yogi Berra said, "The future ain't what it used to be."

No, it certainly isn't.

# # #

III. Order

IT IS THEREFORE ORDERED that PaineWebber's motion to strike the plaintiffs' affidavits is granted in part and denied in part, as outlined above.

IT IS FURTHER ORDERED that Mr. Basile's and PaineWebber's motions to dismiss are denied.

ALABAMA POWER COMPANY, et al., Plaintiffs,

v.

TENNESSEE VALLEY AUTHORITY, et al., Defendants.

No. CV 96–PT–0097–S.

United States District Court,
N.D. Alabama,
Southern Division.

Aug. 28, 1996.

Power companies with exchange power arrangements with Tennessee Valley Authority (TVA) brought action against TVA, respecting statutory eligibility of electric utility's nonregulated power marketing affiliate to purchase surplus power from TVA. TVA moved to dismiss or for summary judgment, and power companies and affiliate moved for summary judgment. The District Court, Propst, Senior District Judge, held that: (1) power companies had standing to bring action; (2) it was not required to simply defer to ipse dixit arguments of TVA as litigant; and (3) affiliate was not "organization" for statutory exemption purposes within meaning of statute limiting area for TVA power sales and, under exemption, allowing TVA to make exchange power arrangements with power-generating organizations with which TVA had such arrangements on 1957 grandfathered date, such as utility.

Power companies' motion granted.

1. Electricity ⇐11(4)

Fact that nonregulated power marketing affiliate of electric utility owned interest as stockholder or otherwise in power generating facility which was separate entity was immaterial in determining whether affiliate was "power generating organization" with which Tennessee Valley Authority (TVA) had "exchange power arrangements" on certain date, for purposes of statutory limitation on TVA's authority to dispose of surplus power; utility was such organization, and affiliate's eligibility to purchase power from TVA had to be solely determined by its relationship with utility. Tennessee Valley Authority Act of 1933, §§ 10–12, 15d, as amended, 16 U.S.C.A. §§ 831i–831k, 831n–4.

2. United States ⇐53(16)

Power companies with exchange power arrangements with Tennessee Valley Authority (TVA) had standing to bring action against TVA respecting eligibility of electric utility's nonregulated power marketing affiliate to purchase surplus power from TVA under statute establishing territorial limitation for TVA power sales and allowing TVA to make exchange power arrangements with power-generating organizations with which TVA had such arrangements on certain date, such as utility, where TVA's power sales to affiliate had substantially exceeded historical sales by TVA to utility. Tennessee Valley Authority Act of 1933, §§ 10–12, 15d, as amended, 16 U.S.C.A. §§ 831i–831k, 831n–4.

3. United States ⇐53(16)

Power companies allegedly in competition with electric utility's nonregulated power marketing affiliate did not have to prove that affiliate power which competed with them was specifically Tennessee Valley Authority (TVA) power, to establish standing to bring action against TVA respecting affiliate's eligibility to purchase surplus power from TVA under statute establishing territorial limitation for TVA power sales and allowing TVA to make exchange power arrangements with power-generating organizations with which TVA had such arrangements on certain date, such as utility. Tennessee Valley Authority

..t of 1933, §§ 10–12, 15d, as amended, 16 U.S.C.A. §§ 831i–831k, 831n–4.

Electricity ⟹11(4)

District court was not required to simply ·fer to ipse dixit arguments of Tennessee .lley Authority (TVA) as litigant in power companies' action against TVA respecting eli-·bility of electric utility's nonregulated pow- marketing affiliate to purchase surplus power from TVA under statute limiting area ·r TVA power sales and allowing TVA to ·ake exchange power arrangements with power-generating organizations with which ·VA had such arrangements on certain date, ·ch as utility, where record suggested that TVA's decision to sell to affiliate resulted ·om desire to change policy rather than ·om interpretation of statute, and it was not shown that Congress had ratified TVA's pur-·rted construction of statute. Tennessee ·alley Authority Act of 1933, §§ 10–12, 15d, as amended, 16 U.S.C.A. §§ 831i–831k, 831n–·

·. Statutes ⟹219(1)

For purposes of judicial review of ad-·inistrative agency construction of statute, if administrator's reading fills gap or defines term in way that is reasonable in light of ·gislature's revealed design, court gives ad-·ministrator's judgment controlling weight.

Corporations ⟹1.5(2)

Under Kentucky law, in general, mere ownership of capital stock of one corporation ·y another does not create identity of corpo-·ate interest.

·. Statutes ⟹195

When there is express exception, it comprises sole limitation on operation of statute ·nd no other exceptions will be implied.

·. Statutes ⟹228

One who claims benefit of exception ·rom prohibition of statute has burden of proving that its claim comes within exception.

·. Federal Courts ⟹414

Federal law, not state law, was ultimate ·aw on piercing the corporate veil to which ·district court was to look in power companies' action against Tennessee Valley Authority (TVA) respecting eligibility of electric utility's nonregulated power marketing affiliate to purchase surplus power from TVA under statute limiting area for TVA power sales and allowing TVA to make exchange power arrangements with power-generating organizations with which TVA had such arrangements on certain date, such as utility. Tennessee Valley Authority Act of 1933, §§ 10–12, 15d, as amended, 16 U.S.C.A. §§ 831i–831k, 831n–4.

10. Electricity ⟹11(4)

Electric utility's later-organized separate nonregulated power marketing affiliate was not "organization" for statutory exemption purposes within meaning of statute limiting area for Tennessee Valley Authority (TVA) power sales and, under exemption, allowing TVA to make exchange power arrangements with power-generating organizations with which TVA had such arrangements on 1957 grandfathered date, such as utility; affiliate was neither in existence nor contemplated when the exemption was enacted, affiliate was not part of utility, and affiliate was not power-generating organization which generated power to exchange. Tennessee Valley Authority Act of 1933, §§ 10–12, 15d, as amended, 16 U.S.C.A. §§ 831k, 831n–4.

See publication Words and Phrases for other judicial constructions and definitions.

11. Electricity ⟹11(4)

Electric utility's later-formed nonregulated power marketing affiliate was neither "successor" nor "assignee" of utility within meaning of power exchange agreement between Tennessee Valley Authority (TVA) and utility, providing that agreement would inure to benefit of and be binding upon parties' successors and assigns, where utility still had its contract with TVA.

See publication Words and Phrases for other judicial constructions and definitions.

12. Electricity ⟹11(4)

Principles of corporate law had to be at least considered in determining intent of Congress for purposes of statutory exemption in statute limiting area for Tennessee Valley Authority (TVA) power sales and, un-

der exemption, allowing TVA to make exchange power arrangements with power-generating organizations with which TVA had such arrangements on 1957 grandfathered date, such as electric utility, in power companies' action against TVA respecting statutory eligibility of utility's nonregulated power marketing affiliate to purchase surplus power from TVA. Tennessee Valley Authority Act of 1933, §§ 10–12, 15d, as amended, 16 U.S.C.A. §§ 831i–831k, 831n–4.

13. Electricity ⚷11(4)

Power sales to nonpower-generating organizations which were not even in existence on statutory exemption grandfathered date do not fall within contemplation of exemption in statute limiting area for TVA power sales and, under exemption, allowing TVA to make exchange power arrangements with power-generating organizations with which TVA had such arrangements on grandfathered date; Congress did not intend "exchanges" by entities that do not generate power which they can exchange. Tennessee Valley Authority Act of 1933, §§ 10–12, 15d, as amended, 16 U.S.C.A. §§ 831i–831k, 831n–4.

Rodney O. Mundy, Alan T. Rogers, Michael D. Freeman, Lyle D. Larson, Teresa G. Minor & Karl R. Moor, Balch & Bingham, Birmingham, AL, Robert H. Forry, Troutman Sanders, Atlanta, GA, Ben H. Stone & Scott E. Andress, Eaton & Cottrell P.A., Gulfport, MS, for plaintiffs.

Edward S. Christenbury, Robert B. Glinski, Harriet Cooper, James E. Fox & Thomas C. Doolan, Tennessee Valley Authority, Knoxville, TN, N. Lee Cooper & Cathy S. Wright, Birmingham, AL, Dorothy E. O'Brien & John McCall, Louisville Gas & Electric, Louisville, KY, for defendants.

MEMORANDUM OPINION

PROPST, Senior District Judge.

This cause comes on to be heard on Defendant Tennessee Valley Authority's Motion To Dismiss Or, In The Alternative, For Summary Judgment filed on March 18, 1996; Power Companies' Motion For Summary Judgment filed on April 15, 1996; and the Motion of LG & E Power Marketing, Inc. For Summary Judgment filed on April 30, 1996. At a recorded conference on June 4, 1996, all the parties acknowledged that the cause is appropriate for determination, one way or the other, on motion(s) for summary judgment. The parties acknowledge that the issues are issues of law related to the interpretation of controlling statutory provisions. The issues are either unbelievably simple or extremely complex. In any event, this court is likely serving only as a conduit to the appellate process.

The plaintiffs have filed a statement of purported material facts which they say are not in dispute. The defendant(s) have responded to that list and agree in most respects. In other respects they agree, but with clarifications, argument, and/or extrapolations. In some respects, there are denials that the alleged facts are material. In a very few instances, there are outright denials. In any event, the parties agree that there are no factual disputes sufficient to defeat at least one of the motions for summary judgment.

Pertinent Statutory Provisions

Of course, the readers will be generally familiar with the Tennessee Valley Authority ("TVA"). It was established under the provisions of the Tennessee Valley Authority Act of 1933. See 16 U.S.C. § 831, *et seq.* TVA was created in the "interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins." 16 U.S.C. § 831. TVA's Board of Directors ("Board") "is directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow *primarily* for the purposes of promoting navigation and controlling floods" (emphasis added). 16 U.S.C. § 831h–1. So far as may be *consistent with such purposes,* the Board is authorized to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power "as in this chapter provided," and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the

maintenance of the projects of TVA. *Id.* Title 16 U.S.C. § 831i authorizes the Board to sell surplus power to all types of entities, but with preference to governmental entities and non-profit cooperative organizations. For a general discussion of the sale of surplus power by TVA, see *Tennessee Valley Authority v. Ashwander*, 78 F.2d 578 (5th Cir.1935), aff'd, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936), reh'g denied, 297 U.S. 728, 56 S.Ct. 588, 80 L.Ed. 1011 (1936).[1]

16 U.S.C. § 831j provides:

> It is declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals *equitably among the States, counties, and municipalities within transmission distance.* This policy is further declared to be that the projects herein provided for shall be considered primarily as for the *benefit of the people of the section* as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that *sale to and use by industry shall be a secondary purpose,* to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity.... (emphasis added).

The parties agree that, in addition to the pertinent provisions of 16 U.S.C. § 831n–4, hereinafter discussed, the provisions of 16 U.S.C. § 831k may have special pertinence in this case. That section provides, *inter alia,* that:

> *And provided further,* That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, *before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair;* and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further,* That the board is authorized to enter into *contracts with other power systems for the mutual exchange* of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief. (emphasis added).[2]

In 1959, as part of an enactment authorizing TVA to issue and sell bonds, Congress, as an apparent *quid pro quo,* included in 16 U.S.C. § 831n–4 the following provisions:

> *Unless otherwise specifically authorized by Act of Congress* the Corporation shall make no contracts *for the sale or delivery of power* which would have the effect of making the Corporation or its distributors, *directly or indirectly, a source of power supply outside the area for which the Corporation 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 the Corporation and its distributors within said area: *Provided, however,* That such additional area shall not in any event increase by more than 2½ per centum (or two thousand square miles, whichever is the lesser) the area for which the Corporation and its

1. The statutory provisions now at issue place a limitation on the authority of TVA to dispose of power recognized in *Ashwander.* At the time *Ashwander* was decided, TVA could apparently sell surplus power to anyone at any place.

2. It would appear that § 831k provides for the *sale* of surplus power to for profit companies if its resale is governed by prices established by TVA and that it *also* separately provides for contracts for the *exchange* of unused excess power with other power systems. If "exchange" is synonymous with "sell," the second proviso would appear to be redundant.

distributors were the primary source of power supply on July 1, 1957: *And provided further,* That no part of such additional area may be in a State not now served by the Corporation or its distributors or in a municipality receiving electric service from another source on or after July 1, 1957, and no more than five hundred square miles of such additional area may be in any one State now served by the Corporation or its distributors.

Nothing in this subsection shall prevent the Corporation or its distributors from supplying electric power to any customer within any area in which the Corporation or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act.

Nothing in this subsection shall prevent the Corporation, when economically feasible, *from making exchange power arrangements with other power-generating organizations with which the Corporation had such arrangements on July 1, 1957*.... (emphasis added).[3]

There follow provisions authorizing TVA to supply power to various named towns or cities in Tennessee, Kentucky, and Georgia, a named air station in Mississippi and other federal agencies. The enactment concludes with a statement of Congressional declaration of intent:

It is declared to be the intent of this section to aid the Corporation in discharging its *responsibility for the advancement of the national defense and the physical, social and economic development of the area in which it conducts its operations* by providing it with 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 and as otherwise provided herein, and this section shall be construed to effectuate such intent. (emphasis added).

Defendants note that 16 U.S.C. § 831dd provides that,

This chapter shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare....

The court notes that there is no specific reference in this section to the sale or exchange of power outside of the defined area. The question arises as to what purposes of Congress are to be served by liberal construction? TVA suggests that the purposes to be served are the purposes for which TVA was created by Congress.[4] In *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1, 7, 88 S.Ct. 651, 655, 19 L.Ed.2d 787 (1968), the Court stated, "[I]t is clear and undisputed that the protection of private utilities from TVA competition was almost universally regarded as the primary objective of the [1959] limitation [in § 831n–4]."[5]

Facts

The court will not specifically repeat all the facts as alleged by plaintiffs and as responded to by defendants. The court will state some of the pertinent facts. Some facts were agreed to as discussed above and others were agreed to during the June 4, 1996 recorded conference.[6]

Among the pertinent facts are the following: The plaintiffs and Louisville Gas and Electric Company ("LG & E") were and are

3. Note that as in § 831k, which is quoted in part above, there are separate provisions for *sales* and *exchanges*. The term "power generating organizations" is used rather than "power systems."

4. The purposes were apparently not primarily the sale of power outside the "section."

5. See *Hardin* for a history of the circumstances leading to the adoption of the 1959 Act.

6. While the court has considered extensive quotes from legislative history and various affidavits, it will not quote therefrom in this opinion. The legislative history suggests that Congress was concerned about extending the area of TVA competition with private companies. Some of the affidavits suggest that both TVA and its experts have heretofore been aware that the 1959 Act likely restricts its ability to enter into such contracts as the LPM contract.

among the "other power-generating organizations" with which TVA had "exchange power arrangements" on July 1, 1957. During 1989–1990, LG & E Energy Corp. ("Energy Corp."), a Kentucky corporation, was formed as a holding company under an arrangement whereby LG & E became a subsidiary of Energy Corp. As the result of a mandatory share exchange, the common stockholders of LG & E became the common stockholders of Energy Corp., and Energy Corp. became the sole common stockholder of LG & E. The reasons for the restructuring given in a "Proxy Statement" contained in Amendment No. One to Form S-4 Registration Statement filed with the Securities and Exchange Commission on April 9, 1990 included that "the holding company will provide the structure and flexibility needed to take advantage of opportunities *in other related businesses* that will enhance stockholder value. The holding company structure will also contribute to the economic development of [LG & E's] service area and provide a *separation* among [LG & E] and other businesses to *insulate* utility customers from those other businesses." (emphasis added). The Proxy Statement also states that, "The holding company structure will give [Energy Corporation] the flexibility to take advantage of opportunities *to develop or acquire other businesses,* thereby providing opportunities for increased earnings." (emphasis added). Further:

> Although [LG & E] presently has not identified any significant investment activities for [Energy Corp.], it is expected that [Energy Corp.] will only develop or acquire other businesses which are closely related to [LG & E's] core business of providing electric and gas service. *These investments will offer the opportunity for greater earnings growth and mitigate the limitations of being a regulated electric and gas utility.*
>
> The holding company structure, by segregating the new businesses into corporations *that will not be subsidiaries of [LG & E], will provide the flexibility needed to achieve successful assimilation of new businesses.* Since the *new businesses* of [Energy Corp.] will be conducted through *separate* subsidiaries of [Energy Corp.] and not of [LG & E], *any benefits or detriments that result from the restructuring and consequent segregation of [LG & E] and the other businesses will flow primarily to the security holders of [Energy Corp.] and not to [LG & E's] customers or owners of [LG & E's] preferred stock and debt securities.*
>
> The holding company structure will enhance the flexibility of [LG & E] to adjust to increased competition. For instance, if the current efforts of Federal agencies to increase competition and reduce regulation are successful, it is reasonable to expect that the risk associated with electric and gas utilities such as [LG & E] will increase. However, through the *development of new businesses,* [Energy Corp.] will be able to expand its sources of income. The expanded income base should assist [LG & E's] financial stability.
>
> Besides benefiting stockholders, [LG & E] believes the creation of the holding company structure will produce future benefits for [LG & E's] utility customers and the Commonwealth of Kentucky in general. *Direct investment opportunities are expected to be available to [Energy Corporation] within and outside of [LG & E's] service area.* An infusion of new capital into the service area should lead to additional jobs, a strengthened economy and an increase in sales of gas and electricity within the service territory, which in turn will directly benefit [LG & E], its stockholders and customers. (emphasis added).

Further,

> *The new holding company structure will provide clear delineation of regulatory jurisdictions. As a subsidiary of [Energy Corp.], [LG & E] will continue to be the same electric and gas utility it is today, serving Louisville and surrounding areas and regulated by the Kentucky Commission and the Federal Energy Regulatory Commission ("FERC").* LG & E Energy, as the non-utility parent corporation, will not be directly regulated by the Kentucky Commission or the FERC. Transactions and contracts between [LG & E] and [Energy Corp.] will be subject to review by the Kentucky Commission and possibly

other regulatory bodies. (emphasis added).

. . . . .

Under the Holding Company Act and current SEC policies, there are also limitations on the extent to which [Energy Corp.] could expand the utility business of [LG & E] (either directly or through a subsidiary) outside of Kentucky. (emphasis added).

. . . . .

In addition, [LG & E] agreed to establish guidelines regulating intercompany transactions, *whereby distinct and separate accounting and financial records* will be maintained and fully documented for each entity within the holding company system. This will enable [LG & E], among other things, to *maintain a separation of costs between [LG & E] and the new businesses.* The structure of intercompany transactions also will be regulated pursuant to these guidelines to ensure that *the new businesses* are not subsidized by [LG & E] and its customers. Accordingly, transfers or sales of assets from [LG & E] to [Energy Corp.] or other subsidiaries generally would be priced under the guidelines at the greater of cost or fair market value, while transfers or sales of assets to [LG & E] from [Energy Corp.] or other subsidiaries generally would be priced at the lower of cost or fair market value. (emphasis added).

. . . . .

The Directors of [LG & E] Company are expected to become the Directors of [Energy Corp.] upon consummation of the Restructuring. In the future, however, [LG & E] and [Energy Corp.] may have different directors.

An "Application For An Order In Connection With Corporate Reorganization" filed by LG & E with the Federal Energy Regulation Commission on December 19, 1989, contains, *inter alia*, the following language:

With one exception, *the proposed reorganization will not affect any contract for the purchase, sale or interchange of electric energy and all such contracts that are in existence on the date of the reorganization will continue in effect in accordance with their terms after the reorganization.*

The one exception is that the agreement between Ohio Valley and LG & E regarding services to be rendered by Ohio Valley for LG & E will cease to be in effect following the Merger. (emphasis added).

. . . . .

With the exception of payment to holders of LG & E's common stock or $25 Preferred Stock who dissent to the Exchange, *there will be no change in the capital structure of LG & E.* The Holding Company will own all of the common stock of LG & E. LG & E's debt obligations and preferred stock (other than the holders of the $25 Preferred Stock who dissent) will continue to be the obligations of LG & E.

Transactions between LG & E, the Holding Company and any non-utility subsidiary that may be created will be governed by the following policies:

I. A distinct separation of costs between utility and non-utility activities will be maintained.

II. Intercompany transactions will be structured to ensure that non-utility activities are not subsidized by LG & E and its customers.

III. Strict internal controls will be maintained to provide reasonable assurance that intercompany transactions are accounted for in accordance with management's policies and guidelines.

IV. All books and records of the Holding Company and all subsidiaries (including LG & E) will be maintained in accordance with Generally Accepted Accounting Principles and, in addition, the books and records of LG & E will continue to comply with the requirements of the Uniform System of Accounts. (emphasis added).

. . . . .

The Holding Company, as the new parent company of LG & E, plans from time

time through subsidiaries to invest in non-utility businesses in which LG & E as expertise. Although LG & E present- has not identified any investment activities for the Holding Company, it is exected that the Holding Company will nly develop or acquire other businesses which are closely related to LG & E's ore business of providing gas and electric ervice. *These investments in non-utility businesses will offer the opportunity for reater earnings growth and mitigate the mitations attendant to being solely an electric and gas supplier in a defined serice area with limited opportunity for rowth.* (emphasis added).

. . . . .

he Holding Company structure, by segregating the non-utility businesses into corporations that will not be subsidiaries of G & E, will provide the flexibility needed o achieve successful assimilation of new businesses and, at the same time, *will inulate the customers of LG & E and the olders of LG & E's public securities from the risks of the non-utility businesses.* Since unregulated businesses of the Holdng Company will be conducted through separate subsidiaries of the Holding Company and not of LG & E, any liabilities ncurred by those subsidiaries will not constitute liabilities of LG & E. *Similarly, he preferred shareholders and debt secury holders of LG & E after the restructuring will be insulated from the risks of the unregulated businesses.* Any benefits or detriments that result from the restructuring and consequent segregation of LG & E and the unregulated businesses will flow primarily to the security holders of the Holding Company and not to the owners of LG & E's preferred stock and debt securities.

The Holding Company structure will enhance the flexibility of LG & E to adjust to increased competition. For instance, if the current efforts of Federal agencies to increase competition and reduce regulation are successful, it is reasonable to expect that the risk associated with electric utilities such as LG & E will most likely increase. *However, through the development of non-utility subsidiaries, the Holding Company will be able to diversify its sources of income.* This diversified income base provided by the Holding Company should mitigate the potential adverse impact on LG & E's financial stability. (emphasis added).

. . . . .

The Holding Company structure provides clear delineation of regulatory jurisdictions. *As a subsidiary of the Holding Company, LG & E will continue to be the same electric and gas utility it is today, serving Louisville and surrounding areas and regulated by the Kentucky commission and the FERC.* (emphasis added).

. . . . .

The Holding Company, as the non-utility parent corporation, will not be regulated by the Kentucky Commission, the Indiana Commission or the FERC. The regulation of OVEC and other affiliated companies will not be affected by the proposed transaction.

In another application filed with the Public Service Commission of Kentucky, LG & E stated, *inter alia,*

In addition to overseeing the operations of LG & E, Holding Company will seek out investment opportunities for economic development. Holding Company, through subsidiaries, will seek to invest in businesses in LG & E's service territory in order to enhance the economy and employment in LG & E's service area and Kentucky in general. *Holding Company will also consider investment opportunities in other areas if they are consistent with its corporate objectives and would enhance shareholder value.* (emphasis added).

. . . . .

Holding Company, as the new parent company of LG & E, plans from time to time through subsidiaries to invest in non-utility businesses in which LG & E has expertise. Although LG & E presently has not identified any investment activities for Holding Company, it is expected that Holding Company will only develop or acquire other businesses which are closely

related to LG & E's core business of providing gas and electric service. *These investments in non-utility businesses will offer the opportunity for greater earnings growth and mitigate the limitations attendant to being solely an electric and gas supplier in a defined service area with limited opportunity for growth.* (emphasis added).

. . . . .

The Holding Company structure provides clear delineation of regulatory jurisdictions. As a subsidiary of Holding Company, *LG & E will continue to be the same electric and gas utility it is today,* serving Louisville and surrounding areas and regulated by the Commission and the FERC. Holding Company, as the non-utility parent corporation, will not be regulated by the Commission, the Indiana Commission or the FERC. (emphasis added).

. . . . .

The Holding Company structure will protect and safeguard the customers of LG & E and the public holders of LG & E's securities from any risks which may be associated with non-utility businesses. The unregulated businesses of Holding Company will be *conducted through separate subsidiaries and any liabilities incurred by those subsidiaries will not constitute liabilities of LG & E.* Similarly, the preferred shareholders and debt security holders of LG & E will be insulated from the risks of the unregulated businesses after the restructuring.

The corporate separation will ensure that all costs of a particular business will be charged to that business and not allocated to LG & E. To further ensure elimination of any potential for cross-subsidization of the various subsidiaries of Holding Company, LG & E will adopt and implement policies and guidelines on intercompany transactions. (emphasis added).

Form U–3A–2 filed with the Securities and Exchange Commission on February 21, 1996, includes the following statements:

LG & E Power Marketing, Inc.—LG & E Power Marketing, Inc. (Power Marketing) is a California corporation with its principal executive offices located at 12500 Fair Lakes Circle, Fairfax, Virginia 22023. Power Marketing received EWG status on April 19, 1994. Power Marketing owns a 50% interest in LG & E Power 15 Incorporated, which is a 50% owner of LG & E–Westmoreland Rensselaer, a general partnership which owns a 79 megawatt gas-fired combined cycle qualifying cogeneration facility located in Rennselaer, New York (Rensselaer), at 39 Riverside Avenue, Rennselaer, New York 12144. Power Marketing therefore owns a 25% interest in Rensselaer. Rensselaer, which received qualifying facility status in 1991 and was recertified in 1993, sells power exclusively at wholesale to Niagara Mohawk Power Corporation under a long term power purchase agreement executed in December 1987. Rensselaer obtained EWG status on March 2, 1995. Power Marketing is engaged directly and exclusively in the business of owning a part of Rensselaer, and selling at wholesale electric energy provided by Rensselaer and other sources not owned by Power Marketing (emphasis added).

. . . . .

Power Marketing—The following contracts exist between Power Marketing and system companies:

(a) In May 1994, Power Marketing entered into an Electricity Brokerage Agreement and a Dispatching Services Agreement with the Company's public utility subsidiary, LG & E. Under the terms of the Electricity Brokerage Agreement, Power Marketing is obligated to use its reasonable best efforts to broker excess power generated by LG & E for off-system sales and broker power LG & E desires to purchase, for no charge, at such times as LG & E requests such services. However, LG & E has no obligation under the Agreement to permit Power Marketing to broker its power.

(b) Under the terms of the Dispatching Services Agreement (which was amended in November 1995), LG & E performs, on a nonexclusive basis, power dispatching and scheduling services, short-term marketing, accounting of power movement and

ansmission coordination service for the benefit of Power Marketing. LG & E is ot obligated to secure generators, purhasers or sellers of power, or to perform any wheeling or transmission services for Power Marketing. LG & E's obligation to rovide the above-mentioned services is also qualified by 1) its prior right to use its facilities to serve its native-load customers r other persons or entities pursuant to any agreements existing prior to the execution of the Dispatching Services Agreenent, 2) any capacity restraints imposed on its dispatching facilities, and 3) regulatory impediments. Further, LG & E has no obligation to expand its existing facilities to perform the services described above, and the non-exclusive nature of the agreement permits LG & E to provide similar services for any other persons or entities. Power Marketing pays a fee for such services based upon a formula designed to ensure that LG & E is reimbursed its cost of providing the services, plus 10%. However, this fee calculation is based on Power Marketing's gross margins in the case of Tennessee Valley Authority power that is purchased and resold by Power Marketing.

(c) Power Marketing and LG & E entered into a Coal Contract Administration Agreement, dated December 15, 1995 (the "Agreement"), under which LG & E negotiates and administers a coal contract between Ohio Edison Company and Power Marketing ("Coal Contract") and a Coal Transportation Contract between Crounse Corporation and Power Marketing. Under the Agreement, LG & E negotiates coal contracts, reviews invoices, arranges for payments to be made to the supplier under the Coal Contract, schedules loading and barge handling, delivers coal and coordinates the sampling of coal (the "Services"). In consideration for the Services, Power Marketing pays to LG & E a fee equal to (i) the sum of all "Direct Costs" incurred by LG & E during each calendar month of the contract term, multiplied by 110%, plus (ii) all "Third Party Charges" incurred by LG & E during such calendar month reimbursed at cost. The Agreement expires on December 31, 1996.

(d) Various departments within LPI, including Legal and Finance, perform services for Power Marketing from time to time on a time and materials reimbursement basis for selected tasks which are not provided pursuant to the agreements described above.

Issues

The issues in this case are relatively simple to state, but, perhaps, not so easy of resolution. They are:

[1] 1. Is LPM, by virtue of its status as an affiliate of LG & E, a "power generating [organization] with which [TVA]" had "exchange power arrangements" on July 1, 1957? [7]

2. If the answer to question 1 is "no," do plaintiffs automatically prevail?

3. Would re-sales of TVA power such as are made by LPM violate § 15d even if made by LG & E after purchases of power by LG & E from TVA? In other words, are there limits on the re-sale authority of the subject July 1, 1957 "power generating organizations," and are these limits imposed on TVA and such organizations?

4. Do plaintiffs have standing to bring this action?

7. LPM being created by Energy Corporation which itself resulted totally from a reorganization of LG & E. Question 1 has sub-parts as follows:

a. Is LPM itself a "power generating organization?"

b. In any event, is it a power generating organization with which TVA had arrangements on July 1, 1957?

c. Even though it is a separate corporate entity, does its tie in to and arrangements with LG & E make it or the combination of the two a power generating organization with which TVA had an arrangement on July 1, 1957?

The court concludes that the fact that LPM owns an interest in a power generating facility which is a separate entity as a stockholder or otherwise is immaterial. LG & E *is* such an organization and LPM's eligibility to purchase must be solely determined by its relationship with LG & E.

5. What deference, if any, is to be given to TVA's decision to contract with LPM?

6. How is the tension created in *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 88 S.Ct. 651, 19 L.Ed.2d 787 (1968) between the holding that the purpose of the 1959 Act is to "protect private utilities from TVA competition" and the holding that courts should take TVA's "determinations as their starting points," to be resolved?

Standing

[2] After considering *Hardin* and evidence of the sales which LPM is making, the court concludes that the plaintiffs have standing. They clearly fall within the category of private utilities which the 1959 Act was intended to protect. Px. 69 indicates that TVA's sales to LPM have substantially exceeded historical sales by TVA to LG & E. LPM's sales are apparently nationwide. In brief, LPM argues that, "The competition with which the plaintiffs are concerned and their reason for bringing this lawsuit is not competition from TVA. Rather, the plaintiffs are concerned with competition from LPM. This is not the competitive issue addressed in the TVA Act...." The court cannot accept this argument. Further, the court cannot accept LPM's argument that, "[T]he competition from LPM that the plaintiffs seek to prevent cannot confer on these plaintiffs standing to bring this law suit." Ignoring the "directly or indirectly" language of the Act, LPM argues that Congress sought only "to protect neighboring utilities from direct competition by TVA." Nor can the court accept LPM's argument that,

> In this case, plaintiffs have no standing to challenge the contract between LPM and TVA, because plaintiffs are strangers to that contract and the competitive interest that Congress sought to protect when it enacted Section 15d(a) is not the same as the interest plaintiffs seek to protect in this lawsuit.

TVA makes an interesting argument with regard to the "standing" issue. The argument is that:

(1) There was no territorial limitation whatsoever on TVA's exchange power arrangements with designated entities, or on the resale of such power.[8]

(2) LPM is one of the exchange power purchasers contemplated by Congress.

(3) The main purpose of the area limitation in the 1959 amendment was to prevent TVA from expanding its territory and invading the service area of the investor-owned utilities.[9]

(4) The exchange power provision thus is not concerned with competitive injury.[10]

(5) "Hence, plaintiffs' alleged injury is a type of competition which section 15d does not address, and against which it could not have been intended to protect. It is thus not within the zone of the interests of the applicable statute, and is not sufficient for purposes of standing." TVA acknowledges that TVA's Board did not, before giving approval for TVA to enter into the agreement with LPM, determine that sales under the contract would not result in competition with plaintiffs.

[3] The court cannot accept TVA's argument. If that argument were accepted, TVA could sell power to any power marketer, affiliated or not, which competes with plaintiffs and plaintiffs would not have standing. The court also cannot accept the argument that, in order to establish standing, plaintiffs must prove that the LPM power which competes with them is or was specifically TVA power. Power is fungible and cannot be so

8. As indicated, the court does not reach this issue.

9. This argument flies in the face of the prohibition against the sale or delivery of power which would have the effect of making TVA "directly or indirectly, a source of power outside the area...."

10. Perhaps not, but the sale or delivery of power having the effect of making TVA a source of power outside the defined area is a concern. Again, the court notes the statutory scheme which, throughout, distinguishes between general sales of power and exchanges of power with power generating organizations, which may, in some instances, take the form of sales and purchases.

ısily identified.[11] TVA's standing argument is effectively this, "[T]he area limitation does ›t apply to exchange power arrangements." VA's sales to LPM *are* exchange power limitations within the contemplation of the :ception clause. Thus, there is no standing. hat circular argument goes to the merits, not to standing. It is the bottom-line issue in ''ıe case. The court concludes that plaintiffs ıve standing to bring this action. The court notes that the defendants did not discuss -'anding in their initial briefs nor until the ›urt raised the question.

Discussion of Merits

While this court has waded and weeded through numerous arguments and counter rguments, it is convinced that there is really nly one significant threshold issue. That is, did the 1959 Act's statutory exception or xemption for power generating organiza-:ons with which TVA had exchange power arrangements on July 1, 1957 contemplate -nd provide that a later organized separate ffiliate under the umbrella of a later organized holding company which also owns all 'he capital stock of one of the July 1, 1957 ligible organizations be considered such a 1957 "organization." The court agrees with 'he parties that the statutory language, with . possible overlay of legislative history consideration, is controlling.

Deference to TVA?

[4] *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968), sheds the only controlling light ›n the issue. Its determination that "it is clear and undisputed that protection of private utilities from TVA competition was al-nost universally regarded as the primary objective of the [territorial limitation in § 15d of the 1959 Act]" renders moot the :onsideration of any arguable legislative history to the contrary. See *Hardin*, 390 U.S. at 7, 88 S.Ct. at 655. Matched against the foregoing holding in *Hardin* is its holding that at least certain determinations of the TVA Board are "entitled to acceptance unless [they lie] outside the range of permissible choices contemplated by the statute." *Id.* at 8, 88 S.Ct. at 656. Based upon the "innate and inevitable vagueness of the 'area' concept", at issue in *Hardin*, and the "complexity of the factors relevant to decision in this matter," the Court concluded that "it is more efficient, and thus more in line with the overall purposes of the Act, for the courts to take TVA's 'area' determinations as their starting points and to set these determinations aside only when they lack reasonable support in relation to the statutory purpose of controlling, but not altogether prohibiting, territorial expansion." *Id.* at 9, 88 S.Ct. at 656. Further matched against this latter holding is the specific language in the statute now under consideration that, "Unless *specifically authorized by Act of Congress* [TVA] shall make no contract for the sale or delivery of power which would have the effect of making [TVA] or its distributors, *directly or indirectly*, a *source* of power supply outside the area for which [TVA] or its distributors were the *primary source* of power supply on July 1, 1957...." (emphasis added). In this court's judgment, this statutory provision negates the defendants' argument that the court should give consideration to the alleged fact that Congress has been aware of similar purchases and sales and has failed to act to prohibit same.[12] The statutory provision does not necessarily conflict with the holding in *Hardin* that TVA determinations are to be given deference when there is an "innate and inevitable vagueness" in statutory terms. This raises, however, the further question of whether it is appropriate for TVA to not only

11. TVA acknowledges that the plaintiffs "are major participants in the wholesale power market." Further, that LPM competes in said market and that both LPM and plaintiffs have the authority to compete in the wholesale market throughout the United States. Further, that "[W]ith the enactment of the Energy Policy Act by Congress and the promulgation of open access regulations by [FERC], that market has grown increasingly competitive." Perhaps, as a matter of policy, plaintiffs should have to compete against LPM's power supplied by TVA. The issue, however, is whether such policy concerns are to be decided by TVA or this court, or "specifically [addressed] by Congress." The 1959 amendment makes no distinction between wholesale and retail competition.

12. The court does not reach the issue of whether defendants' arguments in this regard have a basis in fact.

determine vague "area" issues, but also to determine which "organizations" are "power-generating organizations with which [TVA] had [exchange power] arrangements on July 1, 1957."

It should be noted that the "area" term being considered in *Hardin* was a term used in the *initial* limiting provision of § 15d.[13] It is certainly reasonably arguable that whether an "area" includes a total county or only villages within the county is a more vague concept than whether an entity is an "organization" with which TVA had an arrangement on July 1, 1957. This is particularly true when one term is in the initial limiting language and the other is in a "grandfathered" exception. One addresses a vaguely defined geographical area. The other addresses whether an organization with which TVA now has a contract did or did not exist in 1957; whether that organization is or is not a "power-generating organization"; and whether the contract is an "exchange power arrangement."

It should be noted that the *Hardin* majority apparently considered legislative history suggesting that at least one purpose of Congress was to "authorize adjustments and permit a certain amount of elasticity in the availability of TVA service." *Id.* at 11, 88 S.Ct. at 657. Further, the Court concluded that, "Under those circumstances, the TVA Board could properly have concluded that the pattern of electric power distribution would be more sensible and efficient if TVA competed in the *entire* Tazewell municipal area as well as serving the relatively unprofitable rural customers, many of whom were *rather close* to respondent's transmission line into the Tazewells". *Id.* at 12, 88 S.Ct. at 658.

While Justice Harlan, in his dissent, made a highly cogent argument concerning the Court's deference to TVA's statutory construction, the majority apparently rejected his argument that, "The role of the courts should, in particular, be viewed hospitably where, as here, the question sought to be reviewed does not significantly engage the agency's expertise." *Id.* at 14, 88 S.Ct. at 658–59.[14] A recent Supreme Court opinion casts some doubt on the appropriateness of agency determinations in situations such as this.

[5] In *Smiley v. Citibank (South Dakota), N.A.*, — U.S. —, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996), the Court said:

> We accord deference to agencies under *Chevron* [*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)] not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows. See *Chevron, supra,* at 843–844 [104 S.Ct. at 2781–2782]. Nor does it matter that the regulation was prompted by litigation, including this very suit. *Of course we deny deference "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 212 [109 S.Ct. 468, 473–474, 102 L.Ed.2d 493] (1988). *The deliberateness of such positions, if not indeed their authoritativeness, is suspect.* (emphasis added).

As stated in TVA's brief,

13. While there is an "exception," discussed in *Hardin* not at issue here, which provides: "Nothing in this subsection shall prevent [TVA] or its distributors from supplying electric power to any customer within any *area* in which [TVA] or its distributors had generally established electric service on July 1, 1957, and to which electric service was not being supplied from any other source on the effective date of this Act" (emphasis added), the Court concluded that this "exception" did not affect its interpretation and application of the initial limiting clause.

14. This court agrees with Justice Harlan's observation that " 'economic and engineering aspects' ... [which] may influence the Authority's wish to expand its area of service" should not "prescribe the terms or stringency of Congress' prohibitions against expansion." *Id.* at 14, 88 S.Ct. at 659.

It is, of course, axiomatic that statutory interpretation begins with the words of the statute, as the Supreme Court reiterated in *Norfolk & W. Ry. v. American Train Dispatchers' Ass'n,* 499 U.S. 117, 128 [111 S.Ct. 1156, 1163, 113 L.Ed.2d 95] (1991):

> As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress" [citation omitted].
>
> Furthermore, as the Court explained in *Nationsbank [NationsBank] v. Variable Annuity Life Ins. Co.,* [513 U.S. 251, ——— ———] 115 S.Ct. 810, 813–14 [130 L.Ed.2d 740] (1995):
>
> "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." ... *If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment "controlling weight"* (emphasis added).

TVA has further argued, however, that,

> Since the language of Section 15d(a) is clear and unambiguous, it must be deemed conclusive and be given full effect. *Negonsott v. Samuels,* 507 U.S. 99, 104–05 [113 S.Ct. 1119, 1122–23, 122 L.Ed.2d 457] (1993); *Kelly v. Boeing Petroleum Servs., Inc.,* 61 F.3d 350 (5th Cir.1995). *See also Connecticut Nat'l Bank v. Germain,* 503 U.S. 249 [112 S.Ct. 1146, 117 L.Ed.2d 391] (1992).

The court agrees. What TVA argues is an agency interpretation entitled to deference is, in reality, a legal position which it takes in this case.

This court cannot accept the argument that it must simply defer to the *ipse dixit* arguments of TVA as a litigant. See *Bowen v. Georgetown Univ. Hospital,* 488 U.S. 204, 213, 109 S.Ct. 468, 474, 102 L.Ed.2d 493 (1988); *National Fuel Gas Supply Corp. v. FERC,* 811 F.2d 1563, 1571 (D.C.Cir.), *cert. denied,* 484 U.S. 869, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987) and *ACLU v. FCC,* 823 F.2d 1554, 1567 n. 32 (D.C.Cir.1987); *William Bros., Inc. v. Pate,* 833 F.2d 261, 265 (11th Cir.1987). Rather than giving TVA the power to make rules or to otherwise carry out legislatively delegated interpretive authority, § 831 n–4 requires changes to be "specifically authorized by Act of Congress." *Cf. Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649, 110 S.Ct. 1384, 1390–91, 108 L.Ed.2d 585 (1990).

The record suggests that TVA's decision to sell to LPM resulted from a desire to change policy rather than from an interpretation of the 1959 Act. Its current Chairman has been quoted as saying, "[T]he fence, [the area restriction] no longer makes sense. And when it comes down, competition will be a two-way street, and TVA will once again have the freedom to compete anywhere in the country [as it did prior to 1959]. We had that freedom until 1959. It's time we had it again. It's time to set TVA free" (emphasis added) (Px. 39). The record indicates that previous TVA chairmen have not been so aggressive in attitude.

The case of *Young v. Tennessee Valley Authority,* 606 F.2d 143 (6th Cir.1979), *cert. denied,* 445 U.S. 942, 100 S.Ct. 1337, 63 L.Ed.2d 776 (1980), likely states the correct general law with regard to TVA's construction of statutes. The court stated:

> In considering the legality of agency action under an enabling statute, we do not write on a clean slate. Ordinarily, a court should give great weight to the frequent, consistent, and long standing construction of a statute by an agency charged with its administration....
>
> Particularly this is true with respect to a statute which is reasonably susceptible of two different interpretations. The construction of a statute by those agencies charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress with knowledge of the facts has consistently taken no steps to prohibit or curtail the administrative actions; but has approved them.

Young, 606 F.2d at 145 (citations omitted). This court does not conclude, however, that, here, there has been a "frequent, consistent, and long standing" construction of the statute. Further, there are compelling reasons to believe that the construction that TVA would place on the statute is wrong and that its interpretation is case-expedient. Further, the court does not conclude that Congress has ratified any such purported construction.[15]

Court's Statutory Interpretation

[6] It is generally recognized in Kentucky, as well as in other jurisdictions, that mere ownership of the capital stock of one corporation by another "does not create an identity of corporate interest." *Big Four Mills Ltd. v. Commercial Credit Corp.,* 307 Ky. 612, 616, 211 S.W.2d 831, 834 (1948); *Board of Tax Supervisors of Jefferson County v. Baldwin Piano Co.,* 296 Ky. 673, 677–78, 178 S.W.2d 212, 214 (1944); *Kentucky Electric Power Co. v. Norton Coal Mining, Co.,* 93 F.2d 923 (6th Cir.1938); *White v. Winchester Land Dev. Corp.,* 584 S.W.2d 56 (Ky.Ct.App.1979).

In *Boggs v. Blue Diamond Coal Co.,* 590 F.2d 655, 662 (6th Cir.1979), *cert. denied,* 444 U.S. 836, 100 S.Ct. 71, 62 L.Ed.2d 47 (1979), the court stated,

> Applying "the law as it appears in existing Kentucky decisions," this court declined to disregard the corporate fiction, observing that "[t]he approach of the Kentucky Courts to piercing the corporate veil has been described as evincing 'a general aversion for any disregard of the corporate entity.'" *Id.* [*Poyner v. Lear Siegler, Inc.,* 542 F.2d 955,] at 958. [(6th Cir.1976).] We noted "it would be an unprecedented extension of the Kentucky doctrine to disregard [the subsidiary's] separate corporate existence." *Id.* at 961.
>
> Whatever the semantics, it is unusual to find the parent corporation arguing that the corporate "fiction" should be disregarded, or that the "corporate veil" should be "pierced." The separate artificial corporate personalities are usually disregarded only when the corporate device is used to defraud creditors, create a monopoly, circumvent a statute or for the other similar reasons.
>
> . . . . .
>
> These cases are based on the traditional view that a business enterprise has a range of choice in controlling its own corporate structure. But reciprocal obligations arise as a result of the choice it makes.

A number of cases have recognized that "grandfather" clauses do not extend to separate allied corporations resulting from various corporate ownerships. In *Central Mortgage Co. v. Commonwealth, Insurance Department,* 100 Pa.Commw. 233, 238, 514 A.2d 956, 958 (1986), the court stated:

> We acknowledge that the grandfather clause operates to freeze the status quo of those companies which were validly in the insurance business prior to the effective date of Section 641(b). But we decline to read it as *expanding* those rights so as to advantage an acquiring corporation (here PSFS) by permitting it now for the first time to engage in the insurance business to the possible detriment (as perceived by the General Assembly) of independent insurance agencies.

[7, 8] Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. See *Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616–17, 100 S.Ct. 1905, 1910–11, 64 L.Ed.2d 548 (1980). One who claims the benefit of an exception from the prohibition of a statute has the burden of proving that its claim comes within the ex-

15. Again, see the provision in § 831n–4 which provides, "Unless otherwise specifically authorized by Act of Congress...." Defendants' strongest argument may be that TVA has already supplied power to affiliates of other 1959 excepted entities and that neither Congress, plaintiffs or entities similarly situated to plaintiffs have objected. This argument does not address, however, the provision in the 1959 amendment which requires changes to be "specifically authorized by Act of Congress." The court does not decide, one way or the other, whether sales by TVA to such other entities have been or are analogous to the sales to LPM or whether such sales themselves, if they take place, are prohibited. The court is simply doing what the parties have suggested, applying the language of the statute.

ception. *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366, 87 S.Ct. 088, 1092, 18 L.Ed.2d 151 (1967). *Cf. Mills Music, Inc. v. Snyder*, 469 U.S. 153, 105 S.Ct. 638, 83 L.Ed.2d 556 (1985).

In *In re, Beck Industries, Inc.*, 479 F.2d 410, 418 (2d Cir.1973), *cert. denied*, 414 U.S. 858, 94 S.Ct. 163, 38 L.Ed.2d 108 (1973), the ourt stated,

> Where a parent corporation desires the legal benefits to be derived from organization of a subsidiary that will function separately and autonomously in the conduct of its own distinct business, the parent must accept the legal consequences, including its inability later to treat the subsidiary as its alter ego because of certain advantages that might thereby be gained. In short the parent cannot "have it both ways." The words of the Supreme Court in *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437, 66 S.Ct. 247, 249, 90 L.Ed. 181 (1946), although stated in another context, are appropriate:
>
> > "While corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose, they will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages...."

In a somewhat analogous situation, the court in *National Association of Casualty & Surety Agents v. Board of Governors of the Federal Reserve System*, 856 F.2d 282, 285–286 (D.C.Cir.1988), *cert. denied*, 490 U.S. 1090, 109 S.Ct. 2430, 104 L.Ed.2d 987 (1989), stated:

> The Board thought that both the legislative history and the terms of the statute itself suggested a congressional intent that Exemption D privileges be identified with the precise entity that originally qualified for them. The Board quoted the Senate Committee Report which states that "[t]he authority to engage in activities under [Exemption D] only extends to the entity, be that the Holding Company itself or a subsidiary or subsidiaries thereof, which qualifies for the grandfathered activities status." *Id.* (quoting S.REP. NO. 536, 97th Cong., 2d Sess. 40 (1982) U.S.Code Cong. & Admin.News pp. 3054, 3094). Thus, if a bank holding company owned three banks, only one of which qualified under Exemption D to sell insurance, the other two banks, or any other subsidiaries or affiliates of the bank holding company, could not sell insurance, because "exemption D rights attach [only] to the entity actually conducting the activity on the grandfather date." *Id.* The Board concluded from the circumscribed nature of Exemption D rights that "the intent of the statute is that the grandfathered subsidiary continues to be able to engage in the activity, even if acquired by another bank holding company so long as the subsidiary complies with the geographic and functional limitations proscribed [sic] in exemption D." *Id.*

In *People's Gas Light & Coke Co. v. City of Chicago*, 194 U.S. 1, 16–17, 24 S.Ct. 520, 524, 48 L.Ed. 851 (1904), the Court stated:

> By the state Constitution the general assembly was forbidden to make 'any irrevocable grant of special privileges or immunities,' and the general rule is that a special statutory exemption, such as immunity from taxation, from the right to determine rates of fare, or to control tolls, and the like, does not pass to a new corporation succeeding others by consolidation or purchase, in the absence of express direction to that effect in the statute. *St. Louis & S.F.R. Co. v. Gill*, 156 U.S. [649] 656, 15 Sup.Ct.Rep. 484, 39 L.Ed. [567] 569; *Norfolk & W.R. Co. v. Pendleton*, 156 U.S. 667, 15 Sup.Ct.Rep. 413, 39 L.Ed. 574; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U.S. [578] 586, 17 Sup.Ct.Rep. 198, 41 L.Ed. [560] 562; *Minneapolis & St. L.R. [Ry.] Co. v. Gardner*, 177 U.S. 332, 20 Sup.Ct.Rep. 656, 41 L.Ed. 793; *Georgia R. & Bkg. Co. v. Smith*, 128 U.S. 174, 9 Sup. Ct.Rep. 47, 32 L.Ed. 377. And the same rule is applicable where the constituent companies are merely owned and operated by one of them as authorized by the legislature. An exemption held by the latter would not pass to the others unless so provided. So that the act of 1897 cannot be construed as extending any prior immunity the acquiring company possessed over

the whole system of all the companies consolidated.[16]

In *Tennessee Valley Authority v. Exxon Nuclear Co.*, 753 F.2d 493, 497 (6th Cir.1985), the court stated:

> It is well established that a parent corporation and a subsidiary are in law separate and distinct entities, and under ordinary circumstances a contract in terms and in name with one corporation cannot be treated as that of both, and a parent corporation will not be liable for the obligations of its subsidiaries. 1 *W. Fletcher Cyclopedia Corporations*, § 43 (rev. perm. ed. 1983). In certain instances, courts have permitted the corporate veil to be pierced. But this is generally done to impose liability on a parent corporation, and only after a strong showing of such control of the subsidiary by the parent to effectively render the subsidiary a mere instrumentality of the parent, and of some fraud connected with the use of the parent/subsidiary corporate form.

[9] Defendants correctly argue that the ultimate law which the court should look to is federal law, not state law. Defendants have cited *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir.1981) which states:

> Although the state law arguments advanced here that MATEP's corporate veil should not be pierced do not apply, there is also some federal law on piercing the corporate veil. This law has developed in cases involving other regulatory statutes as different as the Clayton Act, *see, e.g., Klinger v. Baltimore & Ohio R.R.*, 432 F.2d 506 (2d Cir.1970), the Interstate Commerce Act, *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 66 S.Ct. 247, 90 L.Ed. 181 (1946) (per curiam), and the Communications Act of 1934, *Capital Telephone Co. v. FCC*, 498 F.2d 734 (D.C.Cir.1974). The general rule adopted in the federal cases is that "a corporate entity may be disregarded in the interests of public convenience, fairness and equity." *Id.* at 738 (citations omitted). In applying this rule, federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, *see Schenley Distillers Corp. v. United States*, 326 U.S. at 437, 66 S.Ct. at 249; *Flink v. Paladini*, 279 U.S. 59, 62, 49 S.Ct. 255, 255, 73 L.Ed. 613 (1929), an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine, *Capital Telephone Co. v. FCC*, 498 F.2d at 738–39.

Gorsuch appears to state the general federal law. See also *Hansen v. Huston*, 841 F.2d 862, 864 (8th Cir.1988). ("Under federal law, state law doctrines of corporate autonomy may be disregarded when the corporate form is being used to defeat the ends of federal law").[17]

In *Crescent Express Lines v. U.S.*, 320 U.S. 401, 407–09, 64 S.Ct. 167, 170–71, 88 L.Ed. 127 (1943), the Court considered a grandfather clause and the "meaning given to the word, 'business.'" The Court stated, "The appellant argues that it would be engaged in the same business if, in lieu of using seven-passenger sedans, it undertook to haul larger numbers of passengers in buses." The Court held that, "To authorize the appellant to change to the business of carrying passengers by bus would alter the position in the transportation business which it occupied on June 1, 1935." Further, "When Congress provided for certificates to cover all carriers which were already in operation, it did not throw open the motor transportation system to more destructive competition than that already existing...."

Further, "The statute, we have said, contemplated substantial parity between future and prior operations.... As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure

16. *Cf. Shaw v. City of Covington*, 194 U.S. 593, 24 S.Ct. 754, 48 L.Ed. 1131 (1904).

17. This does not answer the question here of which side is trying to "defeat the ends of federal law." There is no fraud or injustice involved in an interpretation of the statute. Neither does fairness or equity appear to be implicated. Many of the cases cited by the defendants are cases wherein for reasons of fairness, equity, etc. *liability* was imposed on a corporate entity. If "convenience" is an issue, whose convenience?

held to extend only to carriers plainly thin its terms."

0, 11] LPM acknowledges that LPM d LG & E "are not the same corporate tity." It argues, however, that "The issue hether LPM and LG & E are a part of e same organization." The court disrees. The court is of the opinion that the erlying issue is whether LPM alone or as affiliate of LG & E can be considered an rganization" which was contemplated by 1959 Act. Under some definitions of rganization," LPM and LG & E are not en now part of the same organization. Unstionably, LPM was not one of the "organizations" contemplated by Congress in 1959. e fact that it may pass on all the profits it erates from sale of TVA power to LG & does not change the fact that it was neier in existence nor contemplated in 1959.[18] ld LG & E bring any corporation in the untry under a pre–1957 contract with TVA merely requiring that it pay all its profits sales of TVA power to LG & E? This urt thinks not. Likely, all the agreeent(s) which exist between LG & E and M could be made by LG & E with any poration if approved by regulatory authories.

PM argues that "Had Congress intended ch nonsensical interpretation [that Conress intended 'organizations' which were in tence in 1957], TVA would have been arred from entering into exchange power ansactions with [Alcoa]." Alcoa was specifly contemplated and excepted in the 1959 ct. It is specious to argue that since Alcoa excepted in the 1959 Act, its status has e bearing on a decision related to LPM.

Some of the arguments and counter arguments of the parties have concerned whether LG & E, like LPM, has the authority to sell in the national wholesale bulk power market, power not generated by it. Apparently the parties agree that LG & E cannot so sell power generated by others at unregulated or "market-based" rates, as LPM can do.[19]

[12] TVA argues, "We note, however, that principles of corporate law as such do not govern the issues presented here involving the meaning of the TVA Act. Rather, the determinative factors are what Congress said and what it meant by Section 15d(a) and how TVA has construed and applied the provision." While the intent of Congress is, of course, paramount, and while principles of corporate law may not totally "govern," this court is of the opinion that such principles must be at least considered in determining the intent of Congress.

TVA acknowledges that there was not only a reorganization in 1990 when Energy Corporation became LG & E's parent, but also in 1994. TVA argues,

> In 1994, LG & E underwent a further reorganization. At that time, the function of the marketing of surplus power off-system from LG & E's service area, which had historically been done by LG & E itself, was transferred to newly formed corporate affiliate, LPM. Freibert aff. ¶ 4; Friebert supp. aff. LPM is a third-tier wholly-owned subsidiary of LEC, and like LG & E is wholly owned by LEC.

Defendants argue that "two affiliated corporations, functionally related by a common purpose, constitute an organization." [20] The

8. The 1942 Agreement between TVA and LG & E provided:

> Company covenants and warrants that all obligations assumed by it in this agreement shall be discharged by it or by an existing subsidiary or by a subsidiary to be created as provided in this Article IX. Any reference in this agreement to "Company" shall be construed to include the Company or its subsidiaries to be created as provided in this Article IX.

he "subsidiaries to be created" are specifically named in Article IX. The 1942 power exchange greement between TVA and LG & E provides: This agreement shall inure to the benefit of and e binding upon the successors and assigns of the respective parties." The court concludes that LPM is neither a successor nor an assignee of LG & E. LG & E still has *its* contract with TVA.

19. There is no suggestion, in the TVA statutes' statements of the primary purposes, that Congress intended that TVA be a primary source of supply of electric power to serve the national market. The suggestions are to the contrary.

20. It should be noted that the reorganization here at issue was not, in pertinent part, a merger. A merger might result in a different legal analysis which considers which of the corporations is absorbed.

issue is whether such an 'organization' existed in July 1957. If LG & E and LPM had been affiliated in 1957, defendants' argument might be more persuasive. The parties have quoted various definitions of the term "organization" designed to suit their respective purposes. Under no definition did LPM exist in 1957. This court is less inclined than others to re-write the law. TVA and LPM have access to Congress if that is their desire.

Defendants argue that "The net effect of this relationship to LG & E and to third parties is the same as if LG & E had purchased the power from TVA itself and resold it, with the exception that LPM bears the risk of the transactions not being profitable rather than LG & E and its ratepayers." This statement itself illustrates at least one of the reasons the corporations are considered to be separate entities. In the various filings quoted from above, Energy Corp. and LG & E went to great lengths to emphasize the separateness of the entities and how LG & E is insulated from the activities of other affiliates. They also emphasized the advantages over the old "organization," including the benefits of not being regulated, expanded business opportunities, etc.

It may be that LG & E could conduct the same type sales as does LPM. On the other hand, its doing so could well violate the spirit, if not the letter, of the 1959 Act. The court again notes that the *sale* of power is provided for in both the first quoted proviso of § 831k and in the initial limiting provision of § 831n–4. It is not used in the exception here under consideration. Both §§ 831k & 831n–4 have separate "exchange" provisions. Since both §§ 831k & 831n–4 make a distinction between sale and exchange, the right of even any of the 1957 "organizations" to simply purchase power for resale outside the confined area is questionable.

This distinction in § 831k was discussed in a letter from TVA to Central Illinois Public Service Company (Px. 34). The letter states:

> This agreement [with Central Illinois Public Service Company] is not one for a sale of TVA power, *but* is an exchange power arrangement. These two types of transactions are basically different, and I am unable to agree ... that under section 12 of the TVA Act (16 U.S.C. 831k) "an 'interconnect with other systems' is deemed to be a sale of power." The last proviso of section 12 authorizes contracts with other power systems for exchanges of unused excess power, for conservation of stored water, and as an emergency or breakdown relief. The authorization for exchange power arrangements is separate from and in addition to that for power sales contracts....
>
> ....
>
> Section 15d of the TVA Act (16 U.S.C. 831n–4), which was adopted as an amendment in 1959, reaffirms the distinction between sales contracts and exchange arrangements.

While this court does not reach the issue of whether TVA can make blanket *sales* of power to even the power generating organizations contemplated by the 1959 Act, the court notes that terms "direct and indirect" must have some meaning.

[13] The references to *exchange* of power with power generating organizations suggests that Congress did not intend that TVA be a source of power through *sales* to non-power generating organizations. Even though exchanges with such excepted power generating organizations may take the form of sales and purchases, sales to non-power generating organizations which were not even in existence in 1957 do not fall within the contemplation of the 1959 Act's exception. The 1959 Act is very specific as to the intended exceptions. It seems clear that Congress did not intend "exchanges" by entities that do not generate power which they can exchange.[21]

21. The court does not have before it a case which questions the right of Savannah Electric and Power Company, or any entity other than LPM, to buy TVA power. At oral argument, TVA's attorney said, "And it's not material whether the plaintiffs, themselves, are actually reselling power at this time. The question is what does the statute require or prohibit?" The court agrees. Paraphrasing a statement made by Chief Justice Marshall, it is a statute that we are expounding.

See *Gonzales v. Garner Food Services, Inc.*, 89 F.3d 1523 (11th Cir.1996) ("The cardinal rule of statutory construction is that the language of a

An interesting argument made by LPM is the following:

> At the time Section 15d was enacted, Congress was aware that there were important statutory restrictions in place with respect to the operations and corporate structures of public utilities. These laws provide insight into the type of corporate organizations and activities in which Congress intended to allow utilities, such as LG & E and Plaintiffs, to engage.

This suggests that Congress may well have intended to restrict sales of TVA power to regulated utilities unless otherwise specified. At oral argument, TVA's attorney argued that, "Our position is that LPM is part of a power generating organization which is eligible to [receive] TVA power and that, of course, is Louisville Gas & Electric." LPM is clearly not "part of" LG & E. There is a certain irony in the fact that LG & E can't sell power to LPM but, arguably, TVA can. In effect, TVA says that the term "organization" is broad enough to include any group which TVA wants it to include.

In order to reach the conclusion urged by TVA and LPM, the court would have to regard all of the following:

1. That LPM is not a power generating organization which generates power to exchange.

2. That LPM is an entity which didn't exist in 1957.

3. That the addition of the subject contract gives LG & E and its affiliate, not one contract of exchange, but two contracts; one of exchange, with some purchase and sale to and from TVA; and one of purchase (and maybe some sale to TVA) only.

4. The requirement that changes must be specifically authorized by Act of Congress.

5. The distinction which Congress itself has made between purchase and sale and exchange.

6. *Hardin's* recognition that the purpose of the 1959 Act was to protect private utility companies from TVA competition.

7. The fact that LPM can engage in businesses and make sales which LG & E cannot as emphasized in documents created by LG & E during the time of the creation of the holding company.

8. The case law which suggests that LG & E and LPM are not the same organization.

9. Statements by TVA's own experts and its earlier officials which suggest that sales of power to LPM by TVA are unlawful.

10. Legislative history which expresses concerns about such attempts to stretch the Act.

Balanced against these and perhaps other factors is TVA's desire to expand its sales of power and its purported entitlement to deference to its view in this quest, without its having obtained approval of Congress. To allow this would be to place TVA in the same position as it was prior to the passage of the 1959 Act. This court cannot be a party to such machinations.

LPM's brief dated August 21, 1996 argues that the specter of competition "fuels this litigation." Further, that "Plaintiffs' complaint is not that the TVA/LPM contract reduces competition, but that LPM is competing with the plaintiffs in the national wholesale market." Further, "It is clear that the Power Companies are feeling the sting of potential competition." The brief is replete with other suggestions of competition and the plaintiffs' desire to avoid this competition. While the arguments may be very persuasive if presented to Congress, they are counterpersuasive here, both as to "standing" and as to the reasons given for the 1959 Act in *Hardin*.

Defendants would have the court apply some trinitarian type doctrine and determine that Energy Corp., LG & E and LPM are three entities in one. The court cannot make this theologically based leap. The very fact that TVA continues to sell to LG & E under one contract and to LPM under another contract suggests that the two contracts are not with the same "organization." Whatever the

statute should be interpreted in accordance with its ordinary, contemporary, and common meaning.... Absent clearly expressed legislative intent to the contrary, the plain language of the statute should be conclusive.").

holding company and its subsidiaries are now, they are not the same "organization" which existed In 1957. LG & E is the same, they are not. If Congress deems that sales to an affiliate corporation would satisfactorily meet its 1959 purpose of protecting private competition, that issue must be addressed by Congress rather than by either this court or TVA expanding the language Congress used in 1959. Neither this court nor TVA should make such a legislative decision.

As illustrated by the *Hardin* case, decisions of this type depend more on who has the final authority than on either pure logic or law. In *Hardin*, the district court made a decision which was reversed by the circuit court whose decision was, in turn, reversed by the Supreme Court, with a dissent.

Paraphrasing the language used in *Hardin*, one could argue that,

> "Given the innate and inevitable vagueness of the ["organization"] concept and the complexity of the factors relevant to decision in this matter, we think it more efficient, and thus more in line with the overall purposes of the Act, for courts to take TVA's ["organization"] determinations as their starting points and to set these determinations aside only when they lack reasonable support in relation to the statutory purpose of controlling, but not altogether prohibiting, territorial expansion."

Id. at 9, 88 S.Ct. at 656.

Any final decision which is made will likely be somewhat subjective. This court cannot, however, defer to TVA and hold that a separate corporation which was not even conceived of until 1990 is part of a 1957 organization. An apple does not become an orange because TVA says that it is. If the court accepted TVA's argument, two organizations would become one organization and one contract would become two contracts.[22] If the situation is the same as it would be with LG & E alone, there was no need for TVA to contract with LPM.[23]

The court will grant the Power Companies' Motion For Summary Judgment filed on April 30, 1996. Within ten days, plaintiffs will submit a proposed final judgment consistent with the conclusions of this Memorandum Opinion. The judgment will provide that its effect is stayed for sixty days to give the defendants an opportunity to seek further stay from the Eleventh Circuit Court of Appeals. The defendants will have ten days to object to the form and content of the proposed judgment. Objections to content will be limited to matters perceived to be inconsistent with the court's opinion.

GENERAL CIGAR COMPANY, INC., Plaintiff,

v.

CR CARRIERS, INC., Thomas B. Ross, C. Michael Cody and Paul Cleveland, Defendants.

Civil Action No. 95–A–1169–S.

United States District Court,
M.D. Alabama,
Southern Division.

Nov. 18, 1996.

Corporation filed action under Racketeer Influenced and Corrupt Organizations

22. "Property was thus appalled,
That the self was not the same;
Single nature's double name.
Neither two nor one was called.
Reason, in itself confounded,
Saw division grow together,
To themselves yet either neither,
Simple were so well compounded."
The Phoenix and Turtle, Sonnet, William Shakespeare.

23. During its consideration of this case, the court raised the question of whether TVA and LPM are complying with the provisions of § 831k which require that TVA sales of power to for profit corporations be accompanied by requirements that resales of such power be at rates not exceeding a schedule fixed by TVA. The defendants' answer seems to be that TVA is not "selling" power to LPM but is "exchanging" power with LPM. This seems to be another "stretch" of realism. In any event, the court adheres to its conclusion that LPM is not an "organization" contemplated by the 1959 Act.

Reorder No. 5126N
JULIUS BLUMBERG, INC.
NYC 10013
⊕10% P.C.W.

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA 97 JUL 28 PM 4:09
SOUTHERN DIVISION

U.S. DISTRICT COURT
N.D. OF ALABAMA

ALABAMA POWER COMPANY,)
DUKE POWER COMPANY,)
ENTERGY MISSISSIPPI, INC.,)
GEORGIA POWER COMPANY, and)
MISSISSIPPI POWER COMPANY,)
)
Plaintiffs,)
v.)
)
TENNESSEE VALLEY AUTHORITY, a)
United States Corporation,)
)
Defendant.)

CIVIL ACTION NUMBER
CV-97-C-0885-S

ENTERED

JUL 29 1997

CONSENT JUDGMENT

The parties, Alabama Power Company, Duke Power Company, Entergy Mississippi, Inc., Georgia Power Company, and Mississippi Power Company (collectively "plaintiffs") and the Tennessee Valley Authority ("TVA" or "defendant"), having filed pleadings and having presented and supported satisfactorily to this Court a proposed Consent Judgment; and

This Court, having jurisdiction over this case, and having considered the pleadings of record, the allegations and defenses included therein, the representations of counsel for the parties, and having been provided with a Settlement Agreement executed on behalf of all parties resolving all issues in this case, a copy of which is attached to this judgment as exhibit A, and having been asked by counsel for all parties to approve the Settlement Agreement and adopt it as the Court's final judgment in this action, hereby ORDERS that the attached Settlement Agreement is incorporated and adopted as the Court's final judgment in this case and further

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orders that the parties to the agreement shall comply with the terms and conditions of the agreement in all respects.

The Court shall retain jurisdiction over the interpretation, effectuation, and implementation of this Consent Judgment.

DONE and ORDERED this 28th day of July, 1997.

U.W. Clemon
United States District Judge

EXHIBIT A TO CONSENT JUDGMENT

Settlement Agreement
in Connection with
Alabama Power Company, et al. v. Tennessee Valley Authority
CV-97-C-0885-S
pending in the United States District Court
for the Northern District of Alabama
Southern Division

This settlement agreement is effective as stated herein by and between the Tennessee Valley Authority ("TVA" or "defendant") and Alabama Power Company, Duke Power Company, Entergy Mississippi, Inc., Georgia Power Company and Mississippi Power Company (collectively "plaintiffs").

RECITALS

WHEREAS, TVA and the plaintiffs strive at all times to remain in compliance with federal statutes governing the supply of electricity by power producers and, likewise, seek and intend to operate in compliance with all applicable requirements of the Tennessee Valley Authority Act of 1933 (16 U.S.C. § 831 *et seq.*) (the "TVA Act"); and

WHEREAS, the operation of interconnected electric utilities is a business affected by the public interest that requires voluntary and good faith efforts to comply with complex statutory and regulatory provisions; and

WHEREAS, both the defendant and the plaintiffs recognize that Congress mandated in Section 15d(a) of the TVA Act that, unless specifically authorized by Act of Congress, TVA may make no contract for the sale or delivery of power that would have the effect of making TVA or its distributors, directly or indirectly, a source of power supply outside the area for which TVA or its distributors were the primary source of power supply on July 1, 1957; and

WHEREAS, TVA is permitted under the provisions of Sections 12 and 15d(a) of the TVA Act, when economically feasible, to make exchange power arrangements with other power generating organizations with which TVA had such arrangements on July 1, 1957; and

WHEREAS, TVA and such power generating organizations have exchanged power pursuant to the provisions of the TVA Act; and

WHEREAS, in 1979, the TVA Board submitted to Congress a TVA policy statement concerning the application of provisions of Section 15d(a) of the TVA Act governing the use and availability of TVA-power; and

WHEREAS, developments within the electric utility industry and certain actions of TVA have led to a number of disputes between TVA and private utilities with whom TVA is permitted to exchange power pursuant to Section 15d(a); and

WHEREAS, the parties desire to pursue increased cooperation in their power operations and believe that it is not advantageous to continue with the pending litigation between the parties; and

WHEREAS, the parties are mindful of the Memorandum Opinion and Final Judgment entered by Senior United States District Judge Robert W. Propst in the case of Alabama Power Company, et al. v. TVA; LG&E Power Marketing Inc., 948 F. Supp. 1010 (N.D. Ala. 1996).

NOW THEREFORE, in consideration of the covenants and agreements set forth herein, the plaintiffs and TVA, themselves and through their undersigned counsel, agree to the settlement of the above-referenced action, subject to Court approval by entry of a Consent Judgment, under the following terms and conditions:

I. DEFINITIONS

1.01. "Agreement" means this Settlement Agreement.

1.02. "Authorized Exchange Power Arrangement," pursuant to the TVA Act, means an agreement between the TVA and one of the "Authorized Exchange Power Companies."

1.03. "Authorized Exchange Power Company," means, as of the effective date of this Agreement, any one of the following power generating organizations that all qualify as such under the definitional provisions of 16 U.S.C. §831n-4(a):

Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric and Power Company

Entergy Mississippi, Inc.
Entergy Arkansas, Inc.
Entergy Louisiana, Inc.
Entergy New Orleans, Inc.
Entergy Gulf States, Inc.

Appalachian Power Company
Columbus Southern Power Company
Ohio Power Company

Indiana Michigan Power Company
Kentucky Power Company
Kingsport Power Company
Michigan Power Company

Carolina Power & Light Company

Nantahala Power and Light Company
Duke Power Company

Kentucky Utilities Company

Cincinnati Gas & Electric Company

Aluminum Company of America through Tapoco, Inc.

Louisville Gas and Electric Company

East Kentucky Power Cooperative, Inc.

Electric Energy, Inc.
Central Illinois Public Service Company
Illinois Power Company
Union Electric Company

1.04. "Court" means the United States District Court for the Northern District of Alabama (Southern Division).

1.05. "Defendant" means the Tennessee Valley Authority.

1.06. "Defendant's Counsel" means the General Counsel of TVA.

1.07. "Exchange Power from TVA" means electric power (capacity and/or energy) that is generated or acquired by TVA that is surplus to the needs of the area served by TVA and is physically delivered to an Authorized Exchange Power Company.

1.08. "Final Approval" means the date on which the Consent Judgment is entered by the Court approving the terms of this Agreement.

1.09. "Parties" means the Tennessee Valley Authority and Alabama Power Company, Duke Power Company, Entergy Mississippi, Inc., Georgia Power Company and Mississippi Power Company.

1.10. "Physical Delivery of Exchange Power from TVA" means the simultaneous coordinated operation of the TVA power system and the power system of an Authorized Exchange Power Company so as to accomplish the physical transfer of Exchange Power from TVA to an Authorized Exchange Power Company, as documented on the transaction schedules of TVA and the Authorized Exchange Power Company.

1.11. "Plaintiffs" means Alabama Power Company, Duke Power Company, Entergy Mississippi, Inc., Georgia Power Company and Mississippi Power Company.

1.12. "Plaintiffs' Counsel" means the law firm of Balch & Bingham LLP.

II. GENERAL SETTLEMENT TERMS

2.01. Pursuant to the TVA Act, the Parties agree that TVA may only offer for sale, sell and/or deliver Exchange Power from TVA to an Authorized Exchange Power Company.

2.02. Pursuant to the TVA Act, the Parties agree that TVA may not offer for sale, sell and/or deliver any power (energy or capacity) to any power marketer, power broker, public utility or other entity that is not an Authorized Exchange Power Company for use outside the area for which TVA was the primary source of power supply on July 1, 1957, except as otherwise required or permitted by law.

2.03. TVA agrees that all Exchange Power from TVA made available to an Authorized Exchange Power Company must entail the Physical Delivery of Exchange Power from TVA to that particular Authorized Exchange Power Company.

2.04. Within thirty (30) days of entry of the Consent Judgment, TVA will convey in writing to all Authorized Exchange Power Companies a clarification of the circumstances, terms and conditions under which Authorized Exchange Power Companies may enter into exchange power arrangements with TVA that are consistent with the terms of the TVA Act and the Consent Judgment. Such letter will include the following statements:

> TVA will not knowingly enter into any exchange power transaction if the purchaser of TVA Exchange Power is procuring that power for the purpose of reselling such power at wholesale to any third party not authorized to exchange power with TVA. TVA is supplying power under Exchange Power transactions with the understanding that such power is not being purchased for the purpose of reselling it to any such unauthorized third party. In the event TVA discovers that such power has been purchased for a purpose inconsistent with the previous two sentences, such transaction shall be terminated.

2.05. TVA will make publicly available information concerning those Authorized Exchange Power Companies that are receiving exchange power from TVA and the amount being delivered from TVA to each such company. TVA will do this through its OASIS system and NERC's July 1, 1997 "tagging" procedures and rules (or any substitute system that conforms with regulatory requirements placed upon Federal Energy Regulatory Commission jurisdictional electric utilities selling electric power at wholesale). This information shall be provided on the same basis that Authorized Exchange Power Companies provide such information on their OASIS systems and through the same tagging procedures and rules applicable to their interchange/exchange power sales.

2.06. TVA agrees that the TVA Board of Directors will consider, and re-adopt within thirty (30) days of entry of the Consent Judgment, the following Policy Statement, which is substantially in conformance with that adopted by the TVA Board of Directors in 1979:

> Statement of Policy Concerning Application of Provisions of Section 15d(a) of the Tennessee Valley Authority Act of 1933, As Amended, Governing Availability of TVA Power
>
> 1. The region in which TVA power is to be made available has been prescribed by Congress, and is set out in Section 15d(a) of the TVA Act, which was included in an amendment enacted in 1959.
>
> 2. Since the adoption of those provisions in Section 15d(a), TVA has exercised great care in entering into power supply arrangements with municipal and cooperative distributors of TVA power and with directly served customers, federal agencies and public entities, as well as in participating in arrangements with neighboring electric power systems with which TVA is authorized to exchange power, to assure compliance with the restrictions contained in the Act.
>
> 3. TVA recognizes electric supply reliability and basic stability in the area supplied by it and its distributors is in the public interest and to conserve energy and capital, bring about efficient use of facilities and resources, and help effectuate the greatest reliability of the TVA system.
>
> 4. TVA has heretofore stated, and now deems it appropriate to reaffirm, that its policy and practice will be to confine its area of retail and wholesale

electric service to the boundary as fixed by Section 15d(a) of the TVA Act.

5. In conformity with this policy and practice, TVA will only engage in the construction of such generating capacity or the purchase of generating capacity as it needs to supply power demands in its own service area. TVA will not afford encouragement or assistance to persons or organizations which it and its distributors cannot legally serve under Section 15d(a) in seeking such service.

6. TVA will not knowingly enter into any exchange power transaction if the purchaser of TVA Exchange Power is procuring that power for the purpose of reselling such power at wholesale to any third party not authorized to exchange power with TVA. TVA will supply power under exchange power transactions with the understanding that such power is not being purchased for the purpose of reselling it to any such unauthorized third party. In the event TVA discovers that such power has been purchased for a purpose inconsistent with this policy, such transaction shall be terminated.

III. MISCELLANEOUS PROVISIONS

3.01. Defendant's Counsel and Plaintiffs' Counsel shall use their best efforts to support entry of a Consent Judgment reflecting and giving effect to this Agreement.

3.02. This Agreement is intended to and shall be governed by the laws of the State of Alabama and the laws of the United States. All disputes arising hereunder or relating hereto shall be subject to the exclusive jurisdiction of the Court.

3.03. The terms and conditions set forth in this Agreement constitute the complete and exclusive agreement between the Parties hereto, and may not be contradicted by evidence of any prior or contemporaneous agreement. The Parties agree that the terms and conditions of this Agreement are clear and unambiguous, and that extrinsic evidence may not be introduced in any judicial proceeding, if any, involving this Agreement. Any modification of the Agreement must be in writing and signed by both Plaintiffs' Counsel and Defendant's Counsel.

3.04. This Agreement has been entered into by mutual agreement after negotiation, with participation of all Parties hereto and/or their respective Counsel.

3.05. This Agreement shall be binding on and inure to the benefit of the respective successors of the Parties.

3.06. The waiver by one Party of any provision of this Agreement shall not be deemed a waiver of any other provision. If any provision of this Agreement is ruled judicially to be invalid, such ruling shall not operate to invalidate the entire Agreement, as the terms and provisions will be deemed severable under such a circumstance.

3.07. The breach by one Party of any one provision of this Agreement shall be deemed a breach of the entire Agreement.

3.08. TVA will terminate all existing commitments under its exchange power arrangements that are inconsistent with this Agreement that are capable of being terminated as of the effective date of this Agreement. Additionally, within 30 days of the effective date of this Agreement, TVA will use best efforts to amend all other existing commitments that are inconsistent with this Agreement to conform with this Agreement and, in particular, with the provisions of 2.04 and 2.06. At the end of said 30 day period TVA will discontinue the delivery of Exchange Power from TVA under any existing commitments that TVA has been unable to amend and remain inconsistent with this Agreement.

3.09. This Agreement shall become effective and binding upon entry of the Consent Judgment. The signatories represent and warrant that they are authorized to execute the same on behalf of the Parties without any additional approvals (including but not limited to Boards of Directors). This Agreement may be executed in counterparts, and execution of counterparts shall have the same force and effect as if all Parties had signed the same instrument.

3.10. The Court shall retain jurisdiction over the interpretation, effectuation and implementation of this Agreement.

3.11. This agreement is entered into based upon the TVA Act as presently in effect and could be affected by changes in the law to the extent that the provisions of the TVA Act or other statutes pertaining to such matters are modified or amended.

3.12. Nothing herein shall prevent the parties from expressing their views or engaging in good faith legitimate debate or discussion about proposed legislation, including the TVA Act, or other issues involving the electric utility industry.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below and agree that it shall take effect on the date it is executed by all of the undersigned.

TOTAL P.09

TENNESSEE VALLEY AUTHORITY

By________________________
Edward S. Christenbury
Its General Counsel
Dated: July 24, 1997

Witness

Sworn to and subscribed before me
this 24th day of July, 1997.

____
Notary Public
My Commission expires: 11-29-97

BALCH & BINGHAM LLP

____
Karl R. Moor
Dated: July 21, 1997

____
Alan T. Rogers
Dated: July 21, 1997, 1997

Witness

Sworn to and subscribed before me
this 21 day of July, 1997.

____
Notary Public
My Commission expires: 6-9-01

JUL-24-1997 11:14 TVA-OFFICE GENERAL COUNSE 423 632 2422 P.09/09
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
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U.S. DISTRICT COURT
N.D. OF ALABAMA

ALABAMA POWER COMPANY, DUKE POWER COMPANY, ENTERGY MISSISSIPPI, INC., GEORGIA POWER COMPANY, and MISSISSIPPI POWER COMPANY,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NUMBER: ____
TENNESSEE VALLEY AUTHORITY, a United States Corporation,	)	CV-97-C-0885-S
Defendant.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Nature Of Action

1. Last year, Judge Robert Propst, Senior United States District Judge, entered a judgment declaring that the Tennessee Valley Authority ("TVA") is prohibited by federal law from supplying electric power directly to power marketers for resale and profit nationwide. See Alabama Power Co. v. Tennessee Valley Authority, 948 F. Supp. 1010 (N.D. Ala. 1996). This is a challenge to TVA's efforts to supply power indirectly to power marketers and others for resale and profit nationwide. TVA is making these indirect sales of power by misusing its grandfathered right to "exchange" power with a limited number of neighboring power generating organizations ("grandfathered exchange companies"). As a result of these sham exchange power transactions, TVA generated power, which may only be lawfully supplied to coordinate operations between TVA and grandfathered exchange companies, is supplied instead

to others who are not permitted to obtain TVA power. This case, therefore, is about TVA's continued defiance of federal law and its implementation of a systematic plan and scheme to transform itself from a special-purpose regional agency into the dominant supplier of power across the Nation.

2. Plaintiffs Alabama Power Company, Duke Power Company, Entergy Mississippi, Inc., Georgia Power Company, and Mississippi Power Company (the "Power Companies"), all competitors of TVA, seek from this Court a declaration that TVA is prohibited by law from making any contract or arrangement — whether written or oral — to supply power directly or indirectly to entities for resale, re-delivery, or use outside the region in which TVA is Congressionally authorized to supply power. The Power Companies further seek to enjoin any and all such unlawful transactions.

Jurisdiction

3. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702.

Venue

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c), 5 U.S.C. § 703 and 16 U.S.C. § 831g(a).

The Parties

5. Plaintiff Alabama Power Company is an Alabama corporation with its principal place of business in Birmingham, Alabama.

6. Plaintiff Duke Power Company is a North Carolina corporation with its principal place of business in Charlotte, North Carolina.

7. Plaintiff Entergy Mississippi, Inc. is a Mississippi corporation with its principal place of business in Jackson, Mississippi.

8. Plaintiff Georgia Power Company is a Georgia corporation with its principal place of business in Atlanta, Georgia.

9. Plaintiff Mississippi Power Company is a Mississippi corporation with its principal place of business in Gulfport, Mississippi.

10. Defendant TVA is a corporation of the United States established and operating under the Tennessee Valley Authority Act of 1933, as amended (16 U.S.C. § 831 *et seq.*) (the "TVA Act"). By statute, TVA is required to maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. 16 U.S.C. § 831g(a).

Statutory Background

11. TVA was created and chartered for the primary purpose of improving navigation on the Tennessee River, producing fertilizer, controlling floods, and helping to improve agricultural practices in the Tennessee Valley region. See 16 U.S.C. § 831 *et seq.*

12. In 1935, at TVA's behest, Congress amended the TVA Act to permit TVA to "operate facilities for the generation of electric energy" for its own legitimate purposes at the federally-financed dams it had constructed to promote river navigation, produce fertilizer and control floods. See 16 U.S.C. § 831h-1.

13. TVA was not established or chartered to engage primarily or exclusively in the proprietary business of operating an electric utility system. See 16 U.S.C. § 831h-1. Instead, TVA was authorized to generate and sell power only as a secondary function, incidental to its primary mission. See 16 U.S.C. §§ 831h-1 to 831k; Alabama Power Company v. TVA, 948

F. Supp. at 1012-1014 & n.19.

14. TVA has undertaken voluntarily to supply power in the Tennessee Valley region. It was not Congressionally mandated or required to do so. See 16 U.S.C. §§ 831h-1 and 831j.

15. Congress has authorized TVA to enter into voluntary contracts with other power systems for the "mutual exchange" of "unused excess power" for the "conservation of stored water, and as an emergency or break-down relief." Id. This type of electric power transaction has a limited and unique purpose. "Exchange power" arrangements permit specific, neighboring power generating utilities to operate in coordination with TVA so as to enhance the reliability and efficiency of each generating system. See Alabama Power Co. v. TVA, 948 F. Supp. at 1013 & n.2.

Factual Background

16. In the 1930's, TVA began to construct and operate hydroelectric dams funded by the federal treasury. Although TVA's primary mission was not to operate an electric utility system, beginning in the mid-1930s, TVA embarked on a massive effort to build power plants and transmission lines so as to provide all the electrical power needs in the Tennessee Valley region.

17. By the 1950's, the area in which TVA or its distributors were the exclusive source of power supply had grown exponentially and comprised an area of approximately 80,000 square miles spanning all or parts of Tennessee, Alabama, Georgia, Kentucky, Mississippi, North Carolina and Virginia.

18. TVA's growth came at the expense of private enterprise and its investors and shareholders. Neighboring investor-owned utilities, faced with TVA's construction of duplicate

and parallel transmission and distribution lines and TVA's federally subsidized power rates, were forced to abandon their property and service areas.

19. As the source of TVA's funding, Congress exercised some degree of supervision and control over TVA's growth. During the late 1940s and early 1950s, Congress severely restricted TVA's federal funding. In response, TVA sought independent financing authority so that it could build more power plants without the need to obtain future appropriations from Congress. Beginning in 1956 and culminating in the enactment of legislation in 1959, TVA gained authority to self-finance through the issuance of bonds to the public.

20. Investor-owned utilities raised objections to TVA's proposed self-financing legislation. Recognizing the threat of an unrestrained TVA and remembering the service areas taken by TVA in the 1930s and 1940s, investor-owned utilities urged Congress to retain control over TVA's purse strings.

21. Congress compromised. While Congress gave TVA the legal authority to self-finance, the enabling legislation also ensured that TVA would no longer pose a competitive threat to neighboring utilities, like the Power Companies. Congress prohibited TVA from making any contract to supply power directly <u>or</u> indirectly outside the Tennessee Valley region. In essence, Congress erected a wall around TVA's then existing service area.

22. The Congressional ban against TVA making any contract (oral or written) to supply power, directly or indirectly, outside a statutorily-proscribed area is codified as Section 15d(a) of the TVA Act. (16 U.S.C. § 831 n-4). The law directs:

> <u>Unless otherwise specifically authorized by Act of Congress</u> the corporation <u>[TVA] shall make no contracts</u> for the sale or delivery of power which would <u>have the effect</u> of making the

[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.

Id.

23. This strict Congressional prohibition limits the area within which TVA is authorized to supply power, whether the power is provided directly by TVA or its distributors, or is otherwise provided indirectly through a grandfathered exchange company. This Congressionally imposed ban bars TVA from taking any action that would have the "effect" of making it an "indirect" source of power supply outside the designated region. See Alabama Power Company v. TVA, 948 F. Supp. at 1020 nn. 9-10, 1028. The purpose of the ban was to protect private utilities, like the Power Companies, from competition against TVA power. As Judge Propst recognized:

> [I]t is clear and undisputed that the protection of private utilities from TVA competition was almost universally regarded as the primary objective of the [service area] limitation.

Alabama Power Company v. TVA, 948 F. Supp. at 1013 (quoting Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 (1968)).

24. This prohibition against the use of TVA power outside the designated area contains a narrow exception. This exception — a grandfather clause — permits the continuation of certain "exchange power arrangements" that previously had been authorized by Congress for the purpose of "conserving stored water, and as an emergency or break-down relief." 16 U.S.C. § 831k. The exception provides:

> Nothing in this subsection shall prevent [TVA], when economically feasible, from making exchange power arrangements with other power-generating organizations with

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which [TVA] had such arrangements on July 1, 1957....

16 U.S.C.A. § 831n-4(a). This exception is limited in scope and permits only the continuation of pre-existing "exchange power arrangements" with the grandfathered exchange companies. See Alabama Power Company v. TVA, 948 F. Supp. at n.10, 1024. No other use of TVA power is authorized by the exception.

25. TVA has long recognized and respected the purpose of the Congressionally imposed area restriction. For example, in 1979, TVA asked Congress to raise the statutory cap on its borrowing authority from $15 billion to $30 billion. In connection with lobbying for this increased borrowing authority, TVA assured Congress that it harbored no plans to supply power outside its boundaries and only sought to expand its generating capacity to meet the growing needs of its existing distributors. The Chairman of TVA's Board of Directors testified before Congress in 1979 that TVA's

> understanding of the law is that we can continue to have exchange power arrangements with our neighbors, that we had exchange arrangements with in 1957. The statute preserves the status quo in a sense. We are the source of power supply only to the people in our region as defined in the Act. We cannot be a source of power supply outside. . . . **we cannot go out and supply someone outside our service area.** And we have turned down requests for such services by the hundreds.

Hearing Before the Subcommittee on Water Resources of the Committee on Public Works and Transportation of the House of Representatives, 96th Cong., 1st Sess. pp. 109-110 (Sept. 12 & 13, 1979) (Testimony of S. David Freeman) (emphasis added).

26. In connection with seeking increased borrowing authority, TVA, in 1979, also submitted for the Congressional Record the following TVA Policy Statement:

Statement of Policy Concerning Application of Provisions of Section 15d(a) of the Tennessee Valley Authority Act of 1933, As Amended, Governing Availability of TVA Power

1. The region in which TVA power is to be made available has been prescribed by Congress, and is set out in Section 15d(a) of the TVA Act, which was included in an amendment enacted in 1959.

2. **Since the adoption of those provisions in Section 15d(a) TVA has exercised great care in entering into power supply arrangements with municipal and cooperative distributors of TVA power and with directly served customers, as well as in participating in interconnection agreements with neighboring electric power systems, to assure compliance with the restrictions contained in the Act.**

3. TVA regards basic stability in the area supplied by it as desirable in the public interest and to conserve energy and capital, bring about efficient use of facilities and resources, and help effectuate the greatest reliability of the TVA system.

4. **TVA has heretofore stated and now deems it appropriate to reaffirm that its policy and practice will be to confine its area of electric service to the boundary as fixed by Section 15d(a) of the TVA Act.**

5. In conformity with this understanding, TVA is building only such generating capacity as it needs to supply power demands in its own service area. **TVA will not afford encouragement or assistance to persons or organizations which it and its distributors cannot legally serve under Section 15d(a) in seeking such service.**

Id. (emphasis added).

27. TVA thus has recognized that it has an affirmative duty and legal obligation to (1) "assure compliance" with the restrictions contained in Section 15d(a); and, (2) make sure

that TVA does not place its power on the open market in competition with investor-owned utilities.

28. In fact, in 1992, during Congressional hearings on legislation to partially de-regulate the electric utility industry, TVA lobbied for protection from any competition inside its 80,000 square mile service area on the basis that Section 15d(a) forbids it from competing outside that same area. TVA argued to Congress that because Section 15d(a) prohibits it from competing with investor-owned utilities in their service areas, fairness required that TVA not be subjected to competition inside its service area. Congress accepted TVA's argument and exempted TVA from the competitive rules enacted for the remainder of the electric utility industry. See 16 U.S.C. § 824k(j).

29. Despite TVA's past commitments to Congress and to the public, the current Chairman of TVA's Board of Directors, Craven Crowell, has publicly and repeatedly announced TVA's desire to "compete" with private utilities outside its existing territory. As Judge Propst recently observed:

> The record suggests that TVA's decision to sell to [a power marketer] resulted from a desire to change policy rather than from an interpretation of the [TVA Act]. Its current Chairman has been quoted as saying, "the Fence, no longer makes sense. And when it comes down, competition will be a two-way street, and TVA will once again have the freedom to compete anywhere in the country. We had that freedom until 1959. It's time we had it again. It's time to set TVA free." Previous TVA Chairmen have not been so aggressive in attitude.

Alabama Power Company v. TVA, 948 F. Supp. at 1023.

30. One class of participant in the national power market to whom TVA would like to supply power (but to whom TVA is statutorily barred from supplying power) is the "power

marketer." A power marketer is a non-facilities based enterprise (meaning it owns no generation plants or transmission/distribution lines) that engages in the business of buying and reselling electric power that is generated by others.

31. By definition, any power TVA supplies to a power marketer is resold and delivered to a third party. When the power is used outside the area in which TVA legally is permitted to supply power, TVA becomes a "source of power supply" in violation of the TVA Act.

32. TVA has publicly released a report — entitled "The Ties That Bind: TVA In A Competitive Electric Market" — recognizing and conceding that it is statutorily prohibited from supplying power to power marketers and announcing that TVA's continued isolation as dictated by Section 15d(a) of the TVA Act is incompatible with its goal of competing in the emerging wholesale electric market.

33. TVA has admitted and acknowledged publicly that the Congressionally imposed bar against it selling or supplying power to power marketers interferes substantially with its ability to operate its power system in the method TVA now prefers and desires.

34. In an effort to broaden the area where its power may be used, TVA, in 1995, made a contract to supply power to a power marketer affiliated with a grandfathered exchange company with whom TVA was authorized to "exchange power." Some of the Power Companies filed suit in the United States District Court for the Northern District of Alabama challenging TVA's ability to enter the contract and supply power to a power marketer. After extensive briefing and argument, Judge Propst issued a lengthy and exhaustive opinion declaring unlawful TVA's contract and its attempt to supply power to the power marketer.

Alabama Power Co. v. TVA, 948 F. Supp. 1010 (N.D. Ala. 1996).

35. Judge Propst ruled that TVA is prohibited by the TVA Act from making any contract to supply power to a power marketer, whether or not that power marketer is affiliated with a grandfathered exchange company. See Alabama Power v. TVA, 947 F. Supp. at 1028 ("Congress did not intend that TVA be a source of power through sales to non-power generating organizations [such as power marketers]").

36. Judge Propst ruled that sales to power marketers, whether directly or indirectly, meet no statutory exception:

> **[S]ales to non-power generating organizations [power marketers] which were not even in existence in 1957 do not fall within the contemplation of the 1959 Act's exemption.** The 1959 Act is very specific as to the intended exceptions. It seems clear that Congress did not intend "exchanges" by entities that do not generate power which they can exchange.

Id. at 1028 (emphasis added).

37. Power marketers are major participants in a newly emerging national commodity market for electricity. This national electricity commodity market involves the trading of paper rights for the future delivery of electricity by new merchants that own no power generation or transmission facilities. Paper rights to power are bought and sold in this very liquid and fast moving market by merchant traders who may be unable, in the course of competitive trading, to reasonably trace or police the sources of the power being purchased. Indeed, the participants — buyers and sellers — in the market do not typically know who will ultimately generate the power that they are trading.

38. TVA supplies power to the national electricity commodity market by: (1) selling

power "on paper" to grandfathered exchange companies, including, but not limited to, East Kentucky Power Cooperative, Louisville Gas and Electric Company, and Cinergy Corporation; but (2) later physically delivering the power for use by an entity other than the so-called "purchasing" grandfathered exchange company.

39. An example of the above-described sham transaction is as follows: (1) TVA agrees to "sell" power to East Kentucky Power Cooperative ("East Kentucky") for July delivery; (2) East Kentucky contemporaneously agrees to "sell" power to a power marketer for July delivery; (3) in July the power marketer instructs East Kentucky to deliver the purchased power to Commonwealth Edison in Chicago (not a grandfathered exchange company); and (4) East Kentucky instructs TVA to deliver the power to Commonwealth Edison.

40. Once TVA power is physically delivered to anyone other than the "purchasing" grandfathered exchange company, regardless of what TVA or others may put on paper, the TVA power is effectively "laundered." Once such a sham transaction is effected, it is nearly impossible for participants in the market to identify TVA as the actual source or to avoid TVA's power. Under current market conditions, therefore, TVA's sham transactions have a contaminating effect on the stream of electrical power in the commodity market -- an effect that can only be removed at its source, TVA.

Allegations

41. The Power Companies are investor-owned utilities that generate, transmit, distribute and sell electric power at wholesale and retail throughout the Southeast and nationally. They are private utilities within the class of entities sought to be protected by the TVA Act from direct or indirect competition against TVA power.

42. Since enactment of Section 15d(a) of the TVA Act, Congress has enacted no law authorizing TVA to make contracts or arrangements to sell, supply or deliver power — directly or indirectly — for use outside the area in which TVA is authorized to be a source of power supply.

43. TVA has announced publicly its primary focus and "core business" is now operating an electric utility business enterprise in competition with private industry on a nationwide level.

44. TVA has made arrangements with grandfathered exchange companies, including, but not limited to, East Kentucky, Louisville Gas and Electric Company, and Cinergy Corporation, for improper and illegal purposes.

45. TVA has knowingly and with disregard for the law negotiated and/or otherwise made arrangements with grandfathered exchange companies for the supply of power knowing that such power will not be used by such entities, but will be delivered to unauthorized third parties for use outside the area in which TVA is permitted to supply power.

46. TVA has engaged in a pattern and practice of operations designed to avoid and otherwise circumvent the law by making unwritten arrangements to supply power to power marketers and others for use outside the area where TVA is authorized to be a source of power

supply.

47. TVA has failed and refused to follow the law by encouraging and assisting in the unlawful use of its power and has failed and refused to ensure that its power is not used in unlawful ways.

48. TVA has effectively abandoned its primary mission of flood control, river navigability and fertilizer production and has unilaterally, without the consent of Congress, adopted a new goal and purpose of becoming the Nation's dominant and most powerful electric utility business.

49. As a proximate result of TVA's unlawful acts and omissions, the national electricity commodity market has been contaminated with subsidized TVA power, and as a proximate consequence thereof, the Power Companies have been harmed and damaged by having to compete against TVA power unlawfully on the market.

COUNT I

(Violation of TVA Act Claim)

50. The Power Companies re-allege paragraphs 1-49 above.

51. TVA has violated the TVA Act by supplying power, directly and indirectly, to power marketers and others for use outside the territory established by Congress.

52. TVA has violated the TVA Act by failing to ensure that its power is not placed on the open electricity commodity market by grandfathered exchange companies.

53. The Power Companies have been and will continue to be injured as a proximate consequence of TVA's violations of the TVA Act.

COUNT II

(Administrative Procedure Act Claim)

54. The Power Companies re-allege paragraphs 1-53 above.

55. TVA's actions in this matter constitute final agency action under the Administrative Procedure Act. The supply of power by TVA for use outside the area set forth in Section 15d(a) of the TVA Act for any purpose other than for power generating system coordination, is beyond TVA's statutory authority, and otherwise arbitrary and capricious. TVA's acts and omissions are due to be declared unlawful and enjoined under the Administrative Procedure Act. 5 U.S.C. §§ 702, 703 and 706.

REQUEST FOR RELIEF

The Power Companies respectfully request this Court to enter a judgment:

A. Declaring that (i) TVA has violated the TVA Act by participating in sham transactions that result in TVA power being delivered and used outside the area established by Congress; (ii) the transactions in which TVA has participated are unlawful, and (iii) TVA is prohibited from participating in and permitting such transactions in the future;

B. Declaring that TVA has exceeded the scope of its delegated authority and has acted unlawfully, arbitrarily and capriciously by supplying power outside the territory established by Congress;

C. Enjoining TVA from making any contract or arrangement — oral or written — to supply power or otherwise supplying power, directly or indirectly, to power marketers or others for use outside the area established by Congress;

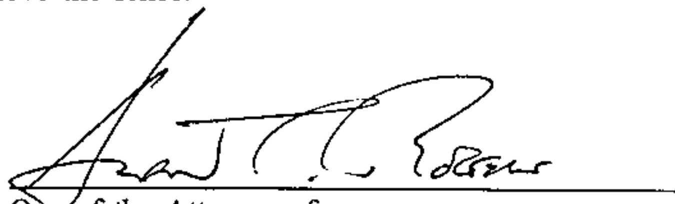
D. Ordering TVA to take all reasonable measures so as to ensure that its power is

not purchased for resale on the open electricity commodity market by any grandfathered exchange company; and

E. Upholding Judge Propst's decision in Alabama Power Co. v. TVA and ordering TVA to cease and desist from any further efforts to circumvent the TVA Act. As Judge Propst noted:

> TVA objects to the area restrictions (the "fence") imposed by Congress in 1959. It should not, however, be allowed to simply jump the fence or have the court open the gate(s). It should ask Congress to tear down or move the fence.

Id.



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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

TENNESSEE POWER COMPANY	)))	DOCKET NO. TX97-5-000

APPLICATION OF TENNESSEE POWER COMPANY
FOR AN ORDER REQUIRING TRANSMISSION SERVICES
UNDER SECTION 211 OF THE FEDERAL POWER ACT

Pursuant to section 211 of the Federal Power Act (as amended, the "FPA"), 16 U.S.C. § 824j, Tennessee Power Company ("TPCO") hereby applies to the Federal Energy Regulatory Commission ("FERC" or "Commission") for an order requiring the Tennessee Valley Authority ("TVA") to provide non-firm transmission services to TPCO across the TVA system at non-discriminatory open access rates, terms, and conditions, the same as that required of jurisdictional public utilities under Commission Orders 888 and 889. TPCO has made a good-faith request for such services to TVA and has been denied. In response to TPCO's September 30, 1996 good-faith request TVA has explicitly refused TPCO transmission access to Electric Energy, Inc. ("EEInc"), an electric utility independent of TVA who maintains its own control area adjacent to and interconnected with TVA's control area, unless TPCO agrees to preconditions which tortiously interfere with EEInc's business. In addition, TVA has refused all transmission service to TPCO unless it agrees to onerous prepayments or letters of credit.

TPCO respectfully requests that the Commission order TVA to provide TPCO with non-discriminatory open access wholesale transmission service across TVA's system to accommodate TPCO's current and future bulk power marketing transactions, the same as required of jurisdictional public utilities under Orders 888 and 889, including said service to EEInc without any preconditions restricting EEInc's legitimate utilization of power provided by TPCO in serving load within its control area. In addition, TPCO respectively requests that the Commission order TVA to provide TPCO a reasonable line of credit in providing transmission service, consistent with independent financial appraisals of TPCO, TPCO's experience and behavior in the market, and consistent with that typically provided to TPCO, and similar marketers, by other transmission providers.

In support of these statements and the requested relief, TPCO states as follows

JURISDICTION

1. The Commission has jurisdiction to issue the requested order pursuant to Sections 211 and 212 the FPA, as amended by Sections 721-726 of the Energy Policy Act of 1992 (the "EPAct") (Pub. L. No. 102-486, Title VII, Subtitle B, codified at 16 U.S.C. §§ 824j-824m).

2. This application is filed by TPCO, an electric utility engaged in the purchase and sale of electric energy for resale, where such utility needs to secure wholesale transmission services from TVA, another electric utility that

owns and operates electric power transmission facilities that are used for the sale of electric energy at wholesale.

PARTIES

3. TPCO, a Tennessee corporation, is a power marketer that takes title to electric power and sells such power for resale. Because TPCO is "a person that sells electric energy," TPCO is an "electric utility" as defined in the FPA (16 U.S.C. § 796(22)), and is a proper party to seek the relief requested in this application.

4. TVA is a wholly-owned corporate agency and instrumentality of the United States government, organized and existing under the Tennessee Valley Authority Act of 1933, as amended, codified at 16 U.S.C. §§ 831-831dd. TVA provides electric generation and wholesale transmission in the states of Tennessee, Kentucky, Georgia, Virginia, North Carolina, Mississippi, and Alabama. The FPA definition of "electric utility" specifically includes TVA. 16 U.S.C. § 796(22). "The term 'transmitting utility' means any electric utility . . . which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale." Id. at § 796(23). Thus, TVA is both an "electric utility" and a "transmitting utility" under the FPA and is subject to the Commission's jurisdiction with respect to this application.

BACKGROUND

5. In a letter dated September 30, 1996 (Attachment 1), TPCO made a good-faith request under Sections 211(a) and 213(a) of the FPA for

transmission services from TVA that included all information required under the Commission's guidelines for such requests. In particular, TPCO requested non-firm point-to-point transmission service, stating that it had an immediate need for point-to-point contract-based transmission service to EEInc, and requested that TVA provide such service on an interim basis under its existing transmission guidelines until such time as it functionally unbundled its transmission and generation, and developed a pro forma tariff pursuant to FERC Orders 888 and 889, which TPCO requested be done within 60 days. TPCO requested that TVA thereafter provide TPCO transmission service on an ongoing basis under the pro forma tariff, and that TVA charge itself under the tariff for transmission services associated with its wholesale sales and purchases, including sales to distributors of TVA power within the Tennessee Valley, as well as off-system sales and purchases, the same as is required of jurisdictional public utilities under FERC Orders 888 and 889, See Attachment 1 at pages 2-4.

6. TPCO further provided TVA with detailed information regarding the specific requirements for non-firm transmission service to EEInc, and also outlined TPCO's transmission service needs associated with a potential coordination agreement with Bristol, Virginia, as well as TPCO's potential need to transport power from independent generating facilities located within the Tennessee Valley. TPCO made it clear that its good-faith request was also to accommodate additional future, currently unspecified, short-notice transactions which could involve everything from capacity options which are never scheduled,

to energy scheduled at a 100% load factor for an extended period. See Attachment 1 at pages 5-7

7. TPCO requested that transmission service be provided pursuant to an "up to" postage-stamp rate, with the rate's ceiling based on an embedded cost methodology (transmission investment and expenses being divided by a measure of system capacity to produce a per unit rate), and specifically requested that debt and interest on debt associated with nuclear facilities and other generation expenses be excluded (except of course as appropriate in the calculation of losses and ancillary services). TPCO proposed that TVA would have the flexibility to charge any rate up to the ceiling for any transaction, but such flexibility would be limited in that TVA could not charge TPCO a rate higher than that charged to any other party (including TVA itself) at that time for comparable service. Since TVA is not otherwise a public utility under the FPA, TVA does not have rates and cost-of-service data on file with the Commission. Consistent with the Commission's rules governing good-faith requests and based on certain assumptions stated in its good-faith request, TPCO estimated that an appropriate rate ceiling for service from TVA would be \$2.82/MWh with losses and \$2.38/MWh without losses. See Attachment 1 at pages 8-9.

8. The terms and conditions of the transmission service requested by TPCO include: (1) service on a first come, first served basis upon scheduling by TPCO, such that TPCO's transactions would be assigned a

position in TVA's 'stacking order' on a non-discriminatory basis, with priority behind previously scheduled non-firm transactions and ahead of subsequently scheduled non-firm transactions, (2) longer term transactions would be given reservation priority over shorter term transactions, and economy purchases by network customers will have priority over non-firm point-to-point service; however, such priority would not be given purchases by TVA in support of sales to entities who are not network customers, and (3) once scheduled, TPCO would be permitted to avoid curtailment on a non-firm transaction by buying through and effectively upgrading its service to firm for periods as short as one hour. TPCO did not seek any special advantage or undue preference relative to TVA's own use of the system or relative to any other third-party customer's request for non-firm service.

9. TPCO specifically requested that charges for non-firm transactions would only be applicable to amounts successfully scheduled across TVA's system and received by the receiving system. No charges would be assessed by TVA during periods when a non-firm transaction is curtailed because of a receiving system's refusal or inability to deliver power, a delivering system's refusal or inability to deliver power, or because of TVA's refusal or inability to transmit power (i.e., non-firm transmission service would not be take-or-pay, even if it is scheduled and then curtailed for whatever reason). See Attachment 1 at page 11.

10. As required of jurisdictional utilities under Order 888, TPCO proposed that TVA take transmission service itself in supplying the wholesale distributors of TVA power, as well as off-system sales and purchases, under the same tariff it provides such services to others, including TPCO, and that it establish separate accounts for revenues it collects from itself and others for transmission services; however, TPCO notes that there is no appropriate State regulatory authority to consider these verifiable revenues collected from all transmission users (including TVA), and to ensure that such revenues are appropriately dedicated to the transmission function rather than being treated the same as generation revenue under a merchant function. In view of the lack of any appropriate State regulatory authority, TPCO requested that TVA establish a procedure to make annual reports to the Commission in a manner to ensure TVA's compliance with the comparability requirement (i.e., to the same extent and as enforceable as that applicable to jurisdictional public utilities).

11. TPCO expressed concerns regarding TVA's Transmission Service Guidelines in place at the time of the good-faith request which included: (1) the take-or-pay reservation required for non-firm service, (2) the charging of "Request Fees" and "Request Deposits" in view of certain cost components already incorporated into the rates, (3) the 1-mill charge for difficult-to-quantify costs, and (4) the $211,518,000 per year of interest expense allocated to transmission, over half of which is attributable to TVA's ambitious nuclear construction program and should not be assessed to the transmission function.

12. By letter dated October 11, 1996, TVA acknowledged TPCO's request for non-firm transmission services, and provided TPCO a copy of TVA's new Transmission Service Guidelines which became effective January 1, 1997, and which TVA maintained were similar to that being offered by electric systems adopting the Commission's pro forma tariff. See Attachment 2.

13. In a letter dated November 27, 1996, TVA responded to TPCO's good-faith request stating that TPCO had not submitted a completed application, the request fee, and the applicable deposit required, nor had TPCO included a showing of creditworthiness; therefore, TVA could not process this request for transmission service. TVA maintained that under its new Transmission Service Guidelines it would implement open-access transmission service consistent with that ordered by the Commission in Orders 888 and 889, and that it would establish an OASIS system and implement a code of conduct "providing for the functional separation of TVA's off-system sales efforts from transmission interface reliability and operation functions." TVA noted that it had discontinued the 1-mill adder for difficult-to-quantify costs, as well as a deposit for non-firm point-to-point transmission service, but defended its request fee, which it increased to $500, and its take-or-pay reservation charge on non-firm transmission. Lastly, TVA denied TPCO transmission access to EEInc unless it is essentially assured that the electric energy being transmitted will not be provided to the United States Enrichment Corporation (USEC), claiming that TVA is not required to provide the requested transmission service to EEInc under the EPAct

"unless TVA is assured that the electric energy being transmitted is for delivery and consumption outside the area which TVA may serve." See Attachment 3.

14. In a December 2, 1996 letter TPCO informed TVA that the preconditions required by TVA before granting transmission access to EEInc would tortiously interfere with EEInc's business, leaving TPCO with no option but to pursue section 211 procedures before the Commission in order to obtain transmission access to EEInc, but expressed a willingness to delay such action and meet with TVA. Notwithstanding this disagreement on the applicability to EEInc of those provisions of the EPAct (incorporated as section 212(j) of the FPA) on which TVA is relying in this denial of transmission service, TPCO wanted to go forward with a non-firm transmission service agreement for other locations. TPCO returned to TVA signed copies of TVA's non-firm transmission service agreement, together with financial information and references on TPCO. Additional information was later provided to TVA upon request. See Attachment 4.

15. TVA informed TPCO in a January 3, 1997 letter that TPCO did not satisfy TVA's creditworthiness requirement due in part to TPCO's limited net worth, and stated that TVA would provide TPCO transmission service if it (1) prepaid for any reservation of transmission service, (2) placed a minimum of $10,000 on deposit with TVA, or (3) provided TVA a letter of credit equal to 3 months' estimated usage. TVA also insisted that TPCO pay the $500 request fee. Lastly, TVA reiterated that it would require written assurances that USEC would

not be the ultimate recipient of any power and energy transmitted to EEInc. See Attachment 4.

Discussion

16. Beginning in the early 1950's both TVA and EEInc supplied a portion of the Paducah Gaseous Diffusion Plant in Paducah, Kentucky (Paducah Facility), which is the USEC load being coveted by TVA. By the late 1980's TVA and EEInc were competing with each other over supplying energy to the Paducah Facility, and as a result of a contract dispute between TVA and the Department of Energy, EEInc begin supplying the entire power requirements of the facility. EEInc was the sole supplier to the Paducah Facility at the time of the enactment of the EPAct. In January 1994, TVA enter into a new agreement with USEC to again supply the Paducah Facility in competition with EEInc, this time under a unique power supply arrangement designed exclusively to compete with EEInc. Recently TVA has been consistently dominating supply to the Paducah Facility, in part because it has effectively blocked EEInc from power sources to the south, while TVA has had open access to power sources in the north. TVA and EEInc are in a long-standing, contractually based, competitive bidding arrangement to supply the Paducah Facility, and TVA, being exempt from antitrust laws, is attempting to erect a market barrier by denying transmission access to suppliers of EEInc, such as TPCO, and to thereby enhance its own competitive position.

17. The basis on which TVA is denying TPCO transmission access to EEInc is found in section 212(j) of the FPA, which was added by the

EPAct, and is entitled Equitability Within Territory Restricted Electric Systems. The intent of Congress in enacting section 212(j) of the FPA was to protect TVA from losing market share within its own electric system as a result of the Commission using the authority granted it in the EPAct to order TVA to provide transmission access to others who could then utilize that access to compete for a portion of TVA's native load, with TVA being in the inequitable position of not being able to similarly compete for the native load of others. TVA's inability to similarly compete was based on the territorial limitations in the TVA Act; however, while not being able to directly compete in a similar manner, TVA has the ability to compete through third parties, only one of which was denied in Federal court on the basis of this limitation (United States District Court, Northern District of Alabama, Southern Division - CV 96-PT-0097-S). TVA is now trying to exploit section 212(j) of the FPA, and deviate from the intent of Congress, by not just preserving its native market, but by utilizing this section, and its exemption from antitrust laws, to increase its market share in a competitive bidding situation that existed well before the enactment of the EPAct. Furthermore, there is indication that TVA is discriminating in price between different purchasers of commodities of like grade to discourage competition by EEInc in supplying the Paducah Facility, with no regulatory oversight and at the ultimate expense of its captive ratepayers.

18. TPCO maintains that a take-or-pay reservation charge for non-firm transmission service connotes a degree of firmness, and certainly introduces a degree of price risk which may be unacceptable in a no fault,

curtailable, non-firm energy transaction with very small margins. This price risk is amplified across each transmission provider involved in a given transaction, who requires a take-or-pay reservation charge for non-firm service, with the failure of one transmission provider to perform leaving the marketer liable to the others for a curtailed schedule. TPCO has no objection to TVA having a non-firm transmission category with reservation, which would be firmer than a totally non-firm category without reservation; however, to not offer a non-firm category of transmission service without a take-or-pay reservation charge would be to do away with a category of power transactions. TVA preserves for itself the right to utilize its system to schedule a curtailable, totally non-firm category of power (commonly referred to as "ESP") to wholesale distributors of TVA power without assessing a take-or-pay transmission component when it is curtailed, and should allow others to utilize its system in a similar manner.

19. While TVA has established an OASIS system on the internet and claims to have implemented a code of conduct "providing for the functional separation of TVA's off-system sales efforts from transmission interface reliability and operation functions," it has not functionally separated transmission and wholesale power merchant functions. TVA is not taking service under its "open access tariff" for transmitting power to any of the wholesale distributors of TVA power, and apparently has no intentions of doing so in the future. Since the enactment of the EPAct, TVA has systematically amended all of its power contracts with distributors of TVA power, with the exception of Bristol, Virginia

(who has terminated its power contract with TVA), to incorporate evergreen term provisions . Although such an evergreen contract could be extensively amended from time to time, with new service schedules, rate schedules, terms and conditions, rules and regulations, etc., it would arguably not be a "new" requirements contract for which TVA would clearly be required to obtain transmission services under the same tariff with which it offers such services to others, such as TPCO, if it were subject to the Commission's unbundling requirement. These contracts will not expire of their own terms in a reasonable time, and present a larger and more enduring obstacle to non-discriminatory open access and more competitive bulk power markets than the typical requirements contracts considered by the Commission in its determination that a public utility will only be required to take transmission services for new wholesale sales and purchases of energy under the same tariff of general applicability to others. The Commission recognized that modification of certain requirements contracts on a case-by-case basis may be appropriate, and it certainly appears appropriate in the case of TVA if the unbundling of wholesale services is ever to be achieved, which the Commission has concluded is necessary to implement non-discriminatory open access transmission. The transmission service TVA is offering under its Transmission Service Guidelines is in no way even remotely related to anything TVA charges the wholesale distributors or itself for transmission service. Notwithstanding TVA's posturing and the spin it puts on its Transmission Service Guidelines, these guidelines, and TVA's implementation of them, do not measure

up to the pro forma tariff intended by the Commission to be the basic mechanism implementing the requirements of comparable, nondiscriminatory open access transmission.

20. Notwithstanding the curtailment priority outlined in TPCO's good-faith request to TVA, TPCO has no objection curtailment on a pro-rata basis, and non-firm point-to-point service being subordinate to firm service, with the understanding that the pro-rata curtailment requirement extends to only those transactions that alleviate a transmission constraint, all as recently clarified by the Commission.

21. The Commission's stated purpose of functional unbundling is to separate the transmission component of monies involved in wholesale transactions, which would then accumulate in a transmission account, thereby assisting regulators in the verification of a transmission provider's compliance with the comparability requirement. Since a transmission provider would be verifiably subject to the same rates, terms, and conditions, it would have an incentive to file fair and efficient rates, terms, and conditions. Absent appropriate regulators to conduct verifications, the existence of a mechanism for verification becomes almost meaningless, with significant potential for abuse by a transmission provider in a competitive market. The separate accounting for the transmission and merchant functions would then be tantamount to taking monies from one pocket and putting it in another, with no real compunction to treat it any differently than if it were all in one pocket. In the case of TVA with no regulatory oversight,

and increasingly competitive posturing, there would be nothing to keep TVA from utilizing a portion of the transmission revenue it collects to cover a portion of merchant function expenses in off-system competition, thereby allowing it to compete off-system below cost, defeating the Commission's objective to implement non-discriminatory open access transmission.

22. TPCO could conceivably function under the financial constraints imposed upon it by TVA in the name of creditworthiness; however, it will simply impose an unjustified burden on TPCO's use of TVA's transmission system and make it less competitive than others similarly using TVA's transmission system. TPCO is in its third year of operation, having entered into numerous agreements, with revenue from marketing activities being in excess of $3 million last year, all of which has been reported to the Commission and is publicly available. TPCO has behaved in a financially responsible manner in all of its business dealings, and has no pending litigation or debt which would compromise its financial position. Dun & Bradstreet has conducted an independent appraisal of TPCO (92-970-4757) and has assigned TPCO a composite credit appraisal of "good." TPCO has no objection to a credit limit (see Attachment 6), but does object to TVA's refusal to provide it any credit whatsoever in connection with transmission service, which is usually the smallest cost component of a given transaction. TVA has been unresponsive to several proposals by TPCO to conduct business, most of which involved TPCO extending credit to TVA, and this refusal by TVA to extend any credit whatsoever to TPCO in

connection with transmission service is just another obstacle to hinder TPCO's ability to conduct business.

.CLAIM FOR RELIEF

23. The EPAct allows the Commission to order transmission service if: (1) the applicant has made a request for transmission services at least 60 days prior to filing an application for such order, Section 824j(a); (2) such order would not violate the provisions of Section 211(c), meets the requirements of Section 824k, and is otherwise in the public interest, Section 824j(a); and (3) would not unreasonably impair the continued reliability of the affected electric systems, Section 824j(b).

24. TPCO's letter dated September 30, 1996 fully complied with the Commission's Policy Statement Regarding Good Faith Requests for Transmission Services and Responses by Transmitting Utilities Under Sections 211(a) and 213(a) of the Federal Power Act, As Amended and Added By the Energy Policy Act of 1992, III F.E.R.C. Stats. & Regs. (CCH) ¶ 30,975 (1993). Furthermore, delivery of that letter to TVA on October 1, 1996, more than 150 days prior to the filing of this application, clearly complies with Section 211(a) requirements.

25. The provisions of Section 211 (c) pertaining to the effect of transmission service on existing contractual or rate schedule obligations involving provision of electric energy do not apply in this case. TVA is not contractually obligated to supply electric energy to TPCO, nor does it have any sales to TPCO

under any rate schedule on file with the Commission. TPCO is not asking TVA to schedule any specific transactions at this time. Rather, TPCO is requesting a generic contract to receive comparable non-firm transmission service on an ongoing basis under a non-discriminatory open access pro forma tariff, the same as that required of jurisdictional utilities under Orders 888 and 889. TPCO has no intention of requesting such service in violation of Section 211(c). Further, the Commission may condition its order by specifically exempting transmission service that would violate Section 211(c).

26. TPCO proposes to obtain transmission services comparable to that which TVA provides for itself, and that this be achieved through the mechanisms establish by the Commission and applied to jurisdictional utilities under Orders 888 and 889. In view of TVA's open-ended requirements contracts with the distributors of TVA power which will not expire on their own terms within any reasonable time, TPCO proposes that TVA functionally unbundle all of its wholesale services, including the transmission component of interruptible blocks of energy sold to distributors for resale to large industrial loads (commonly referred to as "ESP"), make modifications in its requirements contracts as necessary to functionally unbundle its wholesale services, establish a pro forma tariff and transmission accounts, and provide wholesale transmission service to itself (including all deliveries of power and energy to distributors) under the same pro forma tariff it provides such service to TPCO.

27. TVA has not asserted that providing the requested transmission services to TPCO would adversely affect the reliability of its system, or that any "physical or other constraints affecting the provision of such services" exist. Indeed, because all TPCO requests is non-firm service, which by definition allows TVA to interrupt such service in the event the system's reliability is threatened, the reliability of TVA's system will not be impaired in any way, much less "unreasonably" impaired.

28. The Commission previously has determined that, as a general matter, the availability of transmission service will enhance competition in the market for power supplies and lead to lower costs for consumers. Thus, as long as the transmitting utility is fully and fairly compensated and there is no unreasonable impairment of reliability, transmission service is in the public interest. More recently, in Order 888 the Commission concluded that functional unbundling of wholesale services is necessary to implement non-discriminatory open access transmission, which requires three things:

> (1) a public utility must take transmission services (including ancillary services) for all of its new wholesale sales and purchases of energy under the same tariff of general applicability as do others;
>
> (2) a public utility must state separate rates for wholesale generation, transmission, and ancillary services;
>
> (3) a public utility must rely on the same electronic information network that its transmission customers rely on to obtain information about its transmission system when buying or selling power.

While the Commission did not believe it appropriate to order generic abrogation of existing requirements contracts, it did conclude nonetheless that the modification

of certain requirements contracts on a case-by-case basis may be appropriate. The Commission also required all public utilities to make informational filings setting forth the unbundled power and transmission rates reflected in existing requirements contracts to permit wholesale customers to compare rates in anticipation of their contracts expiring so that they can evaluate alternative contracts. In addition, the Commission recognized that many open-ended coordination agreements permit new transactions to occur well into the future, and because these contracts may not expire of their own terms in a reasonable time, they may present a larger and more enduring obstacle to non-discriminatory open access and more competitive bulk power markets. Thus to assure that non-discriminatory open access becomes a reality in the relatively near future, the Commission partially modified existing economy energy coordination agreements to require that the transmission service associated with those transactions be provided pursuant to Order 888's requirements of non-discriminatory open access, no later than December 31, 1996.

REQUESTED RELIEF

29. Because TVA failed to provide TPCO with transmission service following TPCO's good faith request, specifically in regard to transmission service to EEInc, and in view of:

(1) TVA's systematic revision of all of its requirements contracts after the enactment of the EPAct to incorporate evergreen term provisions requiring a 10- or 15-year notice of termination, which would indefinitely delay the requirement in Order 888 that transmission providers take transmission service for new wholesale sales and purchases under the same tariff of general applicability as do others, and

(2) The lack of any appropriate State regulatory authority to verify TVA's compliance with accounting for transmission revenues collected and the comparability requirement under Order 888,

TPCO requests that the Commission order TVA to provide TPCO with non-discriminatory open access wholesale transmission service across its system to accommodate TPCO's current and future bulk power marketing transactions, including non-firm transmission service to EEInc without preconditions, as jurisdictional utilities are required to provide under Orders 888 and 889, including:

- the functional unbundling of all of TVA's wholesale services, including services under its existing requirements contracts (in view of their evergreen provisions), with TVA being required to take transmission service for all of its existing and new wholesale sales and purchases of energy under the same tariff of general applicability as do others, including TPCO;

- a filing by TVA with the Commission setting forth the unbundled power and transmission rates reflected in its existing requirements contracts, including the transmission charges to itself for providing wholesale customers interruptible energy (commonly referred to as "ESP");

- separate rates for wholesale generation, transmission, and ancillary services;

- TVA reliance on the same electronic information network that its transmission customers rely on to obtain information about its transmission system when buying or selling power;

- require that the transmission service component and energy component of those revenues be recorded in separate subaccounts of Account 447, Sales for Resale; and

- require annual filings by TVA to the Commission of transmission revenues collected and annual transmission expenses incurred to serve as a verification of TVA's compliance with the comparability requirement.

TPCO also requests that the Commission order TVA to provide TPCO all information required under 16 U.S.C. § 8241(a), including without limitation a detailed written explanation of TVA's basis for its proposed rates and charges, and a reasonable line of credit in the utilization of transmission services provided by TVA.

NOTICES

30. The "affected electric utility" and "affected Federal power marketing agency" to whom notice should be given pursuant to 16 U.S.C. § 824j and 18CFR Part 36 are:

Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, TN 37902-1499

Southeastern Power Administration
Sam Elberton Building
2 South Public Square
Elberton, GA 30635-2496

No State regulatory authority is affected by this application.

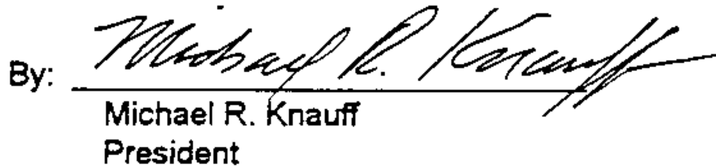
31. Service of papers and other communications in this matter should be directed to:

Michael R. Knauff
President
Tennessee Power Company
4612 Maria Street
Chattanooga, TN 37411-1209

CONCLUSION

WHEREFORE Tennessee Power Company respectfully requests that the Commission issue an order requiring the Tennessee Valley Authority to provide non-discriminatory open access wholesale transmission service to Tennessee Power Company.

Respectfully submitted,
TENNESSEE POWER COMPANY

By: 
Michael R. Knauff
President

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TUESDAY, JUNE 24, 1997

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JUSTICE DEPARTMENT SUES NEW YORK'S ROCHESTER GAS & ELECTRIC CO. OVER ANTICOMPETITIVE AGREEMENT WITH THE UNIVERSITY OF ROCHESTER

Agreement Keeps Customers from Receiving Low-Cost Electricity

WASHINGTON, D.C. -- In an effort to loosen the stranglehold New York's Rochester Gas & Electric Company has in providing electricity in Rochester, the Department of Justice sued the company today challenging an agreement RG&E entered into with the University of Rochester that prevents RG&E customers from receiving low-cost electricity.

The Department's Antitrust Division said that the agreement deprives some RG&E customers of alternative low-cost electricity, which forces them to pay more for their electricity.

"As the electric industry becomes increasingly deregulated, vigorous antitrust enforcement is absolutely essential to ensure that consumers benefit from competition," said Joel I. Klein, Acting Assistant Attorney General in charge of the Department's Antitrust Division. "This case should send a wake-up call to electric utilities. We will not tolerate private arrangements designed to thwart the introduction of competition into this important industry."

According to the lawsuit, RG&E made threats and offered financial rewards to induce the University of Rochester to abandon its plan to build a new, efficient power plant in the

Rochester area. The agreement also prevented the University from participating in any projects that would provide other current RG&E customers with energy from anyone other than RG&E.

Throughout the U.S., state utility commissions are beginning to rely on competition rather than regulation to set rates where possible for sales of electricity. The New York Public Service Commission allows utilities to deviate from their regulated rates in order to compete for customers who have an alternative source of electricity available.

The Department's complaint, which was filed today in U. S. District Court for the Western District of New York, alleges that RG&E threatened to cut off certain research grants to the University if the plant were built. In addition, if the plant were not built, RG&E promised to give the University hundreds of thousands of dollars for conservation programs, even if the University never undertook those programs. The complaint also alleges that RG&E gave the University an exceptionally low electricity rate as part of the arrangement.

The University was planning to build a "cogeneration" plant, which--at a negligible additional cost--produces electricity as a byproduct of producing steam for heating and cooling campus buildings. At the time the parties entered into the agreement, the University's trustees had voted to replace its aging coal-burning steam plant with a modern and efficient gas-fired

cogeneration plant. The complaint alleges that the new plant

would have produced inexpensive surplus electricity that the University could have sold in competition with RG&E.

As a result of the illegal agreement, the new plant was never built, and the University's steam is still being produced by a coal plant built in 1929.

In the lawsuit, the Department asked the court to prohibit RG&E from enforcing the existing agreement or offering anything of value to induce a competitor not to compete with RG&E in the sale of electricity or the generation of electricity for that purpose.

Rochester Gas & Electric is located in Rochester, New York and serves more than 300,000 customers in the Monroe County area.

No trial date has been set.

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97-259