

05-5104_{CV}

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

STATE OF CONNECTICUT, STATE OF NEW YORK, PEOPLE OF THE STATE OF CALIFORNIA EX REL. ATTORNEY GENERAL BILL LOCKYER, STATE OF IOWA, STATE OF NEW JERSEY, STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WISCONSIN and CITY OF NEW YORK,

Plaintiffs-Appellants,
v.

AMERICAN ELECTRIC POWER COMPANY INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, THE SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY INC. and CINERGY CORPORATION,

Defendants-Appellees,

UNIONS FOR JOBS AND THE ENVIRONMENT,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS
RESPONDING TO BRIEF OF APPELLEE TENNESSEE VALLEY AUTHORITY

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INTRODUCTION

Plaintiffs-Appellants – eight states and New York City – have brought suits in nuisance against the Tennessee Valley Authority (“TVA”) for carbon dioxide emissions from its fossil fuel electric generating plants. Plaintiffs allege that TVA is a major emitter of carbon dioxide that contributes to global warming, a nuisance threatening plaintiffs with numerous harms of exceptional severity.

TVA attempts to don the cloak of governmental immunity to avoid liability. But Congress already has cast off that cloak. TVA is not the United States but rather a federally chartered corporation that performs a variety of functions, some governmental and some commercial. The TVA Act contains a “sue and be sued” clause that renders TVA subject to lawsuits the same as any other private entity for its commercial activities. In its brief to this Court, TVA breezes over this “sue and be sued” clause and portrays itself as always acting as the federal government. But a long line of cases distinguish TVA’s electric power functions – which are commercial and thus susceptible to suit as if performed by a private company – from its functions in areas such as navigation, flood control, and fertilizer development, which are governmental. TVA fails to acknowledge this clear demarcation, which the courts have carefully observed for over sixty years. The Court should uphold this well-established precedent and reject TVA’s attempt to escape liability.

BACKGROUND

Although formed by an act of Congress, TVA is a corporation: "TVA operates in much the same way as an ordinary business corporation, under the control of its directors in Tennessee, and not under that of a cabinet officer or independent agency headquartered in Washington." NRDC v. TVA, 459 F.2d 255, 257 (2d Cir. 1972) (statute governing venue of federal agencies does not apply to TVA).

The purposes of the TVA Enabling Act were to improve navigability and to provide for flood control of the Tennessee River, reforestation and proper use of marginal lands in the Tennessee Valley, and agricultural and industrial development of the valley. See Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58 (Preamble); 16 U.S.C. § 831; see also Richard Wirtz, The Legal Framework of the Tennessee Valley Authority, 43 Tenn. L. Rev. 573, 580 (1976) ("Neither the preamble to the TVA Act as enacted in 1933 nor the first section of the Act enumerating the purposes for which the corporation was created makes express reference to electric power."). The Act also empowered TVA to dispose of "surplus power" generated as an incident to navigation and flood control. See 16 U.S.C. §§ 831i; 831h-1; Tennessee Elec. Power Co. v. TVA, 21 F. Supp. 947, 959 (E.D. Tenn. 1938) (three-judge court) (upholding TVA project as "reasonably adapted to use for combined flood control, navigation, power and national defense, and that in actual operation the creation of energy is subordinated to the needs of

navigation and flood control."), aff'd on other grounds, 306 U.S. 118 (1939).

Congress "intend[ed] that [TVA] shall have much of the essential freedom and elasticity of a private business corporation." H.R. Rep. No. 130, 73d Cong., 1st Sess., at 19 (1933). TVA has used this flexibility and independence to become a substantial commercial enterprise. TVA is the largest public power company in the United States and operates one of the largest electric power systems in North America, supplying electric power to some 8.6 million customers in parts of seven states. TVA 2005 Annual Report at 22, available at http://www.tva.gov/finance/reports/pdf/tva2005_annual_report.pdf. In 2005, TVA spent approximately \$6.5 billion to operate its power system, which generated approximately \$7.8 billion in annual revenues. Id. at 1-2.

In light of the growth in TVA's power business, Congress added section 15d to the TVA Act in 1959, substantially changing TVA and making all of TVA's power programs entirely self-financed. See 16 U.S.C. § 831n-4; see also TVA website, <http://www.tva.gov/abouttva/history.htm> ("Political interference kept TVA from securing additional federal appropriations to build coal-fired plants, so it sought the authority to issue bonds. Congress passed legislation in 1959 to make the TVA power system self-financing, and from that point on it would pay its own way."). Section 15d of the Act terms TVA's power program the "Corporation's power business." 16 U.S.C. § 831n-4(f). It

provides that TVA bonds are not obligations of the United States and payment of the principal and interest on TVA bonds are not guaranteed by the United States. Id. § 831n-4(b). Not only must TVA now recover through its power sales all costs of operating the system, TVA also must repay to the U.S. Treasury the \$1.4 billion in appropriations previously invested in power facilities, plus a dividend on that investment. Id. § 831n-4(e)-(f); TVA 2005 Information Statement at 18, available at <http://www.tva.gov/finance/reports/pdf/tva2005info-statement.pdf>.¹

TVA is authorized to charge rates for power that will satisfy the foregoing demands and "such additional margin as the Board may consider desirable." 16 U.S.C. § 831n-4(f). TVA has broad latitude in setting rates, the only restriction being that it give "due regard" to the objective that power be sold at rates "as low as are feasible." Id. TVA has successfully argued that it has unfettered discretion to set rates for electric power. See Consolidated Aluminum Corp. v. TVA, 462 F. Supp. 464, 474 (M.D. Tenn. 1978) (setting of rates is committed to TVA and is not subject to judicial review); Mobil Oil Corp. v. TVA, 387 F. Supp. 498, 506-07 (N.D. Ala. 1974) (same).

¹ See also Letter from Edward S. Chistenbury, General Counsel, TVA, to Jean A. Webb, Secretary, Commodity Futures Trading Commission (Apr. 27, 1998), at 4 (responding to 63 Fed. Reg. 16,250 (Apr. 2, 1998), and describing TVA's electrical generation activities as "business-like activities"), available at <http://www.cftc.gov/files/foia/comment98/foicf9817c005.pdf>.

TVA “[a]ldroitly shift[s] between its roles as a public agency and private business enterprise.” Dean Hill Rivkin, The TVA Air Pollution Conflict: The Dynamics of Public Law Advocacy, 49 Tenn. L. Rev. 843, 852 (1982). However, TVA’s status came into sharp focus recently when TVA, using private attorneys, filed suit against EPA to avoid compliance with an air pollution control order. The EPA, represented by the Department of Justice, moved to dismiss for lack of justiciability because, it argued, both parties are part of a unitary Executive Branch. TVA vigorously argued that the case presented a valid controversy under Article III due to its separation from the Executive Branch. The Eleventh Circuit agreed:

From its inception, TVA has enjoyed an independence possessed by perhaps no other federal agency. . . . TVA’s independence is underscored by its corporate form, its maintenance of a separate legal staff, its removal from centralized control in Washington, its discretionary ratemaking authority, and its exemption from at least 16 provisions of the Administrative Procedures Act.

TVA v. EPA, 278 F.3d 1184, 1192 (11th Cir. 2002) (citations omitted), later proceeding, TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003). In opposing certiorari, TVA argued that Congress made it “independent of centralized federal control, so that TVA can function much like a private business corporation.” Brief of TVA in Opp. to Pet. For Writ of Cert., 2004 WL 716605, at *10, TVA v. EPA, (No. 03-1162). TVA’s certiorari brief further stated:

[T]he Eleventh Circuit thoroughly considered and rejected that contention [that TVA and EPA are a "single entity"], holding that "TVA possesses unique independence as a federal agency." This is clearly correct. Congress indicated in the Conference Report on the TVA Act that "[w]e intend that the corporation shall have much of the essential freedom and elasticity of a private business corporation." The TVA Act confirms this, providing, among other things, that TVA is run by a Board of Directors, that TVA's employees are not subject to the federal Civil Service laws, that TVA's purchasing activities are independent of general federal procurement laws, and that TVA's financing bonds are not obligations of the United States.

Indeed, TVA currently receives no congressional appropriations for its activities. Congress has repeatedly acknowledged TVA's unique nature, for example by precluding suit in the Court of Federal Claims against TVA, and exempting TVA from the Federal Tort Claims Act. And this Court has recognized that TVA "'is a corporate entity, separate and distinct from the Federal Government itself.'" Pierce v. United States, 314 U.S. 306, 310 (1941).

Id. at *14-15 (citations and footnote omitted); see also id. at *14 n.10 (listing additional hallmarks of independence from federal government). The Supreme Court denied a writ of certiorari. Leavitt v. TVA, 541 U.S. 1030 (2004).

TVA made the same argument about its unique independence in the Court of Federal Claims and prevailed there as well. TVA v. United States, 51 Fed. Cl. 284, 286 (2001) ("TVA is independent"). Two months ago, that court entered a judgment of over \$34 million in favor of TVA and against the government. TVA v. United States, 69 Fed. Cl. 515 (2006).

In sum, TVA is a hybrid entity with a corporate form that performs some government functions, most notably flood control and navigation improvement, and some commercial functions, most notably generation of electric power. Its business operations now predominate. TVA is not the United States but rather is a separate entity.

ARGUMENT

POINT I

CONGRESS HAS EXPRESSLY MADE TVA AMENABLE TO SUIT

A. The "Sue and be Sued" Clause of the TVA Act Broadly Waives TVA's Immunity.

Congress expressly has provided in TVA's enabling act that TVA "[m]ay sue and be sued in its corporate name." 16 U.S.C. § 831c(b). Because of the sue and be sued clause, TVA has no sovereign immunity. United States v. Smith, 499 U.S. 160, 168-69 (1991) ("Courts have read this 'sue or be sued' clause as making the TVA liable to suit in tort, subject to certain exceptions"); Peoples Nat'l Bank of Huntsville v. Meredith, 812 F.2d 682, 684 (11th Cir. 1987) ("doctrine of sovereign immunity does not bar suit against TVA"); Stevens v. TVA, 712 F.2d 1047, 1051 (6th Cir. 1983) ("The plain implication is that Congress intended that, for ordinary purposes of litigation, suits against the TVA are not suits against the United States."); Queen v. TVA, 689 F.2d 80, 85 (6th Cir. 1982) ("this [sue and be sued] language was intended to be a broad waiver of sovereign immunity").

The Supreme Court repeatedly has held that when Congress launches a federal entity into the commercial world and endows it with a sue and be sued clause, the federal entity has no immunity unless it can make a "clear showing" that "an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function." Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 480 (1994) (quotation omitted; emphasis added); Loeffler v. Frank, 486 U.S. 549, 554 (1988) (same); Franchise Tax Bd. v. United States Postal Serv., 467 U.S. 512, 520 (1984) ("[U]nder Burr not only must we liberally construe the sue-and-be-sued clause, but also we must presume that the [federal entity's] liability is the same as that of any other business."); FHA v. Burr, 309 U.S. 242, 245 (1940) ("when Congress launch[e]s a governmental agency into the commercial world and endow[s] it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."). In fact, in Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 391-92 & n.3 (1939), the Court rejected immunity for a federal corporation in a tort case and noted that TVA and other federal corporations lack immunity because of their sue and be sued clauses.²

² Two other tests that a sue and be sued agency may use to obtain immunity notwithstanding the broad waiver are inapplicable here. See Meyer, 510 U.S. at 480 (agency must show that "certain types of suits are not consistent with the statutory or constitutional scheme" or that "for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense.").

TVA cannot satisfy either prong of the controlling test requiring a governmental function and a grave interference. TVA's electric power functions are a commercial function. And immunity is not necessary to avoid a grave interference with TVA's electric power functions.

B. TVA's Generation, Transmission and Sale of Electric Power Constitute a Commercial, Not a Governmental, Function.

Consistent with the controlling test requiring TVA to establish a governmental function to be immune, an unbroken chain of case law extending back over sixty years separates TVA's electric generation activities, which are a commercial function, from its government functions such as navigation, flood control, fertilizer development, administration of government loans and dissemination of public information. For example, in a case directly on point, TVA has been held liable under the law of nuisance for emission of pollutants from its fossil fuel-fired power plants. Ky. Hogqs, Inc. v. Wagner, No. 80-3213, 1981 U.S. App. LEXIS 11605 (6th Cir. July 9, 1981) (upholding nuisance judgment in which TVA and another power company were held liable for damaging crops by emissions of sulfur dioxide).

The seminal case distinguishing TVA's commercial function of generating electric power from its governmental functions of navigation and flood control is Grant v. TVA, 49 F. Supp. 564 (E.D. Tenn. 1942). In Grant, a farmer sued TVA for flood damage

to his crops allegedly caused by TVA's dams and navigation improvements. The court distinguished the two sets of functions:

By a long line of cases it has definitely been settled that neither the government nor its instrumentalities would have to respond in damages arising in the development and maintenance of waters for purposes of navigation and flood control, including claims for negligence. It may be noted that this position is not because of governmental immunity from suit but on the grounds of public policy.

* * *

But the functions of the defendant in the commercial field are entirely different. Upon principle and authority, it is quite clear that the government should respond in damages for wrongs committed when it is engaged in the same activities as its citizens. It is my judgment that Congress intended that the defendant can be sued for all wrongs committed for conduct pertaining to its generating, use and sale of electric energy made from the power created by its dams.

Id. at 566 (footnote omitted).

Since Grant, the courts continually have maintained and observed this fundamental distinction between TVA's activities relating to electricity generation, transmission and sale, and its government functions. For example, in Adams v. TVA, 254 F. Supp. 78, 80 (E.D. Tenn. 1965), a homeowner sued TVA for damages to his house from TVA's blasting activities for the construction of a fossil fuel-fired power plant. The court held TVA to have no immunity: "The case at bar is much stronger than the Grant case in that the injuries complained of resulted from excavating for the foundations for a steam plant which had no connections

with navigation or flood control." In Latch v. TVA, 312 F. Supp. 1069, 1072 (N.D. Miss. 1970), a wrongful death action against TVA for an electrocution from its power lines, the court drew a line between TVA's "non-governmental acts relating to the distribution and sale of electric power," and its "far-ranging governmental activities in the fields of national defense, navigation and flood control" and therefore held there to be jurisdiction over the complaint. In Brewer v. Sheco Construction Company, 327 F. Supp. 1017, 1019 (W.D. Ky. 1971), the court held that TVA was not immune from strict liability for its blasting activities because the "alleged injuries are the result of the T.V.A.'s construction of a new power substation which is related to the T.V.A.'s use and sale of electrical energy." Similarly, in Smith v. TVA, 436 F. Supp. 151, 153-54, (E.D. Tenn. 1977), the court held that TVA was not immune from a suit sounding in strict liability and trespass for property damage caused by TVA's blasting activities in connection with an electric generating facility even though the facility was appurtenant to a dam.

The cases holding TVA to be immune, by contrast, deal with government functions such as flood control, navigation improvement, fertilizer development, administration of government loans, and dissemination of public information. See Edwards v. TVA, 255 F.3d 318, 322 (6th Cir. 2001) ("One of TVA's functions as an instrumentality of the United States is the maintenance of an integrated system of multipurpose dams"); Peoples Nat'l Bank, 812 F.2d at 685 (government loan program to fisherman

administered by TVA was a governmental function); Queen, 689 F.2d at 85 ("in certain limited situations the TVA is exempt from liability arising out of the exercise of certain wholly governmental functions, where the TVA acts solely as the Government's agent and where the United States itself would not be liable" – dissemination of public information regarding energy conservation held to be a governmental function immune from defamation action) (emphasis added); In re Agric. Bus. Co., 613 F.2d 783 (10th Cir. 1980) ("the TVA fertilizer program is governmental in nature, and not industrial or commercial in character"); Lynn v. United States, 110 F.2d 586, 590 (5th Cir. 1940) (as agency of the United States "[i]n the erection of dams," TVA not liable for consequences of manipulating waters under its control); Morris v. TVA, 345 F. Supp. 321 (N.D. Ala. 1972) (same); Atchley v. TVA, 69 F. Supp. 952 (N.D. Ala. 1947) (same). Thus, TVA's reliance on cases in which it was held to be immune from liability because it performed a governmental function is misplaced as none involved the generation, transmission or sale of electric power.

Relying upon one of these cases, Edwards, TVA argues that the discretionary function exception applies to all conduct pertaining to TVA's power program that may be characterized as discretionary. However, Edwards – a wrongful death action where the decedent had fallen into a river near a TVA dam – involved TVA flood control activities and expressly limited its holding to TVA's performance of a governmental function:

in certain limited situations the TVA is exempt from liability arising out of the exercise of certain wholly governmental functions, where the TVA acts solely as the Government's agent and where the United States itself would not be liable. This "nonliability" doctrine is applied when the subject governmental function is discretionary.

255 F.3d at 322 (emphasis added) (citation and quotations omitted). The Court found that, because "[o]ne of TVA's functions as an instrumentality of the United States is the maintenance of an integrated system of multipurpose dams," id., TVA's decisions regarding appropriate safety measures pertaining to the public's access to the waters around the dam fell within the scope of the discretionary function exception. Edwards thus merely stands for the proposition – as stated by various other courts – that as a matter of public policy, immunity will apply in "certain limited situations" where liability arises out of TVA's performance of "wholly governmental functions."³

TVA also relies upon Queen, supra, but that case further demonstrates the limitation of TVA's immunity to governmental functions. The cause of action in Queen did not grow out of TVA's generation, transmission or sale of electric power. Rather, Queen was a defamation action arising from statements

³ TVA makes much of the plaintiffs' acknowledgment at oral argument in the district court that if the discretionary government function doctrine applies here, TVA may be dismissed from the case. TVA Br. at 4. But that is merely stating the obvious since all parties here agree that carbon dioxide emissions are completely unregulated by the federal government. Thus the allowable level of such emissions would be considered "discretionary" if the doctrine applied.

made by TVA employees about an energy conservation device. In seeking to impose liability, plaintiff alleged that TVA officials were performing "proprietary rather than sovereign functions" because their actions arose out of TVA's role as a utility. 689 F.2d at 83. In response, the Sixth Circuit stated:

While this factor may be relevant to the liability of the TVA itself for damages, the cases applying [Barr v. Matteo, 360 U.S. 564 (1959) (holding that federal executive officials enjoy absolute immunity from suit for common law torts based on acts within their discretionary authority)] have not admitted of any such distinction in the immunity of an officer. . . . There are stronger reasons for subjecting TVA officials to liability than any of the officials in the cases cited above, because TVA is more extensively involved in the commercial arena than most other Government agencies.

Id. (emphasis added). As in Edwards, the court in Queen held TVA has immunity only for "certain wholly governmental functions, where TVA acts solely as the Government's agent and where the United States itself would not be liable." Id. at 86. Because it found that the "public relies on the TVA as a Governmental source of information on energy conservation," a "matter of important public concern," it held TVA to be immune. Id.⁴

In short, TVA cannot establish that its generation of electric power is a governmental function and thus cannot overcome the presumption that Congress waived its immunity in the sue and be sued clause. Where, as here, Congress has given a

⁴ Queen demonstrates that the various cases cited by TVA involving federal official immunity for TVA employees, see TVA Br. at 37-38 nn.18-19, are not relevant to the liability of TVA itself as the tests for immunity are distinct.

federal corporation "the status of a private commercial enterprise," Congress has "cast off" the "cloak of sovereignty" and permitted the entity to sue and be sued like any other commercial enterprise. Loeffler, 486 U.S. at 556. TVA's electricity generation activities constitute a "suable" commercial function.

C. An Implied Restriction of TVA's General Authority to Be Sued Is Not "Necessary to Avoid a Grave Interference" with its Electric Power Functions.

TVA also cannot demonstrate that this case would "gravely interfere" with its electric power functions. In Burr, for example, the claimant, who had obtained a judgment against an employee of the Federal Housing Administration ("FHA"), sought to garnish the employee's wages. 309 U.S. at 243. The FHA argued that considerations of "policy" and the "heavy" burdens that would be imposed on governmental instrumentalities if garnishment were permitted weighed in favor of immunity to the garnishment writ. The Court flatly rejected this argument:

[T]he bridge was crossed when Congress abrogated the immunity by this 'sue and be sued' clause. And no such grave interference with the federal function has been shown to lead us to imply that Congress did not intend the full consequences of what it said. Hence, considerations of convenience, cost and efficiency which have been urged here are for Congress which, as we have said, has full authority to make such restrictions on the 'sue and be sued' clause as seem to it appropriate or necessary.

Id. at 249 (footnote omitted). Thus, the cost and efficiency issues identified by TVA do not establish grave interference. Accord Fed. Express Corp. v. United States Postal Serv., 151 F.3d 536, 540-42 (6th Cir. 1998) (no grave interference from federal tort case regarding false advertising against sue and be sued agency).

Here, the complaints allege that “[d]efendants have available to them practical, feasible and economically viable options for reducing carbon dioxide emissions without significantly increasing the cost of electricity to their customers” (J.A. 22; OSI J.A. 64). Taking this allegation as true on this motion to dismiss, there is no possibility of a grave interference. Moreover, TVA cannot possibly establish grave interference in light of its express decision not to adopt a rigid long-term plan for the methods it will use to generate electricity but instead to adopt a flexible “portfolio alternative”:

One of the important conclusions that TVA reached in Energy Vision 2020 was that future events (uncertainties) will likely require changes in any discrete energy strategy. The utility industry is entering an era of significant changes as it moves from a regulated to a less regulated environment. . . . Consequently, flexibility in resource option selection and implementation is highly valued. Flexibility heightens a utility’s ability to respond to events as they unfold.

The portfolio alternative provides more flexibility than any discrete strategy. Much like a portfolio of stocks is chosen to manage risk and accomplish specific objectives, TVA’s preferred portfolio alternative better enables TVA to meet

customer needs at an acceptable level of risk and still meet the objectives of balancing costs, rates, environmental impacts, debt, and economic development. . . . As events unfold, TVA can decide which of the portfolio options to deploy.

Integrated Resource Plan, 61 Fed. Reg. 7572, 7574 (Feb. 28, 1996) (emphases added). The portfolio options TVA lists include a number of options that would reduce carbon dioxide emissions (including some of the same options listed in plaintiffs' complaints): "combined cycle repowering of coal-fired plants, use of landfill and coalbed methane and refuse derived fuel," "demand-side management programs," "wind turbines," and "a biomass energy facility." Id. Thus, TVA's long-term plan provides the very flexibility that would be needed to comply with a requirement to reduce carbon dioxide emissions. TVA cannot establish grave interference.

POINT II

TVA'S ARGUMENTS FROM OTHER AREAS OF LAW TO AVOID BEING HELD AMENABLE TO SUIT ARE UNAVAILING

In the face of this clear law governing TVA's liability, TVA has turned to a wide variety of cases from other areas of the law to try to avoid liability. All of these efforts, however, are unavailing.

A. Federal Tort Claims Act Cases Are Inapposite.

TVA relies on cases construing the discretionary function exception to the Federal Tort Claims Act ("FTCA"): Dalehite v. United States, 346 U.S. 15 (1953); Indian Towing Co. v. United States, 350 U.S. 61 (1955), and United States v. Varig Airlines, 467 U.S. 797 (1984). See TVA Br. at 35-36. However, the FTCA expressly states that it "shall not apply to . . . [a]ny claim arising from the activities of the Tennessee Valley Authority." 28 U.S.C. § 2680(l). Thus, statutory exceptions in the FTCA, such as the exception for discretionary government functions, *id.* at § 2680(a), simply do not apply here. See Latch, 312 F. Supp. at 1072 (cases dealing with "TVA's activities in the distribution and sale of electric power" involve "a determination of tort liability, quite apart from the scope of the Federal Tort Claims Act, including its exceptions."); Smith v. TVA, 436 F. Supp. at 154 n.3 ("the court fails to see how the TVA can avoid liability on the basis of a construction of a statute which is expressly not applicable to it."); Atchley, 69 F. Supp. at 956 n.4 ("TVA was exempted from the provisions of the [FTCA] at its own request on the ground that it was already subject to suit and certain of the procedural aspects of the Act would be burdensome. The Act was passed after the decision in the Grant case and it must be presumed that TVA sought and Congress granted the exemption with that case in mind.").

In Adams, supra, where a homeowner sued TVA for damages to his house from TVA's blasting activities from the construction of a fossil fuel-fired power plant, TVA made the very same argument it is making here. TVA analogized itself to the United States and invoked FTCA cases dealing with a variety of government functions such as military operations, construction of airports and reservoirs, storage of munitions, and even atomic detonations. The court responded that the cases cited by TVA

do not deal with the problem presented by this case. They involved the effects of the performance of a governmental function upon nearby property. . . . In the opinion of the Court, the determination as to the amount of explosives to use in the excavations for the Bull Run plant was not the kind of judgment protected by Dalehite v. United States, 346 U.S. 15, and similar cases.

254 F. Supp. at 80 (emphasis added). The court looked to the sue and be sued clause and held TVA was not entitled to immunity. Id.

Apparently the only other federal entity that, like TVA, has been expressly exempted from the FTCA and is a federal corporation with a sue and be sued clause, is the former Panama Canal Company ("PCC"). See 28 U.S.C. § 2680(m). Cases dealing with the liability of PCC held that it was amenable to suit like an ordinary business corporation due to its commercial functions. See Gulf Oil Corp. v. Panama Canal Co., 407 F.2d 24, 28-29 (5th Cir. 1969) ("when Congress authorized federal instrumentalities of the type here involved to "sue and be sued", it used those words in their usual and ordinary sense.' This is especially true of corporate instrumentalities.") (quoting Burr, 309 U.S. at

246); De Scala v. Panama Canal Co., 222 F. Supp. 931, 934-35 (S.D.N.Y. 1963) ("Since it is engaged in business as a common carrier and in other commercial enterprises, the basic policies underlying governmental immunity from suit do not apply to the Company") (quotations omitted). When the PCC was abolished by treaty in 1977, Congress established a new entity, the Panama Canal Commission, which is not a corporation, has no sue and be sued clause, and performs governmental functions. The Fifth Circuit held that the Commission has governmental immunity because, unlike the former PCC, it undertakes only governmental functions. McGehee v. Panama Canal Comm'n, 872 F.2d 1213, 1218 (5th Cir. 1989) ("we conclude that an award of interest against the Commission would be inappropriate because the Commission does not operate as a commercial venture"). The same reasoning that precluded the former PCC from gaining immunity applies to TVA. The FTCA does not apply to TVA.

B. TVA is Not the United States.

TVA relies on non-FTCA cases addressing the liability of the United States and argues that the separation of powers concerns animating the discretionary function doctrine in those cases also should apply to TVA. See TVA Br. at 28 (citing In re Joint E. & S. Dists. Asbestos Litig., 891 F.2d 31 (2d Cir. 1989); McMellon v. United States, 387 F.3d 329 (4th Cir. 2004)). However, those cases are irrelevant as TVA is not the United States but rather

is a federally chartered corporation. Pierce v. United States, 314 U.S. 306, 310 (1941) ("TVA, although an instrumentality of the Federal Government, is a corporate entity, separate and distinct from the Federal Government itself") (quotation omitted); Stevens v. TVA, 712 F.2d 1047, 1051 (6th Cir. 1983) ("suits against the TVA are not suits against the United States.").

In fact, as a litigant TVA routinely takes positions adverse to the United States. See, e.g., TVA v. EPA, 278 F.3d 1184 (11th Cir. 2002); Big Rivers Elec. Corp. v. EPA, 523 F.2d 16 (6th Cir. 1975); TVA v. United States, 13 Cl. Ct. 692 (1987); TVA v. United States, 96 F. Supp. 409 (N.D. Ala. 1951). The only time TVA sues in the name of the United States is when it condemns real property or conveys real property for certain purposes. See, e.g., United States ex rel. TVA v. Welsh, 327 U.S. 546 (1946); 16 U.S.C. § 831c(h), (k). TVA cannot avail itself of the immunity of the United States.

Not only are cases like In re Joint Eastern & Southern Districts Asbestos Litigation and McMellon inapplicable due to the fact that they address the immunity of the United States as opposed to that of a federal corporation like TVA, they also deal with a fundamentally different statutory scheme. The Suits in Admiralty Act, 46 U.S.C. Appx. § 741 et seq., which was at issue in those cases, contains no "sue and be sued" clause and thus the presumption of a narrow waiver of sovereign immunity applied whereas the opposite presumption applies here. Meyer, 510 U.S.

at 480 ("sue and be sued waivers are to be liberally construed notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign.") (quotation and citation omitted). And the core governmental functions at issue in those cases – manufacturing a merchant marine fleet for World War II in response to a "national emergency" in the asbestos case, In re Joint E. & S. Dists. Asbestos Litig., 891 F.2d at 34, and flood control in McMellon – stand in stark contrast to the commercial generation of electricity. Absent a governmental function, the case law is clear that the immunities of the United States do not apply to TVA. Thus, the separation of powers concerns animating the discretionary government function doctrine are not at issue here.

C. TVA Differs from the U.S. Postal Service in Significant Respects.

TVA argues that its attributes and purposes are those of the federal government and therefore all of its activities, including its power program, are governmental. In support of this argument, TVA relies on United States Postal Service v. Flamingo Industries (USA) Ltd., 540 U.S. 736 (2004), which held that the U.S. Postal Service ("USPS") is immune from antitrust liability. See TVA Br. at 29-30. TVA's reliance is on Flamingo Industries is misplaced. First, Flamingo Industries held that the sue and be sued clause in the USPS' organic statute made it generally amenable to suit; the further issue of antitrust

immunity at issue in Flamingo Industries turned upon interpretation of the antitrust statute, not at issue here. Second, the USPS is not a federal corporation: "The statutory designation of the Postal Service as an 'independent establishment of the executive branch of the Government of the United States' is not consistent with the idea that it is an entity existing outside the Government." Flamingo Indus., 540 U.S. at 746 (quoting 39 U.S.C. § 201). In fact, the Court found it important that Congress had specifically "declined to create the Postal Service as a Government corporation, opting instead for an independent establishment." Id. The Court also looked to a series of governmental hallmarks that the USPS enjoys but TVA lacks. For example, the USPS has its roots in the Constitution. Id. at 739. Further, the USPS

has broader obligations, including the provision of universal mail delivery, the provision of free mail delivery to the certain classes of persons, and, most recently, increased public responsibilities related to national security. Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including its state-conferred monopoly on mail delivery, the power of eminent domain, and the power to conclude international postal agreements.

Id. (citation omitted). Of these attributes, TVA only shares the power of eminent domain and this power has been specially addressed under TVA's statute as a power of the United States, see supra, in contrast to TVA's other powers.

Further, unlike TVA, the USPS is subject to the FTCA and thus in a suit against the USPS "the party being sued is still

the federal government." In re Young, 869 F.2d 158, 159 (2d Cir. 1989). This is not true of suit against a federal entity that is not covered by the FTCA. Marcella v. Brandywine Hosp., 47 F.3d 618, 622-23 (3d Cir. 1995) (distinguishing Young in case against federal corporation because USPS is subject to FTCA).

The most salient feature that TVA and the USPS have in common is their sue and be sued clauses, but that is of no assistance to TVA. See Loeffler, 486 U.S. at 556 ("By launching 'the Postal Service into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.'") (citations omitted); Fed. Express Corp., 151 F.3d at 543 (rejecting immunity claim of USPS for asserted federal tort claim under Lanham Act); Active Fire Sprinkler Corp. v. United States Postal Serv., 811 F.2d 747 (2d Cir. 1987) (rejecting immunity for USPS). In short, cases addressing the immunity of the USPS do not provide any reason for extending governmental immunity to TVA here.

D. Cases Addressing the Immunity of Federal Entities from State Taxation are Inapposite.

TVA cites several cases dealing with federal land banks and loan corporations for the proposition that all activities of federal entities are always governmental. See TVA Br. at 33-34 (citing Fed. Land Bank of Wichita v. Bd. of County Comm'rs, 368 U.S. 146 (1961); Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380

(1947); Fed. Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 102 (1941); Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 32 (1939); Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 477 (1939)). However, these cases all deal with the immunity of federal entities from state taxation – not immunity from suit – and are based upon the principle that, because the power to tax is the power to destroy, states may not tax federal entities. McCulloch v. Maryland, 17 (4 Wheat.) U.S. 316, 431 (1819) (“the power to tax involves the power to destroy”). The broad statements in those cases to the effect that the government engages in no proprietary functions do not carry over into other contexts. See Fed. Land Bank of St. Louis v. Priddy, 295 U.S. 229, 235 (1935) (“Immunity of corporate government agencies from suit and judicial process, and their incidents, is less readily implied than immunity from taxation.”).⁵

Moreover, in the same two-year period in which the Court decided Graves, Pittman and Bismarck Lumber, it also issued its seminal decision in Burr, 309 U.S. 242, holding that a sue and be sued corporation is presumed to have waived full immunity and must demonstrate grave interference with a government function to overcome the immunity. In fact, Justice Frankfurter, the author of the opinion in Merrill (one of the tax immunity cases), was also the author of the Court's opinion in Keifer & Keifer v.

⁵ The Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), dealing with the 10th Amendment, was also based upon the delicate relationship between the States and the federal government, and is thus irrelevant to this federal common law case.

Reconstruction Finance Corp., 306 U.S. 381, holding that a federal corporation whose organic statute had no sue and be sued clause, but that was a subsidiary of another federal corporation whose statute did have the clause, had no immunity from suit in tort. In Keifer & Keifer the Court expressly cited TVA and reasoned that Congress would not have granted immunity to one federal corporation while denying it via the sue and be sued clause to "not less than forty" other federal corporations such as TVA. Id. at 390 & n.3. The tax immunity cases do not support TVA's claim of immunity here.⁶

⁶ TVA cites a series of district court cases making broad statements to the effect that TVA performs wholly governmental functions. See TVA Br. at 36 n.16. However, these cases do not address tort liability at all and do not purport to alter the rule established since Grant that TVA lacks immunity from tort liability when it performs a commercial function. The statement from Quality Technology Company v. Stone & Webster Engineering Company, 745 F. Supp. 1331 (E.D. Tenn. 1990), aff'd, 909 F.2d 1484 (6th Cir. 1990), dealing with TVA employees, was dictum as TVA was not a party. And the court in fact held that the liability of TVA's employees turned on whether they performed a "federal government function." 745 F. Supp. at 1339. The remainder of the cases are contract cases that say nothing about TVA's immunity vel non. In fact, those contract cases implicitly demonstrate that TVA is not the same as the federal government because they are not from the Court of Federal Claims, which has exclusive jurisdiction over contract claims against the United States. As TVA pointed out in its opposition to certiorari in TVA v. Whitman, Congress precluded suits against TVA in that court. See supra.

POINT III

THE POLITICAL QUESTION DOCTRINE DOES NOT REQUIRE DISMISSAL OF TVA

TVA contends that the Property Clause of the U.S. Constitution constitutes a textual commitment of greenhouse gas emissions limits to Congress. However, again, TVA is not the United States. See supra. It is only when TVA condemns property that TVA acts in the name of the United States. TVA v. United States, 13 Cl. Ct. 692, 697 (1987). "All other property has been found to be taken directly in TVA's name." Id. at 698; accord TVA v. EPA, 278 F.3d at 1197. TVA's reliance upon cases involving the United States is thus misplaced. In fact, TVA has successfully argued for the justiciability of cases in which TVA is adverse to the United States. Id. at 1197-98. Moreover, to establish constitutional commitment, the provision must be far more specific than simply authorizing legislative power. See Powell v. McCormack, 395 U.S. 486, 548 (1969) ("Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution."). Not even plenary power by Congress over a subject matter establishes constitutional commitment. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 249 (1985).

Finally, TVA's argument that it has statutory power to operate its steam plants is not relevant to the question of immunity from suit. TVA Br. at 24-25. Since, by definition, TVA can only engage in activities within its statutory authorization, then by TVA's logic it would be immune from all suits for all of

its conduct all of the time. The Court need not create such new law, however. There is a long and well-established jurisprudence governing the liability of the TVA when it operates as a commercial electric utility. Those precedents apply here and require rejection of TVA's request for dismissal.

CONCLUSION

TVA does not have governmental immunity.

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March 16, 2006

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