# 05-5104-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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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, CITY OF NEW YORK,
Plaintiffs-Appellants,

v.

AMERICAN ELECTRIC POWER COMPANY INC., AMERICAN ELECTRIC POWER SERVICE CORPORATION, SOUTHERN COMPANY, TENNESSEE VALLEY AUTHORITY, XCEL ENERGY, INC., CINERGY CORPORATION,
Defendants-Appellees,

UNIONS FOR JOBS AND THE ENVIRONMENT,
Amicus.

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On Appeal from the United States District Court
for the Southern District of New York

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**BRIEF OF DEFENDANT-APPELLEE**
**TENNESSEE VALLEY AUTHORITY**

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February 20, 2006


Office of the General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Facsimile 865-632-6718

Maureen H. Dunn
General Counsel
Harriet A. Cooper
Assistant General Counsel
Edwin W. Small
Assistant General Counsel
Telephone 865-632-3021
Attorneys for Defendant-Appellee
Tennessee Valley Authority

## STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellee Tennessee Valley Authority (TVA) thinks that oral argument would be helpful and will be glad to participate in oral argument should it be scheduled by the Court.

## NOTICE OF IDENTICAL BRIEF

This brief is identical to the brief that TVA is simultaneously filing in a related appeal pending in this Court, *Open Space Institute, Inc, et al. v. American Electric Power Co., Inc, et al.*, No. 05-5119-cv.

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## PRELIMINARY STATEMENT

Based on alleged common law nuisance, Plaintiffs seek an injunction ordering the Tennessee Valley Authority (TVA), an executive branch agency and instrumentality of the United States, to reduce carbon dioxide emissions resulting from TVA's use of Federally-owned fossil-fired generating plants on Federal real property to produce electricity for Federal purposes because such emissions allegedly contribute to cause global warning. Significantly, the Complaint does not allege that TVA's challenged conduct is unconstitutional, beyond its powers under the TVA Act, or in violation of any applicable Federal statute or regulation.

The district court dismissed the Complaint as to all Defendants based on the political question doctrine. The dismissal as to TVA was clearly correct, both for the reasons stated by the district court applicable to all Defendants, and for additional reasons unique to TVA. Because TVA is a Federal agency and its challenged conduct (the use of Federally-owned fossil-fired generating plants on Federal real property to produce electricity to accomplish Federal purposes) is authorized by the TVA Act and does not violate the Constitution or any applicable Federal statute or regulation, it is fundamental that, as to TVA, no justiciable controversy is raised by Plaintiffs' Complaint under both the political question doctrine and the Federal discretionary function exception, both of which are based on constitutional separation of powers.

## JURISDICTIONAL STATEMENT

TVA is a wholly-owned corporate agency and instrumentality of the United States created by and existing pursuant to the TVA Act of 1933, *as amended*, 16 U.S.C. §§ 831-831ee (2000 & Supp. III 2003), and accordingly, the district court had subject matter jurisdiction of this action against TVA pursuant to 28 U.S.C. § 1331 (2000). *See, e.g., Wayne v. TVA*, 730 F.2d 392, 397 (5th Cir. 1984) ("[A] claim against a wholly owned federal corporation created under an Act of Congress, such as TVA, falls within the general grant of federal question jurisdiction found in [28 U.S.C.] § 1331 . . . ."); *Jackson v. TVA*, 462 F. Supp. 45, 51 (M.D. Tenn. 1978) ("28 U.S.C. § 1331 constitutes a grant of federal subject matter jurisdiction over all suits against TVA."), *aff'd "on the basis of the district court's opinion*," 595 F.2d 1120, 1121 (6th Cir. 1979).

By an Opinion and Order entered September 19, 2005, and Amended Opinion and Order entered September 22, 2005, the district court dismissed this action as to all Defendants on the ground of nonjusticiable political question. *Connecticut v. Am. Elec. Power Co*., 406 F. Supp. 2d 265 (S.D.N.Y. 2005). By Notice of Appeal filed September 20, 2005, and Amended Notice of Appeal filed September 28, 2005, Plaintiffs timely appealed as to all Defendants. Thus, this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 (2000).

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Should the district court's dismissal of Plaintiffs' Complaint as to all Defendants be affirmed on the ground of nonjusticiable political question as held by the district court and also on alternative grounds?[1]

2. Should the district court's dismissal of Plaintiffs' Complaint as to TVA also be affirmed on the ground of nonjusticiable political question for reasons which are unique to TVA based on its status as a Federal agency?

3. Should the district court's dismissal of Plaintiffs' Complaint as to TVA also be affirmed based on the Federal discretionary function exception?

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[1] Briefs of the other Defendants in this appeal argue that the district court's dismissal should be affirmed on the ground of nonjusticiable political question for the reasons stated by the district court, and also on alternative grounds which are applicable to all Defendants. Those arguments are adopted by reference.

## STATEMENT OF FACTS

### Plaintiffs Concede That TVA's Conduct Is Discretionary in Nature.

It is undisputed that TVA's challenged conduct is discretionary in nature. First, there is no allegation in the Complaint that TVA's challenged conduct is unconstitutional, beyond its powers under the TVA Act, or in violation of any applicable Federal statute or regulation.

Second, at oral argument in the district court, Plaintiffs conceded that, if the Federal discretionary function exception applies to actions involving TVA's electric power activities ("commercial" activities according to Plaintiffs), the Complaint should be dismissed as to TVA because both parts of the established test for the discretionary function exception are otherwise present (i.e., the amount of TVA's carbon dioxide emissions resulting from TVA's use of fossil-fired plants to produce electricity is not governed by any mandatory Federal statute, regulation, or policy, and TVA's decisions about the extent to which it uses fossil-fired plants to produce electricity for its power program are susceptible to social, economic, and political policy balancing). As stated by counsel at the argument:

> We concede. If the Discretionary Government Function doctrine applies here, they are out. . . . TVA is claiming that the courts have dispensed with th[e] commercial governmental function distinction. It's not true.

(R. 79, Mot. Hr'g Tr. 149:13-19, Aug. 12, 2005.)

**TVA Is an Agency and Instrumentality of the United States.**

TVA is a constitutionally authorized[2] corporate agency and instrumentality of the United States,[3] created by and existing pursuant to the TVA Act of 1933, *as amended*, 16 U.S.C. §§ 831-831ee (2000 & Supp. III 2003), with authority under 16 U.S.C. § 831c(b) (2000) to sue and be sued in its own name.

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[2] *See, e.g., Ashwander v. TVA*, 297 U.S. 288, 338-39 (1936) (upholding TVA Act against constitutional challenge relating to sale of electric power); *Goodpasture v. TVA*, 434 F.2d 760, 763 (6th Cir. 1970) ("The TVA Act is constitutional."); *United States ex rel. TVA v. An Easement & Right-of-Way Over Two Tracts of Land, Etc*., 246 F. Supp. 263, 270 (W.D. Ky. 1965) ("TVA's . . . integrated system of multipurpose dams, steam plants, and transmission lines, which together improve navigation, help control floods, produce power, and serve generally to develop the Tennessee River watershed are authorized by the commerce clause of the Constitution; make a substantial contribution to the defense needs of the nation and are authorized under the war power and defense clauses of the Constitution; and promote the development of the resources of the area served by TVA power and the general welfare of such area and of the nation as a whole and are authorized under the general welfare clause of the Constitution.") (internal citations omitted), *aff'd "for the reasons stated and upon the authorities set forth in the opinion of the district court*," 375 F.2d 120, 121 (6th Cir. 1967).

[3] *See, e.g.,* 16 U.S.C. § 831r (2000) (denoting TVA to be "an instrumentality and agency of the Government of the United States"); *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 134 (1939) (referring to TVA as "an instrumentality of the United States"); *Ashwander v. TVA*, 297 U.S. 288, 315 (1936) (referring to TVA as "an agency of the Federal Government"); *Hill v. United States Dep't of Labor*, 65 F.3d 1331, 1333 (6th Cir. 1995) (TVA is "a wholly-owned corporate agency and instrumentality of the United States . . . ."); *Springer v. Bryant*, 897 F.2d 1085, 1089 (11th Cir. 1990) ("The TVA is a federally owned corporation that acts as an agency or instrumentality of the United States."); *Posey v. TVA*, 93 F.2d 726, 727 (5th Cir. 1937) ("[T]he Authority is plainly a governmental agency of the United States . . . .").

"The TVA Act functions as the corporate charter of the Authority." *Alabama v. TVA*, 636 F.2d 1061, 1066 (5th Cir. 1981). "[T]he United States is the 'owner and sole stockholder' of TVA"; "its ownership is not evidenced by stock certificates, but by the terms of the TVA Act." *Jackson v. TVA*, 462 F. Supp. 45, 51 (M.D. Tenn. 1978), *aff'd*, 595 F.2d 1120, 1121 (6th Cir. 1979).

TVA is headed by a Board of Directors composed of United States citizens appointed by the President by and with the advice and consent of the Senate. *See* 16 U.S.C. § 831a (2000). The TVA Board is responsible for directing the activities of TVA to achieve goals of the TVA Act. *Id*. Pursuant to 16 U.S.C. § 831h (2000), the TVA Board submits annual reports to the President and Congress about TVA's activities.[4]

Under the TVA Act, TVA is charged with broad responsibilities for the multipurpose development of the Tennessee Valley region for the public good, and all of its programs are directed toward that goal. As the Supreme Court stated in *United States ex rel. TVA v. Welch*, 327 U.S. 546, 553 (1946):

> The broad responsibilities placed on the Authority [by the TVA Act] relate to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley. **The T.V.A. was empowered to** make contracts, purchase and sell property deemed necessary or convenient in the transaction of its business, and to **build dams, reservoirs, transmission lines,**

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[4] TVA's statutorily-required annual reports are, of course, subject to judicial notice. *See Ill. Cent. R.R. v. TVA*, 445 F.2d 308, 310 n.4 (6th Cir. 1971).

> **power houses, and other structures. . . . All of the Authority's actions in these respects were to be directed towards "development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act . . . all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas . . ."[5]**

The TVA Act at 16 U.S.C. § 831d(*l*) (2000) authorizes TVA to "produce, distribute, and sell electric power."[6] In accordance with that statutory authority, TVA operates a large electric power generating and transmission system as part of its multipurpose development activities.[7] As stated in *4-County Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132, 1135 (S.D. Miss. 1996):

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[5] Emphasis added above and throughout this brief unless noted otherwise.

[6] A number of other Federal agencies also distribute and sell Federally-generated electric power. The primary agencies involved in those activities are the Department of Energy's four power marketing administrations—the Bonneville Power Administration, the Southeastern Power Administration, the Southwestern Power Administration, and the Western Area Power Administration. These power marketing administrations are described generally on the Department of Energy's website, which provides links to the individual websites of the four administrations with detailed information about the administrations. See http://www.energy.gov/organization/powermarketingadmin.htm.

[7] TVA generates electricity for its power program through its operation of 11 coal-fired steam plants (59 units), 3 nuclear steam plants (5 units), 29 hydroelectric plants (109 units), 6 combustion turbine plants (72 units), 7 diesel units, 16 solar energy sites, 1 wind energy site (18 turbines), and 1 pumped-storage plant (4 units). See TVA's 2004 Annual Report, p. 19; *available at* http://www.tva.gov/finance/reports/pdf/ TVA2004_annual_report.pdf.

> TVA . . . maintains and operates one of the nation's largest electric power systems as part of a program to fulfill its mission for the development of the Tennessee Valley region's resources and economy.

*See also United States ex rel. TVA v. Three Tracts of Land,* 377 F. Supp. 631, 634 (N.D. Ala. 1974) ("16 U.S.C. § 831n and § 831n-4, indicate that steam plants are to be constructed by TVA when they become necessary to discharge TVA's broad responsibilities for the advancement of the national defense and the physical, social and economic development of the area and Congress further intends that TVA should provide an ample supply of electric power for such purposes.").

**The TVA Act Authorizes TVA to Build and Operate Fossil-Fired Plants on the Federal Real Property Entrusted to TVA.**

The TVA Act at 16 U.S.C. § 831c(h)-(j) (2000) authorizes TVA to acquire and hold real property in the name of the United States for the purpose of building and operating "power houses" and "power structures" thereon, and 16 U.S.C. § 831n (2000) authorizes TVA to issue bonds for the construction of "steam plant[s]." Thus, TVA's authorized power program activities specifically include TVA's construction and operation of the fossil-fired plants about which Plaintiffs complain. In *Rainbow Realty Co. v. TVA*, 124 F. Supp. 436, 439-40 (M.D. Tenn. 1954) (three-judge panel), in holding that TVA had authority under the TVA Act to construct such plants, the court pointed out that Congress had made appropriations to TVA for the construction of eight coal-fired steam plants:

> Appropriation Acts of Congress have provided funds for eight major [coal-fired] steam plants now constructed or in process of construction by T.V.A.: 54 Stat. 781, covering Watts Bar Steamplant; 63 Stat. 76, 80, covering Johnsonville; 64 Stat. 37-38, covering Widows Creek; 64 Stat. 1223, 1229, covering Kingston and Shawnee Steamplants; 65 Stat. 268, 280, covering Colbert; and 66 Stat. 637, 645, covering the Gallatin and John Sevier Steamplants. **These repeated congressional appropriations indicate clearly the interpretation by Congress of the T.V.A. Act to authorize construction of steamplants.**

*See also Ill. Cent. R.R. v. TVA*, 445 F.2d 308, 314 (6th Cir. 1971) ("We think TVA has authority to mine and ship coal from its reserves as an integral part of its generating operations . . . ."); *United States ex rel. TVA v. An Easement & Right-of-Way Over Two Tracts of Land, Etc*., 246 F. Supp. 263, 271 (W.D. Ky. 1965) ("The Court concludes, as a matter of law, that plaintiff has the constitutional and statutory authority to build and operate [coal-fired] Paradise Steam Plant . . . ."), *aff'd "for the reasons stated and upon the authorities set forth in the opinion of the district court*," 375 F.2d 120, 121 (6th Cir. 1967); *United States ex rel. TVA v. Puryear*, 105 F. Supp. 534, 535 (W.D. Ky. 1952) ("There is undoubtedly statutory authority in the T.V.A. Act, granted in section 4 [16 U.S.C. § 831c], for the construction of the [coal-fired] Shawnee Steamplant. The mere reading of the statute is convincing as to this.").

**TVA's Decisions About the Appropriate Use of Fossil Fuels for Its Power Program Involve Discretionary Policy Balancing.**

TVA is well aware that burning fossil fuels at TVA power plants results in carbon dioxide emissions and that carbon dioxide is a greenhouse gas. TVA also is well aware of the scientific research relating to greenhouse gases and global warming. Indeed, in conducting its power program, TVA has taken, and is taking, actions it considers appropriate based on that research and on the potential for harm from carbon dioxide emissions, and is reporting its actions to the President and Congress. See, for example, TVA's 2004 Annual Report (at 17)[8] to the President and Congress where TVA described some of its efforts to reduce greenhouse gas:

> TVA's power system performance was complemented by progress in our program to further reduce fossil-plant emissions and continue to improve air quality in the region. In 1995, TVA was the first energy provider in the nation to participate in Climate Challenge, a voluntary Department of Energy program for electric utilities to reduce greenhouse emissions. TVA is now supporting the successor to that program, Climate Vision, which has called on the electricity sector and other industry sectors to reduce greenhouse gas intensity by 18 percent between 2002 and 2012. In addition to these activities, TVA is a member of the Southeast Regional Carbon Sequestration Partnership and is working with the Electric Power Research Institute and other electric utilities on projects investigating technologies for carbon dioxide capture and geologic storage.

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**8** *Available at* http://www.tva.gov/finance/reports/pdf/TVA2004_annual_report.pdf.

In making judgments about what actions to take based on the potential for harm from carbon dioxide emissions, TVA necessarily balances competing social, economic, and political policies in order to carry out its statutory missions of providing low-cost reliable electric power while also protecting the environment and supporting economic development.[9] The fact that TVA balances these disparate interests is a matter of public record that is documented in various Government publications, including three TVA environmental impact statements[10]

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[9] With respect to new energy resources, TVA also must comply with the direction of Congress in 16 U.S.C. § 831m-1(b)(1) (2000):

> Tennessee Valley Authority shall employ and implement a planning and selection process for new energy resources which evaluates the full range of existing and incremental resources (including new power supplies, energy conservation and efficiency, and renewable energy resources) in order to provide adequate and reliable service to electric customers of the Tennessee Valley Authority at the lowest system cost.

Further, TVA must comply with 831m-1(d) (2000):

> Before the selection and addition of a major new energy resource on the Tennessee Valley system, the Tennessee Valley Authority shall provide an opportunity for public review and comment and shall include a description of any such action in an annual report to the President and Congress.

[10] As a Federal agency, TVA is subject to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f (2000), which requires Federal agencies to consider the environmental effects of major Federal actions which are likely to have a significant effect on the quality of the human environment. For major

issued in the last eleven years related to TVA's power program: Energy Vision 2020, Integrated Resource Plan/Environmental Impact Statement (TVA 1995); Final Supplemental Environmental Impact Statement for Operating License Renewal of the Browns Ferry Nuclear Plant in Athens, Alabama (TVA 2002); Final Programmatic Environmental Impact Statement, Tennessee Valley Authority Reservoir Operations Study (TVA 2004).

TVA's Energy Vision 2020 environmental impact statement (EIS) involved TVA's consideration of a wide range of resource alternatives for meeting electric power needs. *See* 61 Fed. Reg. 7572 (Feb. 28, 1996) (Issuance of Record of Decision). TVA's long-term goal was "viewed as not only maintaining low electric rates and reliable service, but also fostering sustainable economic development and protecting environmental quality" and the decision process "integrated economic development and environmental goals." *Id*. at 7573-7574. As summarized in the Record of Decision:

> The primary analytical method used for Energy Vision 2020 was the multi-attribute tradeoff method. This approach allowed TVA to quantitatively integrate the identified environmental impacts of proposed energy resource strategies and to formulate alternative strategies to mitigate adverse environmental impacts while retaining other beneficial characteristics of specific strategies.

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(. . . continued)
Federal actions with significant environmental impacts, NEPA requires agencies to prepare and issue environmental impact statements.

> Energy resource strategies are created from different combinations of energy resource options. Energy resource options are either supply-side options (e.g., new generating resources such as coal-fired or nuclear units, gas-fired combustion turbines, repowering of existing units, integrated gasification, or wind turbines), or customer service options (e.g., demand-side management actions, including energy efficiency improvements and energy conservation, or beneficial electrification). . . .
>
> TVA developed 2,000 energy resource strategies from more than 100 supply-side and 60 customer service options. These strategies were then analyzed through the use of computer models to identify combinations of resource options that best met the evaluation criteria . . . .
>
> The multi-attribute tradeoff method allowed potential environmental impacts of each strategy to be compared to all other evaluation criteria (such as debt, electric rates, and economic development) and to all other strategies on an objective basis. This process identified where real tradeoffs existed. One of the most important tradeoffs occurred between better environmental performance and electric rates because achieving better environmental performance typically produces higher costs and higher electric rates. However, the integrated resource planning process used by TVA allowed it to reformulate strategies repeatedly to produce strategies that performed better across all criteria, including environmental criteria. . . . Eventually this integration process produced seven final alternative strategies that performed well across all of the criteria, including environmental criteria.

*Id*. at 7573.

The TVA Board adopted the EIS's preferred alternative (the portfolio alternative—a blend of the seven final alternatives) at its February 26, 1996, public meeting, finding that "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." *Id*. at 7574. One of the factors utilized in considering the alternatives was greenhouse gas emissions. As noted in the Record of Decision:

> [G]reenhouse gas emissions from the TVA system are projected to increase under all strategies by 25 to 38 percent. This increase is still less than that projected for the no-action alternative (it results in a 52-percent increase) and on a per unit of electric energy basis produced 10 to 15 percent less than that produced by the existing system. This means that the efficiency of the TVA system is improved under the final seven alternatives.

*Id*.

The Browns Ferry License Renewal EIS involved the TVA Board's May 16, 2002, decision to refurbish and restart Browns Ferry Nuclear Unit 1 and to seek operating license extensions for all three Browns Ferry nuclear units. *See* 67 Fed. Reg. 41,565 (June 18, 2002) (Issuance of Record of Decision). Again, the impact of greenhouse gas emissions was considered. As noted in the Record of Decision:

> On May 16, 2002, the TVA Board of Directors decided to adopt the preferred alternative (Alternative 2) to refurbish and restart BFN Unit 1, and to proceed with NRC license extensions for all three units at BFN. This decision took into account environmental considerations together with economic and technical aspects of the project. Proceeding with license extensions and Unit 1 restart is the best business decision for TVA and the Tennessee Valley in terms of power supply, power price, generation mix, return on investment, and avoidance of environmental impacts. This decision has the three-fold benefits of assuring future power supplies without the environmental effects resulting from operation of fossil fuel generating plants (including increased emissions of greenhouse gases), avoiding the

> even larger capital outlays associated with new construction, and avoiding the environmental impacts resulting from siting and construction of new power plant generating facilities.

*Id*. at 41,568.

Finally, the Reservoir Operations Study EIS involved proposed changes in the way that TVA operates its reservoir system. 69 Fed. Reg. 30,975 (June 1, 2004) (Issuance of Record of Decision). The TVA Board adopted the EIS's preferred alternative (the blended alternative) at its May 19, 2004, public meeting. *Id*. Because an increase or decrease in hydro generation can impact the amount of generation needed from fossil fuels, the effect of TVA's action on greenhouse gas emissions again was considered. As noted in the Record of Decision discussion regarding the Commercial Navigation Alternative:

> TVA has concluded that the Commercial Navigation Alternative, with its minor changes in water availability limited primarily to mainstream reservoirs, has slightly better environmental consequences than the Base Case and Preferred Alternative and is the environmentally preferable alternative. . . . It would provide beneficial effects on greenhouse gas emissions . . . .

*Id*. at 30,978.

As to the public policy balancing nature of TVA's decisions regarding use of fossil fuels for electric production in view of the potential environmental consequences, the Environmental Protection Agency stated the obvious in its September 8, 2003 notice of denial of a petition for EPA to regulate carbon dioxide emissions of motor vehicles:

> It is hard to imagine any issue in the environmental area having greater "economic and political significance" than regulation of activities that might lead to global climate change. Virtually every sector of the U.S. economy is either directly or indirectly a source of GHG [greenhouse gas] emissions . . . .
>
> The most abundant anthropogenic GHG, $CO_2$, is emitted whenever fossil fuels such as coal, oil, and natural gas are used to produce energy. The production and use of fossil fuel-based energy undergirds almost every aspect of the U.S. economy. For example, approximately 70 percent of the electric energy used in this country is generated from fossil fuel . . . .
>
> . . . .
>
> The [various] approaches for reducing $CO_2$ emissions all have substantial economic implications. While it may eventually be possible to achieve widespread capture and sequester $CO_2$ emissions from power plants, such an approach would require a new generation of power plants and would be very costly, even if implemented over many years. As for the use of alternative fuels, governments and private companies around the world are investing billions of dollars to explore the possibility of using non-fossil fuels for power generation . . . . Any widespread effort to switch away from fossil fuels in [the power] sector would likewise require a wholesale transformation of our methods for producing power . . . . It is hard to overstate the economic significance of making these kinds of fundamental and widespread changes in basic methods of producing and using energy.
>
> The issue of global climate change also has enormous political significance. It has been discussed extensively during the last three Presidential campaigns; it is the subject of debate and negotiation in several international bodies; and numerous bills have been introduced in Congress over the last 15 years to address the issue.

68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

## SUMMARY OF THE ARGUMENT

The Court should affirm dismissal of the Complaint as to TVA on two doctrines based on constitutional separation of powers—nonjusticiable political question and the Federal discretionary function exception.

The political question doctrine clearly precludes review of Plaintiffs' Complaint seeking an injunction against TVA, both for the reasons stated by the district court which are applicable to all Defendants, and for additional reasons, unique to TVA, based on TVA's status as a Federal agency charged with the multipurpose development of the Tennessee Valley region for the public good. Pursuant to its authority under the Property Clause, Congress expressly authorized TVA to acquire and hold real property in the name of the United States and to construct and operate fossil-fired plants on that real property as TVA deems necessary in its discretion to accomplish the purposes of the TVA Act. Because TVA's challenged conduct (the operation of Federally-owned fossil-fired plants on Federal real property to produce electricity for Federal purposes) is authorized by the TVA Act, and is not in violation of the Constitution or any applicable Federal statute or regulation, it is fundamental that no justiciable controversy is raised by Plaintiffs' Complaint seeking injunctive relief against TVA. Under the Property Clause, Congress has exclusive authority to control uses of Federal property, and it

has specifically authorized TVA to build and operate fossil-plants on the Federal real property entrusted to TVA.

The Court also should affirm the dismissal as to TVA based on the Federal discretionary function exception. In the district court, Plaintiffs' conceded that the two elements of the exception are satisfied here (i.e., TVA's challenged conduct is not governed by any mandatory Federal statute, regulation, or policy dictating a specific course of action, and is susceptible to social, economic, and political policy balancing), but argued that TVA is not entitled to the exception because the challenged conduct arises out of TVA's electric power program, a "commercial" activity according to Plaintiffs. Plaintiffs' position is without merit. While the TVA Act's sue-and-be-sued clause permits lawsuits against TVA, that clause did not abrogate TVA's status as an executive branch Government agency. Accordingly, the Federal discretionary function exception, which is based on constitutional separation of powers, is applicable to TVA. And under controlling Supreme Court jurisprudence, TVA's authorized activities, like the authorized activities of other Federal agencies, are wholly governmental and cannot be parsed into governmental and nongovernmental categories as Plaintiffs contend.

## ARGUMENT

### I. The District Court's Dismissal of Plaintiffs' Complaint as to TVA on the Ground of Nonjusticiable Political Question Should Be Affirmed on That Ground.

The political question doctrine clearly precludes review of Plaintiffs' Complaint seeking an injunction against TVA, both for the reasons stated by the district court which are applicable to all Defendants, and for additional reasons, unique to TVA, based on TVA's status as a Federal agency charged with the multipurpose development of the Tennessee Valley region for the public good. The reasons applicable to all Defendants are set forth and discussed in the district court's opinion and the briefs of other Defendants in this appeal; the additional reasons unique to TVA are discussed below.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Supreme Court identified six factors which establish the existence of a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence.

While Plaintiffs' Complaint as to TVA implicates all the *Baker* factors, the first, third and fourth factors are inextricably implicated.

As to the first *Baker* factor, under the Property Clause of the Constitution (art. IV, § 3, cl. 2), the authority of Congress over Federal property[11] is "without limitations." *See Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) ("[W]e have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'"). And the Property Clause power granted to Congress includes the "full power in the United States to protect its lands [and] to **control their use**." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917). *See also McKelvey v. United States*, 260 U.S. 353, 359 (1922) (Under the Property Clause, **Congress "may sanction some uses** and prohibit others."). Further, the "repeated decisions of [the Supreme Court] have gone upon the theory that the power of Congress is **exclusive**." *Utah Power & Light Co. v. United States*, 243 U.S. at 404. As summarized in *United States v.*

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**11** The term "property" under the Property Clause has been broadly defined to include all personal and real property belonging to the United States. *Ashwander v. TVA*, 297 U.S. 288, 331 (1936).

*City & County of San Francisco*, 310 U.S. 16, 29 (1940) (internal footnote and quotations omitted):

> The power over the public land thus entrusted to Congress is without limitations. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.

*Accord, e.g., Alabama v. Texas*, 347 U.S. 272, 273-74 (1954); *Light v. United States*, 220 U.S. 523, 537 (1911) ("The courts cannot . . . interfere when, in the exercise of its discretion, Congress establishes a [Federal property use] for what it decides to be national and public purposes.").

Pursuant to its authority under the Property Clause (art. IV, § 3, cl. 2), Congress has expressly authorized TVA to acquire and hold real property in the name of the United States (16 U.S.C. § 831c(h)), and to construct and operate "power houses," "power structures," and "steam plant[s]" on that real property as TVA deems necessary in its discretion to accomplish the purposes of the TVA Act.[12] *See* 16 U.S.C. § 831c(i)-(j) (authorizing TVA to construct "power houses"

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**12** As noted earlier, Congress specifically authorized TVA to "produce, distribute, and sell electric power" (16 U.S.C. § 831d(*l*)) to help achieve the multipurpose development goals of the TVA Act, and that statutory authorization is constitutional under the commerce, war power, defense, and general welfare clauses. *See, e.g., United States ex rel. TVA v. An Easement & Right-of-Way Over Two Tracts of Land, Etc*., 246 F. Supp. 263, 270 (W.D. Ky. 1965) (holding TVA's integrated system of hydroelectric dams, power houses, and transmission lines to be authorized under the commerce, war power, defense, and general welfare clauses of the Constitution), *aff'd "for the reasons stated and upon the authorities set forth in the opinion of the district court*," 375 F.2d 120, 121 (6th Cir. 1967).

and "power structures"); 16 U.S.C. § 831n (authorizing TVA to issue bonds to construct "steam plant[s]"); *Rainbow Realty Co. v. TVA*, 124 F. Supp. 436 (M.D. Tenn. 1954) (three-judge court) (holding that TVA has statutory authority to construct steam plants and noting that as of 1954 Congress had appropriated funds for TVA's construction of eight coal-fired steam plants); *United States ex rel. TVA v. An Easement & Right-of-Way Over Two Tracts of Land, Etc*., 246 F. Supp. 263, 271 (W.D. Ky. 1965) (holding TVA's construction and operation of coal-fired Paradise Fossil Plant to be within TVA's statutory authority), *aff'd*, 375 F.2d 120, 121 (6th Cir. 1967); *United States ex rel. TVA v. Puryear*, 105 F. Supp. 534, 535 (W.D. Ky. 1952) (holding TVA's construction of coal-fired Shawnee Fossil Pant to be within TVA's statutory authority). Further, Congress has specified that the TVA Act "shall be liberally construed to carry out the purposes of Congress . . . respecting Government properties entrusted to the Authority." 16 U.S.C. § 831dd (2000).

As to the third and fourth *Baker* factors, in accordance with the authority delegated to TVA in the TVA Act, TVA makes decisions which are

discretionary in nature[13] about the appropriate mix of various energy sources TVA should use to produce electricity for its statutorily authorized power program. Because Plaintiffs do not assert that TVA's challenged use of the Federal property entrusted to it violates the Constitution or any applicable Federal statute or regulation, Plaintiffs' Complaint challenging TVA's discretionary decisions about the use of Federally-owned fossil-fired generating plants on Federal real property to produce electricity for Federal purposes does not present a justiciable controversy.[14]

The holding in *Rainbow Realty Co. v. TVA*, 124 F. Supp. 436 (M.D. Tenn. 1954) (three-judge court), in which the plaintiff challenged TVA's statutory and constitutional authority to build and operate fossil-fired steam plants (as opposed to hydroelectric plants) to produce electricity for its power program, is

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**13** There is no allegation in the Complaint that TVA's challenged conduct is unconstitutional, beyond its powers under the TVA Act, or in violation of any applicable Federal statute or regulation.

**14** Because Plaintiffs' seek injunctive relief which would prevent TVA from implementing affirmative discretionary decisions made pursuant to the TVA Act, Plaintiffs' claims against TVA are particularly susceptible to dismissal under the political question doctrine. As pointed out in *Gordon v. Texas*, 153 F.3d 190, 194 (5th Cir. 1998):

> [R]equests for injunctive relief can be particularly susceptible to justiciability problems, for they have the potential to force one branch of government—the judiciary—to intrude into the decisionmaking properly the domain of another branch—the executive.

closely in point. In denying injunctive relief and dismissing the plaintiff's complaint, the court held:

> **[T]he extent to which electric power from steamplants [as opposed to] power from hydro-electric plants may be supplied by T.V.A. is a question for legislative determination and not for determination by the courts.**

*Id*. at 441.[15]

The *Rainbow Realty* holding fully accords with decisions in other cases that involved challenges to the activities of Federal agencies acting within their constitutional and statutory limits. The *Pauling v. McElroy*, 278 F.2d 252

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[15] In a related line of cases based on separation of powers, the courts have repeatedly held that because takings of private property for TVA's power program are takings for a public purpose, challenges to TVA's determinations about the necessity and scope of such takings are not justiciable. *See, e.g., Ill. Cent. R.R. v. TVA*, 445 F.2d 308, 313 (6th Cir. 1971) ("[I]t is for the administrative agencies vested with the power to acquire property by condemnation, and not for the courts, to decide what properties are needed to accomplish statutory or public purposes."); *United States ex rel. TVA v. An Easement and Right-of-Way Over 1.8 Acres*, 682 F. Supp. 353, 357 (M.D. Tenn. 1988) ("[B]ecause the property was taken for a public purpose made explicit by statute, the courts were without power to review the amount of land taken, the location of the lines, the time for the taking, and the need for the taking."); *United States ex rel. TVA v. An Easement and Right-of-Way Over Two Tracts of Land*, 246 F. Supp. 263, 270 (W.D. Ky. 1965) ("The necessity, expediency, location, design, method of operating, and what property is needed for the [TVA] facilities . . . including . . . the transmission line involved in this case, are matters for administrative and legislative determination which are not subject to judicial review."), *aff'd*, 375 F.2d 120 (6th Cir. 1967); *United States ex rel. TVA v. An Easement and Right-of-Way 200 Feet Wide and 874 Feet Long*, 235 F. Supp. 376, 377 (N.D. Miss. 1964) ("The necessity for taking a particular tract, and the location of the power line, are legislative or administrative questions rather than judicial.").

(D.C. Cir. 1960), and *Pauling v. McNamara*, 331 F.2d 796 (D.C. Cir. 1964), cases are closely analogous. In *McElroy*, the plaintiffs sought to enjoin the Secretary of Defense and members of the Atomic Energy Commission from detonating nuclear weapons for testing purposes, alleging that the world-wide fallout from such nuclear testing would add radioactive strontium to soil, increase the amount of radioactive contamination in the world food supply and in the bones of human beings, contribute to the exposure of human beings to radiation, and cause possible injury to plaintiffs and others. *McElroy*, 278 F.2d at 253. The D.C. Circuit affirmed dismissal of the case, stating:

> **The District Court correctly held that the . . . complaints presented no justiciable controversy. The relief here sought is to stop actions of the Executive which Congress has explicitly authorized**. . . . The acts and powers challenged here are plainly authorized by law and are not prohibited by the Constitution. . . . [It is] settled law that the questions presented by the pleadings are in that area of the law where the Executive and the Legislature are supreme.

*Id*. at 254.

In the subsequent *McNamara* case, the plaintiffs sought the same injunctive relief based on allegations that they had been damaged genetically, somatically, and psychologically. 331 F.2d at 799. The district court dismissed the case on four grounds, including the ground that "the actions and powers challenged were plainly authorized by law and the Constitution." *Id*. at 797.

Affirming, the D.C. Circuit stated "[t]he District Court was plainly correct on all points" and held the case was properly dismissed based on the

> fundamental principle that the executive action challenged by the pleadings plainly falls in that area where the Executive and Legislative Branches are supreme and final, reviewable only by the electorate, not by the courts.

*Id*. at 798.

The decisions of this Court and the district court in *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2d Cir. 1985), *aff'g*, 591 F. Supp. 1332 (S.D.N.Y. 1984), are analogous as well. There, the district court dismissed, on the ground of nonjusticiable political question, a complaint seeking an injunction against the deployment of cruise missiles, stating:

> **Questions like** how to ensure peace, **how to promote prosperity, what is a fair utilization and distribution of economic resources are examples of questions that must be decided by the fair, sound, and seasoned and mature judgment of men and women responsive to the common good. The power to make these determinations is therefore appropriately allocated to the political branches.**

591 F. Supp. at 1338. This Court affirmed, stating:

> [T]he complaint . . . raises issues which have been committed by the Constitution to coordinate political departments, and requests relief which cannot be granted absent an initial policy determination of a kind clearly for nonjudicial discretion.

755 F.2d at 37; internal citations omitted.

*Ferris v. Wilbur*, 27 F.2d 262 (4th Cir. 1928), also is directly applicable. There, the Fourth Circuit affirmed dismissal of a case seeking to enjoin as a nuisance the storage of explosives at a Naval mine depot in Virginia, stating:

> [A] suit for injunction will not lie against an official of the Executive Department to restrain as a nuisance a use of government property authorized by Congress and within the discretion of the executive. . . .
>
> [I]n this case the land upon which the explosives are to be stored belongs to the government, and the only injury which complainants apprehend is injury arising out of the government's use of it own property. The question is whether such use authorized by act of Congress can be enjoined by the courts as a nuisance. The question, we think, answers itself. . . .
>
> **[I]t is unthinkable that the courts should enjoin as a nuisance the use of government property by a co-ordinate branch of the government, the executive, where such use is authorized by a valid act of the other coordinate branch, the legislative.** It is elementary that courts will not enjoin as a nuisance action authorized by valid legislative authority.

*Id*. at 264-65.

All the above decisions are directly applicable here. Congress has expressly authorized TVA to acquire and hold real property in the name of the United States and to construct and operate fossil-fired power plants on that real property as TVA deems necessary in its discretion to accomplish the purposes of the TVA Act. Accordingly, Plaintiffs' complaint seeking to enjoin TVA's use of Federally-owned fossil plants on Federal real property to generate electricity for Federal purposes does not present a justiciable controversy.

## II. The District Court's Dismissal of Plaintiffs' Complaint as to TVA Also Should Be Affirmed Based on the Federal Discretionary Function Exception.

### A. The Federal Discretionary Function Exception Is Constitutionally Based.

The Federal discretionary function exception precludes common law suits challenging conduct of a Federal agency where the agency's challenged conduct (1) is not governed by a mandatory Federal statute, regulation or policy dictating a specific course of action, and (2) the conduct is susceptible to social, economic, or political policy balancing. *See, e.g., In re Joint E. & S. Districts Asbestos Litig*., 891 F.2d 31, 36-37 (2d Cir. 1989). The foundation of the Federal discretionary function exception is constitutional separation of powers. *See, e.g., In re Joint E. & S. Dists. Asbestos Litig*., 891 F.2d at 35 ("The wellspring of the discretionary function exception is the doctrine of separation of powers."); *McMellon v. United States*, 387 F.3d 329, 341 (4th Cir. 2004) (en banc) ("The Supreme Court has made clear that the discretionary function exception contained in the FTCA is grounded in separation-of-powers concerns."). Thus, the exception applies even where there is a broad waiver of sovereign immunity which contains no explicit reference to a discretionary function exception (e.g., the Suits in Admiralty Act). *Id*.

### B. TVA Is an Executive Branch Government Agency and its Power Program Is Governmental in Nature.

Although the TVA Act's sue-and-be-sued clause permits lawsuits against TVA, that clause did not abrogate TVA's status as an executive branch Government agency. As the Supreme Court explained in *United States Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004), in holding that the Postal Service was not subject to an antitrust suit:

> The sue-and-be-sued clause waives immunity, and makes the Postal Service amenable to suit, as well as to the incidents of judicial process. [Citations omitted.] **While Congress waived the immunity of the Postal Service, Congress did not strip it of its governmental status. The distinction is important.** [*Id*. at 744.]
>
> 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. The statutory instruction that the Postal Service is an establishment "of the executive branch of the Government of the United States" indicates just the contrary. The PRA gives the Postal Service a high degree of independence from other offices of the Government, but it remains part of the Government. [*Id*. at 746.]
>
> Our conclusion is consistent with the nationwide, public responsibilities of the Postal Service. The Postal Service has different goals, obligations, and powers from private corporations. Its goals are not those of private enterprise. The most important difference is that it does not seek profits, but only to break even . . . which is consistent with its public character. . . . Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including . . . the power of eminent domain . . . . [*Id*. at 747.]

*Accord In re Young*, 869 F.2d 158, 159 (2d Cir. 1989) ("Through the 'sue and be sued' clause in the Postal Reorganization Act congress effectively waived sovereign immunity for the postal service, but the waiver does not change the fact that the party being sued is still the federal government.").

TVA's governmental attributes and purposes, including those of its power program, closely mirror those noted in *Flamingo*. Like the Postal Service, TVA has a high degree of independence, but it remains part of the Government. For example, TVA is an "Executive agency" as defined by 5 U.S.C. § 105 (2000), the members of TVA's Board of Directors are appointed by the President, by and with the advice and consent of the Senate (16 U.S.C. § 831a), and TVA Board members may be removed by the President. *See, e.g., Dodd v. TVA*, 770 F.2d 1038, 1040 (Fed. Cir. 1985) ("As a government corporation, 16 U.S.C. §§ 831, 831r, TVA is an agency in the executive branch, 5 U.S.C. § 105 . . . ."); *Morgan v. TVA*, 115 F.2d 990, (6th Cir. 1940) (upholding President's removal of a TVA director); *TVA v. United States*, 51 Fed. Cl. 284, 285 (2001) ("Both TVA and DOE are agencies within the executive branch, the heads of which are subject to presidential removal.").

Like the Postal Service, TVA has eminent domain authority; specifically, TVA has the "power in the name of the United States of America to exercise the right of eminent domain." 16 U.S.C. § 831c(h). And, as shown by the

many published TVA condemnation cases (there are over 100) and the records of Federal district courts in the Tennessee Valley region, TVA has invoked that power in the Federal courts thousands of times over the last seventy years, in the name of the United States, to acquire plant sites and transmission line easements for TVA's constitutionally authorized power program. *See, e.g., United States ex rel. TVA v. An Easement & Right-of-Way Over Two Tracts of Land, Etc*., 246 F. Supp. 263, 270 (W.D. Ky. 1965), *aff'd*, 375 F.2d 120 (6th Cir. 1967).

Legally, "TVA in marketing electricity is disposing of property of the United States under policies laid down by Congress." *Mobil Oil Corp. v. TVA*, 387 F. Supp. 498, 507 n.22 (N.D. Ala. 1974). Under those policies, TVA is required to charge rates for power that will cover TVA's costs and provide a margin for investment in power program assets; but, in setting its rates, TVA is required to avoid seeking profits and to comply with the statutory "objective that power shall be sold at rates as low as are feasible." 16 U.S.C. § 831n-4(f) (2000). In fact, any net proceeds over those reasonably needed for continued operations are required to be paid into the Treasury of the United States. *Id*. § 831y (2000). And in selling power, TVA is required to "give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit." *Id*. § 831i. Thus, TVA's sale of power to industry is a secondary purpose, utilized principally to secure a load factor and revenue

returns which will permit domestic and rural use at the lowest possible rates. *Id*. § 831j (2000).

Under 16 U.S.C. § 831i, "TVA has been vested with express statutory authority to prescribe resale rate schedules for the sale of power by its distributors, and that . . . discretion delegated to it by Congress . . . is not subject to judicial review." *Allen v. Elec. Power Bd. of Metro. Gov't*, 422 F. Supp. 4, 6 (M.D. Tenn. 1976). And, under the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1980), TVA functions as the "State regulatory authority" as to those distributors over which it has ratemaking authority. *See* 16 U.S.C. § 2602(17) (2000).

In short, TVA's attributes and purposes, including the attributes and purposes of its power program, are those of government and not those of profit-seeking private enterprise. While TVA attempts to conduct its programs like a "business," TVA does so to accomplish its public purposes at the lowest possible costs and to provide power at the lowest possible rates, not to make profits for private shareholders.

### C. There Is no Governmental Versus Proprietary Distinction Under Federal Discretionary Function Law.

Contrary to the rule often applied under state law to state and local government agencies, the authorized activities of Federal instrumentalities through which the Federal government acts are wholly governmental and cannot be parsed

into governmental and non-governmental categories. And this is true even as to sue-and-be-sued agencies involved in activities which have a private commercial analogs (e.g., lending activities, insurance activities). The Supreme Court's holdings on this point are clear and consistent. For example, in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939), which involved a sue-and-be-sued agency involved in lending activities, the Court stated:

> [W]hen the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions . . . .

Similarly, in *Pittman v. Home Owners' Loan Corp*., 308 U.S. 21, 32 (1939), which involved a sue-and-be-sued agency involved in lending activities, the Court reiterated:

> [T]he activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions . . . .

And in *Fed. Land Bank v. Bismarck Lumber Co*., 314 U.S. 95, 102 (1941), which involved a sue-and-be-sued agency involved in lending activities, the Court again held:

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. It also follows that when Congress constitutionally creates a corporation through which the federal

> government lawfully acts, the activities of such corporation are governmental. [Internal citation omitted.]

In *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947), in holding that apparent authority did not bind a sue-and-be-sued agency engaged in insurance activities, the Court stated:

> [W]e assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.

In *Fed. Land Bank v. Bd. of County Comm'rs*, 368 U.S. 146, 150-51 (1961), which involved a sue-and-be-sued agency involved in lending activities, the Court summarized its prior holdings:

> **Legitimate activities of governments are sometimes classified as "governmental" or "proprietary"; however, our decisions have made it clear that the Federal Government performs no "proprietary" functions. If the enabling Act is constitutional and if the instrumentality's activity is within the authority granted by the Act, a governmental function is being performed.**

Those Supreme Court holdings are directly applicable to cases involving the tort liability of Federal agencies. As the Court stated in *Garcia v. San Antonio Metro. Transit Auth*., 469 U.S. 528, 545 (1985), in rejecting a

governmental-nongovernmental distinction for purposes of applying the Fair Labor Standards Act to state and local governments:

> The goal of identifying "uniquely" governmental functions . . . has been rejected by the Court in the field of government tort liability in part because the notion of a "uniquely" governmental function is unmanageable.

As indicated in *Garcia*, the Supreme Court has consistently refused to read a governmental-nongovernmental distinction into the law of Government tort liability. For example, the leading discretionary function case of *Dalehite v. United States*, 346 U.S. 15 (1953), involved alleged Government negligence in activities which were common industrial activities—the manufacture and shipping of fertilizer. The majority opinion held the discretionary function exception applicable; the dissent would have held the discretionary function exception inapplicable on the theory that the challenged conduct "involved actions akin to those of a private manufacturer, contractor, or shipper." *Id*. at 60. Subsequent Supreme Court decisions in tort cases have reaffirmed the point. *See Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (refusing to read state law governmental-nongovernmental distinction into Federal law as a basis for determining the Government's tort liability, declaring the distinction to be "a rule of law that is inherently unsound"); *United States v. Varig Airlines*, 467 U.S. 797, 812 (1984) (reaffirming *Indian Towing's* refusal to be drawn into the

governmental-nongovernmental "quagmire" for purposes of determining the Government's tort liability).[16]

### D. The Discretionary Function Exception Applies to TVA's Power Program Activities.

Because TVA is an executive branch agency and all its authorized functions are governmental, the discretionary function exception applies to cases arising out of TVA's power program. *Edwards v. TVA*, 255 F.3d 318 (6th Cir. 2001), confirms the exception's applicability to TVA power program activities. In *Edwards*, a fisherman drowned when he slipped and fell "into the 'swirling water and current' created by the discharge of the water through [Fort Loudoun] dam's hydroelectric turbines." *Id*. at 320. Relying on the discretionary function

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**16** In accordance with the above Supreme Court decisions, many courts in cases arising out of TVA's power program have recognized that TVA is wholly governmental in nature. *See, e.g., Quality Tech. Co. v. Stone & Webster Eng'g*, 745 F. Supp. 1331, 1339 (E.D. Tenn. 1989) ("As has been declared by many courts, the TVA is a federal government corporation — 'an agency performing wholly governmental services, and is an instrumentality of the United States.'"), *aff'd*, 909 F.2d 1484 (6th Cir. 1990) (table); *PRI Pipe Supports v. TVA*, 494 F. Supp. 974, 975 (N.D. Miss. 1980) ("TVA is an agency performing wholly governmental services . . . ."); *TVA v. U. S. Carbon Prods.*, *Inc*., 427 F. Supp. 474, 477 (E.D. Ill. 1976) ("TVA is . . . an agency performing wholly governmental services."); *TVA v. Mason Coal, Inc*., 384 F. Supp. 1107, 1115 (E.D. Tenn. 1974) ("TVA is an 'arm of the [federal] government' and an agency performing wholly governmental services.") (alteration in original), *aff'd*, 513 F.2d 632 (6th Cir. 1975) (table); *Knickerbocker v. TVA*, 348 F. Supp. 230, 232 (E.D. Ill. 1972) ("TVA is . . . an agency performing wholly governmental service."); *Ramsey v. United Mine Workers of Am*., 27 F.R.D. 423, 425 (E.D. Tenn. 1961) ("Actually the TVA is the United States in action, 'an arm of the government', and an agency performing wholly governmental service.").

exception, the Sixth Circuit held that TVA could not be held liable and thus squarely applied the exception to a tort case arising directly out of TVA's power production activities. *Id*. at 325.[17]

*Queen v. TVA*, 689 F.2d 80 (6th Cir. 1982), also illustrates the point. The plaintiff in *Queen* manufactured and marketed a device that allegedly would significantly reduce electric bills. In response, TVA informed consumers in the TVA service area that the device would not result in any significant reduction in electric bills. Plaintiff sued the TVA power program engineers who disseminated the information and TVA for libel and slander. The TVA engineers were, of course, Federal employees,[18] but Plaintiff argued that Federal official immunity should not apply to them because they "were performing proprietary rather than sovereign functions, because their actions arose out of TVA's role as a utility." *Id*.

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[17] Cases applying the discretionary function exception to the power programs of other Federal power marketing agencies include: *Richardson v. United States*, 943 F.2d 1107 (9th Cir. 1991) (applying the exception to the electric power activities of the Bonneville Power Administration); *Mitchell v. United States*, 787 F.2d 466 (9th Cir. 1986) (same); *Mellott v. United States*, 808 F. Supp. 746 (D. Mont. 1992) (applying the exception to the electric power activities of the Western Area Power Administration).

[18] Because TVA is an agency of the United States, its employees are Federal employees. *See, e.g., Jones v. TVA*, 948 F.2d 258, 262 (6th Cir. 1991) ("Jones was a federal employee during his tenure with TVA."); *Hill v. TVA*, 842 F. Supp. 1413, 1416 n.2 (N.D. Ala. 1993) ("TVA employees are regarded as federal employees in the excepted service under [the Civil Service Reform Act].").

at 83. The court rejected the argument, holding the TVA engineers were entitled to Federal official immunity "based on acts within their discretionary authority." *Id*. at 83.[19]

As to TVA, the *Queen* court also found no liability, stating that "in certain limited situations the TVA is exempt from liability arising out of the exercise of certain wholly governmental functions." *Id*. at 86. (The Sixth Circuit subsequently clarified that "[t]his nonliability doctrine is applied when the subject governmental function is discretionary." *Edwards v. TVA*, 255 F.3d at 322; internal quotations omitted.) Thus, the Sixth Circuit in *Queen* necessarily concluded that TVA's power program activities at issue there were "wholly governmental functions."

In the district court, Plaintiffs cited six TVA cases as supporting Plaintiffs' assertion that a governmental-nongovernmental distinction should be used to deny application of the exception. The **holdings** of those cases do not

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**19** Other cases finding that TVA power program employees were involved in discretionary functions for purposes of Federal official immunity include *Johns v. Pettibone Corp*., 843 F.2d 464, 466-67 (11th Cir. 1988) (affirming district court holding that the defendant TVA employees, six managers and supervisors in power production and power construction, were entitled to Federal official immunity because their challenged conduct was "discretionary"), and *Quality Tech. Co. v. Stone & Webster Eng'g. Co.*, 745 F. Supp. 1331, 1343 (E.D. Tenn. 1989) (holding TVA's manager of nuclear power to be entitled to Federal official immunity because his challenged actions were "discretionary"), *aff'd*, 909 F.2d 1484 (6th Cir. 1990) (table).

support Plaintiffs' position,[20] and in any event, Plaintiffs' reliance on those cases is misplaced because, as discussed above, the governmental-nongovernmental

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[20] *Ky. Hoggs, Inc. v. Wagner*, No. 80-3213, 1981 U.S. App. LEXIS 11605 (6th Cir. July 9, 1981), which was asserted by Plaintiffs to be "directly on point," involved sulfur dioxide emissions from a TVA coal-fired plant causing damage to soybean crops. It is not "on point." **The discretionary function exception was not implicated because it was undisputed that TVA's emissions were in violation of Clean Air Act standards applicable to TVA.** (TVA did not appeal the district court judgment against it; the Sixth Circuit decision cited by Plaintiffs involved the appeal of a codefendant in the case, not an appeal by TVA.)

*Grant v. TVA*, 49 F. Supp. 564 (E.D. Tenn. 1942), involved crop damage caused by flood waters and the third claim of the complaint alleged the flooding resulted from TVA's accumulation of waters to generate electricity. The court held that "**assuming** that there is a right to sue on the third claim because it concerns the defendant's commercial activities, it is my judgment that [TVA's] motion for summary judgment on this claim should be sustained. . . . [T]here is no material evidence to be submitted to a jury on the third claim." *Id*. at 566.

*Adams v. TVA*, 254 F. Supp. 78 (E.D. Tenn. 1965), involved blasting damages resulting from steam plant construction. The court did **not** hold that the discretionary function exception was inapplicable because power program activities were involved; rather, **the court considered the discretionary function exception on its merits and held that "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*."** *Id*. at 80.

*Latch v. TVA*, 312 F. Supp. 1069 (N.D. Miss. 1970), was an electrocution case in which the issue was the proper basis of jurisdiction. In the process of finding jurisdiction, the court stated that TVA's sue-and-be-sued clause "relinquished any sovereign immunity which TVA might have had as a government agency or corporation for proprietary functions . . . ." *Id*. at 1072. The *Latch* opinion did not consider whether the discretionary function exception might be applicable; it simply stands for the unremarkable point that TVA is amenable to suit in tort.

distinction advocated by Plaintiffs is directly contrary to controlling Supreme Court precedents.

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(. . . continued)

*Brewer v. Sheco Constr. Co*., 327 F. Supp. 1017 (W.D. Ky. 1971), involved blasting damages resulting from electrical substation construction. **The court stated that "[e]ven though several cases attempt to distinguish between governmental and proprietary type functions [citation omitted], this court believes that it is not necessary to define such a dichotomy** in this case, but only necessary to state that the T.V.A. is not immune from a suit of this nature [strict liability], nor is such a suit contrary to public policy." *Id*. at 1019. The case did not involve the discretionary function exception.

*Smith v. TVA*, 436 F. Supp. 151 (E.D. Tenn. 1977), involved blasting damages resulting from construction of a hydroelectric generating plant. The court held that plaintiff's strict liability and continuing trespass counts were maintainable (since TVA is subject to suit), but that plaintiff's nuisance count was not: "Since the TVA project here involved is being constructed under legislative authority, the construction of the project would not constitute a nuisance. Therefore, the continuing nuisance count will be dismissed." *Id*. at 154.

## CONCLUSION

For the reasons stated and upon the authorities cited, the judgment of the district court should be affirmed as to TVA.

Respectfully submitted,

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Maureen H. Dunn
General Counsel

Harriet A. Cooper
Assistant General Counsel

Office of the General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, Tennessee 37902-1401
Facsimile 865-632-6718

Edwin W. Small
Assistant General Counsel
Telephone 865-632-3021

Attorneys for Defendant-Appellee
Tennessee Valley Authority

003756185

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Edwin W. Small
Attorney for Defendant-Appellee
Tennessee Valley Authority

Dated: February 20, 2006

## CERTIFICATE OF SERVICE

I certify that on February 20, 2006, the Brief of Defendant-Appellee Tennessee Valley Authority was served on all parties by mailing through the United States Postal Service two copies of the brief to each of the mailing addresses shown on the following list, and by emailing a copy of the brief in portable document format to each of the email addresses shown on the following list.

_____

Edwin W. Small
Attorney for Defendant-Appellee
Tennessee Valley Authority

APPELLANTS

State of Connecticut
Matthew I. Levine, Esq.
Assistant Attorney General
P.O. Box 120
Hartford, CT 06161-0120
matthew.levine@po.state.ct.us

State of New York
Simon Wynn, Esq.
Assistant Attorney General
Environmental Protection Bureau
120 Broadway
New York, NY 10271
Simon.Wynn@oag.state.ny.us

State of California
Ken Alex, Esq.
Deputy Attorney General
1300 I Street
Sacramento, CA 95814
ken.alex@doj.ca.gov

State of Iowa
David K. Sheridan, Esq,
Assistant Attorney General
Lucas State Office Bldg.
321 E. 12th Street, Room 018
Des Moines, IA 50319
dsherid@ag.state.ia.us

State of New Jersey
Lisa J. Morelli, Esq.
Deputy Attorney General
P.O. Box 93
Hughes Justice Complex
Trenton, NJ 08625
lisa.morelli@law.dol.lps.state.nj.us

State of Rhode Island
Michael Rubin, Esq.
Assistant Attorney General
150 South Main Street
Providence, RI 02903
mrubin@riag.state.ri.us

State of Vermont
Erick Titrud, Esq.
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
etitrud@atg.state.vt.us

State of Wisconsin
Thomas J. Dawson, Esq.
Assistant Attorney General
17 West Main Street
Madison, WI 53707-7857
dawsonTJ@doj.state.wi.us

City of New York
Susan M. Kath, Esq.
Assistant Corporation Counsel
100 Church Street, Room 6-145
New York, NY 10007
skath@law.nyc.gov

APPELLEES

American Electric Power Co., Inc.
American Electric Power Services
Cinergy Corp.
Steven M. Bierman, Esq.
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
sbierman@sidley.com
jguerra@sidley.com
amacbeth@sidley.com

Southern Company
Shawn Patrick Regan, Esq.
Hunton & Williams LLP
200 Park Avenue, 52nd Floor
New York, NY 10166
sregan@hunton.com
nfichthorn@hunton.com
bbrownell@hunton.com
awood@hunton.com

Xcel Energy Inc.
Thomas E. Fennell, Esq.
Jones Day
222 E. 41st Street
New York, NY 10017-6702
tefennel@jonesday.com
mlrice@jonesday.com
jastrazzeri@jonesday.com

AMICI CURIAE

Alaska Inter-Tribal Council
Akiak Native Community
Ronald A. Shems, Esq.
Shems, Dunkiel, Kassel & Saunders
9 College Street
Burlington, VT 05401
rshems@sdkslaw.com

Unions for Jobs and the Environment
Lisa M. Jaeger, Esq.
Bracewell & Giuliani, LLP
2000 K Street, NW, Ste. 500
Washington, DC 20006
lisa.jaeger@bracewellgiuliani.com

**ANTI-VIRUS CERTIFICATION FORM**
See Second Circuit Local Rule 32(a)(1)(E)

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_____
Edwin W. Small
Attorney for Defendant-Appellee
Tennessee Valley Authority

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