No. 22-

IN THE

Supreme Court of the United States

DAVID HOLBROOK,

Petitioner,

v.

TENNESSEE VALLEY AUTHORITY;
BVU AUTHORITY,

Defendants .

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARK T. HURT
THE LAW OFFICES OF
MARK T. HURT
159 West Main Street
Abingdon, VA 24210
(276) 623-0808

MARTIN BIENSTOCK
Counsel of Record
BIENSTOCK PLLC
1629 K. Street NW, Suite 300
Washington, DC 20006
(202) 908-6600
mbienstock@bienstockpllc.com

Counsel for Petitioners

317072

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The Tennessee Valley Authority ("TVA") is an independent government corporation that leverages government power and resources to operate commercially, as an electric power company. Its enabling statute provides that its electricity plants are to be primarily "for the benefit of. . . consumers." 16 U.S.C. § 831j. "[A]ccordingly," Congress instructed:

> [S]ale to and use by industry [of TVA power] shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates.... (*Id.*)

About a decade ago, TVA allegedly moved to a private-sector model, architecting a structure in which, contra the statute, load factors and revenue returns from sales to industry are *not* used to benefit consumers. Petitioner filed suit asserting claims for breach-of-contract, illegal-exaction and under the APA. The Fourth Circuit upheld dismissal of Petitioner's complaint, applying *inter alia* a new judicial-abstention doctrine which abjures judicial review of discretionary agency decision-making even where Congress provided a meaningful standard to apply.

The question presented is:

Do federal courts have authority to review TVA's fidelity to its enabling statute, or is TVA's rate-setting excepted from all judicial review even when TVA sets rates in deliberate disregard of Congress' clearly expressed policy directive?

PARTIES TO THE PROCEEDING

Petitioner is David Holbrook. Petitioner was the plaintiff below.

Respondents are Tennessee Valley Authority and BVU Authority. Respondents were defendants below.

RELATED PROCEEDINGS

United States District Court (W.D.V.A.)

David Holbrook v. Tennessee Valley Authority and BVU Authority, No. 1:20-cv-00025, March 19, 2021 (order granting motion to dismiss)

United States Court of Appeals (Fourth Circuit)

David Holbrook v. Tennessee Valley Authority and BVU Authority, No. 21-1415, September 7, 2022 (Opinion)

TABLE OF CONTENTS

Table of Contents

Table of Contents

Page

Table of Contents

Table of Contents

Page

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Statutes and Other Authorities

Page

INTRODUCTION

The TVA is a unique federal agency. Acting outside of the direct control of the President or Congress, it utilizes sovereign power, regulatory authority and government subsidy in support of its commercial electric-power operations. It holds more than $50 billion in public assets, which it uses to generate and distribute more than $10 billion in electricity each year in service of more than 10 million customers.

Congress has instructed the TVA on how to allocate the benefits of the substantial public resources and authority with which it is endowed. The second sentence of Section 831j speaks directly to the question, providing as a matter of policy that the primary purpose of TVA power is to benefit consumers. 16 U.S.C. § 831j. The statute then requires TVA to implement this policy by utilizing sales to industry to generate revenue returns and load factors that will enable TVA to provide consumers with the lowest possible rates. *Id.*

For most of its existence, TVA apparently complied with these Congressional directives. It even included the relevant statutory purposes in its form contracts with local distributors, and it made consumers the express, intended beneficiaries of those contracts. Then, about a decade ago, amidst discussions of TVA privatization, TVA rejected its founding directive in favor of its own policy. It determined that sales to industry no longer should be used for the purpose of reducing consumer rates. It implemented rate changes which reduced industrial rates and correspondingly increased consumer rates, so that today its competitors – who do not have the same statutory

requirement to benefit consumers – treat consumers relatively more favorably than does the TVA.

Petitioner is a consumer who pays rates set by the TVA. He filed suit under the Administrative Procedures Act ("APA"), for breach of contract, and for illegal exaction, alleging that TVA failed to consider and faithfully apply the governing statute in setting his rates. TVA's rate-setting decisions are not otherwise subject to review (or even scrutiny) in any other forum.

Under this Court's well-established jurisprudence, the APA requires judicial review of TVA's rate-setting activities so long as Congress has supplied a meaningful standard against which to judge its exercise of discretion. Since the second sentence of Section 831j identifies both a policy and methodology that TVA must apply when setting rates, courts are able to review TVA's rate-setting activities to ensure they comply with that section. Courts regularly review agency rate setting, and TVA rate setting does not involve the type of "rare circumstances," such as enforcement decisions, Congressional appropriations, or national security, that might preclude review.

Nonetheless, in response to Petitioner's suit, the Fourth Circuit coppered up a newly designed abstention doctrine, not argued by the parties below or the District Court. Under this doctrine, a "presumption of unreviewability" attaches to certain agency decisions, based on a variety of factors, including primarily pre-APA lower court decisions, but without regard to modern precedent and to whether the agency function at issue is of the type readily reviewed by courts in the modern era. For this class of "presumptively unreviewable" agency

decisions, courts may not review an agency's exercise of discretion even where Congress has supplied a meaningful standard to apply -- the exact opposite of the "meaningful standard" test applied under this Court's precedents. Only if mandamus lies will the Fourth Circuit allow review.

Applying its newly formulated test, the Fourth Circuit found that lower court cases against the TVA, involving other claims and issues (only one of which, an unreported conclusion of law, had preceded enactment of the APA), combined with the "complexity" of rate setting, had created a presumption of unreviewability. It then evaluated Section 831j not for whether it contained a meaningful standard to apply, but for a command issued in the form of "TVA shall do 'x'." Faced with a statute that did in fact use the term "shall" (twice), it explained that under its presumption of unreviewability, not even a statutory provision requiring that TVA "shall have this goal [in setting rates]" would allow for judicial review. It therefore concluded that TVA rate-setting was an unreviewable agency function.

The Fourth Circuit also dismissed Holbrook's breach-of-contract claim and illegal-exaction claim. As to the breach-of-contract claim, it found the claim precluded under *Astra USA, Inc. v. Santa Clara Cnty., Cal.*, 563 U.S. 110 (2011), even though *Astra* had prohibited claims against non-government contractors, not government entities, and explicitly had left open the question whether an agency might expressly grant beneficiary status to a third-party. It dismissed the illegal exaction claim because, it erroneously concluded, an unlawful fee never could be an "exaction." Both conclusions conflict with decisions of the Federal Circuit.

The Fourth Circuit therefore dismissed Holbrook's claims in their entirety, leaving him with no forum in which to obtain review of TVA's unlawful actions in setting rates, even though Congress has not exempted either the TVA or its rate setting from federal-court jurisdiction.

As this Court previously has recognized, TVA today functions primarily as a government corporation providing a commercial service. Certiorari is necessary to ensure that TVA is held accountable for allocating the benefits of its $50 billion operation among its 10 million customers in accordance with the explicit directions of Congress. TVA otherwise will be entirely unaccountable: it cannot be held accountable in any other judicial or administrative forum, and has no shareholders to which its Board is answerable.

Recent decisions of this Court have highlighted the dangers to liberty that may rise when federal agencies assume powers in excess of those permitted under our Constitutional framework. Here, the Fourth Circuit's ruling permits TVA to leverage sovereign power, government subsidies, and regulatory authority on behalf of a commercial enterprise without being subject to judicial review for how it allocates the benefits of this aggregation of power. Certiorari is necessary so the Court can identify the Constitutional limits of legislative power that may be delegated to entities such as the TVA, and the role that Courts must play in ensuring their compliance with such limits.

OPINIONS BELOW

The opinion of the court of appeals is reported at 48 F.4th 282 and reprinted in the appendix at Pet. App. la. The

decision of the district court is reported at 527 F. Supp. 3d 853 and reprinted at Pet. App. 31a.

JURISDICTION

The court of appeals rendered its decision on September 7, 2022. Pet. App. 1a. On November 14, 2022, by order of the Chief Justice, the time for filing this petition was extended to and including January 5, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of 16 U.S.C. §§ 831i – 831j are reproduced at Pet. App. 42a. The relevant portions read as follows:

16 U.S.C.A. § 831i (TVA Act § 10)

> [T]he Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter . . ..

16 U.S.C.A. § 831j (TVA Act § 11)

> Th[e] policy is . . . declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and

> accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity.

STATEMENT OF THE CASE

FACTS

A. The TVA Is an Independent Agency that Congress Subjected to Court Review.

On April 10, 1933, Franklin Delano Roosevelt sent a "Message to Congress Suggesting the Tennessee Valley Authority." The Message asked Congress to create the TVA as "a corporation clothed with the power of Government but possessed of the flexibility and initiative of a private enterprise." *Id.*

Congress obliged. To foster TVA independence, the TVA Act included provisions establishing the TVA as independent of control by the President. It provided for TVA to be governed by an independent Board of Directors (16 U.S.C. § 831a), and exempted it from a broad range of laws otherwise applicable to federal agencies. *See N. Carolina ex rel. Cooper v. Tennessee Valley Auth.*, 515 F.3d 344, 349 (4th Cir. 2008) (structural and statutory indicia of TVA independence justify subjecting it to court review).

TVA's board and executive long maintained the goal of retaining independence from Congressional control. *See* McCarthy, Keeping TVA Unshackled--A Continuing Struggle, 49 Tenn. L. Rev. 699 (1982) (TVA's former general counsel describing efforts to maintain TVA autonomy). Over time, this independence grew. In 1959, Congress provided the TVA with authority to issue its own bonds with which it could fund power-generating programs, rather than with congressional appropriations, thus freeing TVA of control by Congress through annual funding. TVA Act § 15d, 16 U.S.C. § 831n–4. In 2004, the TVA Act was amended to authorize the part-time Board (whose members are nominated by the President and confirmed by the Senate) to appoint a chief executive officer. TVA Act § 2, 16 U.S.C. § 831a.

The TVA operates as an agency so independent of presidential control that it takes positions in court that are adverse to the United States, and routinely refuses representation by the Attorney General. *See, e.g., Tenn. Valley Auth. v. EPA*, 278 F.3d 1184 (11th Cir. 2002); *Tenn. Valley Auth. v. United States*, 13 Cl. Ct. 692 (1987). Unlike other government officers, TVA's CEO and other C-Suite executives are paid millions of dollars each in salary and benefits each year, reflecting their independence from the Executive branch, and their commercial roles. TVA 2021-22 Form 10K ("Form 10-K") at 158.

While Congress granted TVA substantial independence and authority, it fully recognized that TVA's commercial operations would be subject to Court review. Accordingly, the TVA Act included a sue-and-be-sued clause, allowing it to be sued in its corporate name. TVA Act § 4, 16 U.S.C. § 831c(b). A decade later, when Congress enacted the

Federal Tort Claims Act of 1946, Congress carved out the TVA from the immunity that it provided to other agencies. *See Thacker v. Tennessee Valley Auth.,* 139 S. Ct. 1435, 1439–40 (2019).

B. The TVA Utilizes Government Power and Resources to Operate a Commercial Electricity Company.

The TVA Act authorized the TVA to engage in a wide range of activities. *Thacker*, 139 S. Ct. at 1439. "[O]ver the years, as it completed other projects, the TVA devoted more and more of its efforts to producing and selling electric power." *Id.* Today, the TVA is a $52 billion corporation. Form10-K at 90. Its electricity sales generate more than $10 billion in annual revenues, which constitute 99% of its annual budget. Form 10-K at 92. It is the third-largest electricity generator in the nation. Form 10-K at 165.

While the TVA operates primarily as a commercial entity, it nevertheless enjoys the power and benefits of operating as a federal agency. *See* Glozer, *Time for the Sun to set on the Tennessee Valley Authority*, 2904 Heritage Foundation Backgrounder ("Heritage Backgrounder") (May 6, 2014), at 4-7. It enjoys an effective, ongoing federal subsidy of billions of dollars; is exempt from federal and state taxes; and is exempt from a host of federal, state and local laws, from the civil service laws to antitrust. *Id.* TVA also is exempt from State laws regulating the retail sale of electricity to local businesses and consumers. *Id.* at 7. *See also* Form 10-K at 59.

C. Congress Specifically Instructed the TVA on How to Set Electricity Rates.

The second sentence of Section 831j specifically directs the TVA on how it is to allocate the benefits of the electricity-generating plants that Congress authorized it to operate. *Id.* Section 831i, a different provision, limits TVA's resale rate authority to setting rates that are intended to carry out these purposes. TVA is an instrumentality of Congressional will; Congress never has revoked this crucial functional responsibility that it directed to the TVA, or authorized it to set resale rates other than in fulfillment of this responsibility.

1. The Second Sentence of Section 831j (Sale to and Use by Industry)

When creating the TVA, Congress authorized it not only to sell power for the benefit of consumers but also to sell it for use by industry. It specified, however, that, as a matter of policy, TVA projects were intended primarily for the benefit of domestic consumers, and that sales to industry were to be only a secondary purpose. Accordingly, the TVA Act made clear that sales to and use by industry were to be utilized to permit domestic use at the lowest possible rates.

Specifically, the second sentence of Section 831j specifies that:

> [The] policy is . . . declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the

> domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity.

16 U.S.C. § 831j. In other words, TVA can and should provide commercial power too, keeping its eye on the objective of providing power to domestic and rural users "at the lowest possible rates."

2. Section 831i (Limited Authority to Set Resale Rates)

Section 831i of the TVA Act includes provisions authorizing the TVA's regulation of wholesale transactions and its setting of resale rates. As to sales at wholesale, Section 831i authorizes the TVA "to make such rules and regulations. . . as in its judgment may be just and equitable." 16 U.S.C. § 831i.

In contrast, as to resale rates, that section authorizes TVA to provide "for such rules and regulations as in its judgment may be necessary or desirable *for carrying out the purposes of this Act. Id.* (emphasis added).

D. The TVA Entered a Contract with Holbrook's Local Power Company Expressly Making Consumers the Third-Party Beneficiaries of the Contract.

The TVA sells electricity to consumers like Holbrook by entering form contracts with local power companies, who then sell electricity to consumers at retail. JA 105-06; *see also* TVA-BVU Power Contract, Dkt. No. 23, Ex.5 ("TVA-BVU Power Contract"). As permitted under Section 831i, the form contacts authorize TVA to set the local power companies' resale rates, in conformance with the TVA's statutory purposes. JA 87-88.

The TVA's form contracts with local power companies expressly provide that the contracts are "primarily for the benefit of the consumers of electricity." JA 10; TVA-BVU Power Contract at 1. The form contracts recognize this provision as "of the essence" of the contract. *Id.*

E. The TVA Rejected Congress' Rate Setting Directives in Favor of Its Own Policy.

TVA makes changes to its retail rates using two separate processes. It uses "Rate Adjustments" to change the amount of revenues that are to be generated; and it uses "Rate Changes" to change the allocation of costs among different classes of customers, such as among consumers and industry. JA 171. Rate Changes are designed by TVA to be revenue neutral. *Id.* By segregating the process of Rate Changes from the process of Rate Adjustments, TVA isolates its decisions concerning the allocation of rates among consumers and industry from broader questions concerning its need for sufficient revenues.

Following the 2004 authorization to hire a full-time CEO, the TVA, of its own initiative, undertook a significant project to alter its own mission in selling electricity to consumers. As a result, for the past dozen years TVA has eschewed Section 831j in setting rates and rendered it nugatory. This occurred around the same time the Office of Management and Budget performed "a strategic review" of the TVA's role, including "the possible divestiture of TVA, in part or as a whole." *See* Congressional Research Services, *Privatizing the Tennessee Valley Authority: Options and Issues* (July 29, 2013).

By 2010, TVA believed that it had unreviewable rate-setting authority.[1] JA 298. Acting accordingly, and in the spirit of a for-profit corporation to which it was being compared, TVA adopted a policy which gave no weight at all to the policy directives of Section 831j.[2] JA 114, 170, 187, 276. Over the next decade, it repeatedly made Rate Changes designed to eliminate the use of load factors

1. Over time, TVA became aware that various courts had said that TVA rate-setting was unreviewable – though the more careful opinions typically issued the caveat that review would be available if TVA was alleged to violate "the purposes of [the TVA] Act." *See, e.g., Ferguson v. Electric Power Bd. of Chattanooga*, 378 F. Supp. 787, 789 (E.D. Tenn. 1974) ("*In the absence of a clear violation of the 'purposes of this Act'* the matter of rate setting under the Tennessee Valley Authority Act is not subject to judicial review.") (emphasis added). None of the cases previously stating that TVA rate setting was unreviewable had involved the allegations at issue here, likely because prior to 2010 TVA complied with the requirements of Section 831j.

2. While TVA rate setting takes place in private, information about its practices is provided in environmental assessments it produces under the EPA Act.

and revenue returns generated from sales to and use by industry for the benefit of domestic consumers. *Id.*

By the time this lawsuit was filed, the transformation was complete. As a result of TVA's new policy, load factors and revenue returns from sales to industrial users no longer are used to reduce rates for domestic consumers. To the contrary, TVA's industrial rates are the very lowest among 17 regional power companies, while its residential rates are ranked only seventh best competitively. *See* Lazard Report to the Tennessee Valley Authority, February 7, 2021, at 36-37 (available at https://perma.cc/ZZ5J-B3C8) (Lazard Report).

F. Holbrook Suffered Direct Injury as a Result of TVA's Setting Rates in Derogation of Congress' Instructions.

Petitioner Holbrook is a retail consumer of TVA-generated electricity. JA 119. As a result of TVA's failure to comply with Section 831j, Holbrook paid and continues to pay inflated electricity bills each month. *Id.*

G. The Proceedings Below.

Holbrook filed suit in the Western District of Virginia. He sought relief for breach of contract and unlawful exaction, and under the APA for review of the TVA's rate-setting in violation of its statutory purposes. JA 119. TVA moved to dismiss, arguing that federal courts lack jurisdiction to review TVA rate-setting activities, that such cases are not justiciable, and that in any event federal courts should abstain from review. The district court dismissed on that ground, relying on the Sixth

Circuit's opinion in *McCarthy v. Middle Tennessee Elec. Membership Corp.*, 466 F.3d 399, 407 (6th Cir. 2006) (APA's "prohibition on judicial review" of TVA's rate setting provides TVA unreviewable power to preempt State laws through use of contract terms and conditions). Pet. App. 32a.

The Fourth Circuit affirmed the dismissal, but for reasons different from the District Court and according to a legal theory not argued by the TVA. It found that the APA applied generally to Holbrook's claim. Pet. App. 3a, n.1. But, faced with a statute that clearly provided "law to apply" (*see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); a recalcitrant agency determined to ignore that law; and, perhaps, a New Deal pricing policy it considered outdated (*see* Pet. App. 22a, n.13), the court below devised and applied a new test to govern when a matter is unreviewable because committed to agency discretion under APA Section 701(a)(2), in service of insulating TVA from court review. Pet. App. 10a-14a.

To craft this new test, it first acknowledged that "[e]arly cases" used a "no law to apply" test drawn from the APA's legislative history to determine when a court should refrain from reviewing discretionary agency decisions. Pet. App. 12a. It then asserted that because this test is "so difficult to meet," this Court "often takes a different approach," that operates "more like a common-law analysis than a task of statutory construction." Pet. App. 12a-13a.

It next devised a new, two-part test that does not look at all to whether the statute at issue contains a meaningful standard for the exercise of agency discretion

that courts might apply. Pet. App. 14a. Instead, under the newly devised test, a "presumption of unreviewability" may derive from multiple factors, including lower court opinions and the "complexity" of agency decision-making. Pet. App. 14a-18a, 21a. At this stage, rather than look to the nature of the agency function at issue to determine whether it is susceptible to review under this Court's recent precedents and modern practices, the court is to look primarily at case law decided prior to enactment of the APA in 1946. If the court finds support for such a presumption, then the agency is not subject to court review even if it has acted arbitrarily and capriciously or abused its discretion, unless Congress has issued a command to the agency in a form suitable for enforcement through an order of mandamus. Pet. App. 22a.

The Fourth Circuit applied this new-found test to Holbrook's claim. It found first that TVA rate-setting was presumptively unreviewable because other lower courts had said so, even though those cases did not involve challenges to TVA's failure to comply with the rate setting directives of Section 831j. *Id.* It supported its conclusion by pointing to a smattering of older cases, without acknowledging that in the modern era, rate-setting issues routinely are subject to judicial review, and without identifying a clear rationale for why TVA rate-setting should be presumptively unreviewable.

It then found that Section 831j did not contain a command of the type that could overcome the newly fashioned presumption against review. *Id.* In reaching its conclusion, it did not take account of Section 831i, which cabined TVA's resale authority by limiting it to setting resale rates for "carrying out the purposes of [the Act];"

or the policy directive in Section 831j that TVA projects were intended for the "benefit of . . . consumers." It also was undeterred by Congress' use of the term "shall," or the requirements that TVA utilize sales to industry to generate load factors and revenue returns, because in its view a Congressional command that "the agency shall have this goal [in setting rates]" is an insufficient basis to require Court review under Section 701(a)(2). Pet. App. 24a, n.14. It concluded that because the statute lacked the requisite command, TVA's actions in setting rates in derogation of Congress' instructions was unreviewable. Pet. App. 25a, 29a-30a.

The Fourth Circuit's analysis did not evaluate whether Section 831j supplies law to apply, as is required under this Court's "meaningful standard" test, or provide a reasoned explanation (outside formulaic application of its newly created common-law test) for why judicial review is not available to determine whether TVA complied with the law when performing its core remaining function in setting rates, when courts decide properly presented cases involving rate-setting activities all the time.

The Fourth Circuit also dismissed Holbrook's breach-of-contract and illegal-exaction claims, the former on the basis that *Astra* prohibits third-party beneficiary claims against the government, and the latter because, it concluded, an unlawful fee is not an exaction. Both conclusions conflict with recent decisions of the Federal Circuit.

The Fourth Circuit opinion affirmed dismissal of Holbrook's complaint, and established TVA rate-setting as an agency function entirely exempt from judicial review.

REASONS FOR GRANTING THE PETITION

POINT I

CERTIORARI IS NECESSARY BECAUSE THE FOURTH CIRCUIT'S REFUSAL TO REQUIRE JUDICIAL REVIEW OF TVA'S ALLOCATION OF RATES IN DEROGATION OF CONGRESS' INSTRUCTIONS PRESENTS AN ISSUE OF EXTRAORDINARY IMPORTANCE AFFECTING THE PRIMARY PURPOSE OF A SIGNIFICANT GOVERNMENT AGENCY.

A. Petitioner's Action Is the Only Process Available for Obtaining Court Review of TVA's Compliance with Congress' Rate Setting Directives.

TVA does not set its resale rates through notice-and-comment or formal rulemaking. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978). Its rates aren't subject to an individual "adjudication" under APA Section 554. Its resale rates are not subject to State law utility regulations. *See* Heritage Backgrounder at 4-7. Nor is there some other forum upon which Congress conferred exclusive jurisdiction. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-36 (1958).

Absent review in an action such as this one, TVA rate-setting is not subject to review anywhere, anytime, or in any forum.

B. Holbrook Stated a Claim for Relief under the APA.

Petitioner Holbrook is a retail consumer of TVA-generated electricity. JA 119. He has alleged that in setting retail rates, TVA is acting in deliberate disregard of its obligations under Section 831j. JA 116-119.

Petitioner has offered credible evidence in support of his allegations, including TVA's own admissions (JA114, 170, 187, 276); its repeated Rate Changes (*see* JA 108-119); and price comparisons with industry peers (Lazard Report, at 36-37). Petitioner further has alleged that as a result of TVA's failure to comply with its statutory requirements, he paid and continues to pay inflated electricity bills each month. JA119. His complaint sought relief under *inter alia* the APA. JA121.

C. The TVA Act Provides a Meaningful Standard for Courts to Apply in Reviewing Whether the TVA Sets Rates Consistent with the Directives of Congress.

This Court previously has noted the tension between the prohibition of judicial review for actions "committed to agency discretion" under Section 701(a)(2), and the command in APA Section 706(2)(A) that courts set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See, e.g., Weyerhaeuser Co. v. United States Fish and Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). It has resolved this tension firmly in favor of judicial review, concluding that Congress' enactment of the APA had established a presumption of review that always would apply to an agency's exercise of discretion so long as Congress had supplied a meaningful standard to apply. *Id.* As the Court explained in *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568 (2019):

> we have read the § 701(a)(2) exception for action committed to agency discretion quite narrowly, restricting it to those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. And we have generally limited the exception to certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion, such as a decision not to institute enforcement proceedings, or a decision by an intelligence agency to terminate an employee in the interest of national security.

Id.

Here, Congress has supplied a "meaningful standard" against which to assess TVA's exercise of discretion in setting rates. Section 831i limits the ambit of TVA's rate-setting to fulfilling "the purposes of the Act," described by the second sentence of section 831j as "for the benefit of . . . domestic consumers." *Id.*

Congress further provided that "accordingly," "sale to and use by industry shall be a secondary purpose," which are "to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates." This clause identifies a specific outcome goal: "lowest possible [domestic] rates;" a specific methodology for achieving that outcome goal: "sufficiently high [industry] load factor and revenue returns;" and connects them through the phrase "[shall be] utilized . . . to secure" to demonstrate its intention to direct TVA to action. In its structure and

text, the plain meaning of Section 831j therefore provides meaningful standards for court review.[3]

TVA is of course entitled to deference in its methods of applying the statutory factors to achieve the stated goal. But courts can and should hold TVA accountable for acknowledging and attempting to meet the statutory goal, even if courts do not second guess its technocratic expertise. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made . . . Normally, an agency rule would be arbitrary and capricious if the agency has. . . entirely failed to consider an important aspect of the problem.").

D. The Fourth Circuit Erroneously Substituted a New Judicial Abstention Approach to Agency Action in Place of this Court's "Meaningful Standard" Test to Find TVA Rate-Setting Unreviewable.

In its opinion below, the Fourth Circuit acknowledged that this Court had resolved the "tension" inherent in

3. Section 831j does not require that TVA gouge industrial users by always setting the highest possible industrial rates and using whatever profit it generates to subsidize rates for consumers. The statute instead identifies two factors for reducing consumer rates: revenue returns, and also "load factor." "Load factor" refers to the economic value generated from utilizing available capacity. Increasing "load factor" might tend towards reducing rates for industry, which can attract more industrial users and thereby reduce rates overall. Increasing revenue returns would tend towards increasing rates. It is TVA's responsibility to balance these factors to achieve the stated goal of "lowest possible domestic rates."

Section 701(a)(2) by devising and applying the "no law to apply" and "meaningful standard to apply" test described above. But then, after reviewing *Overton Park* and other "early cases" (roughly pre-1990), the Fourth Circuit pronounced that the "no law to apply" test had been "so difficult to meet" that this Court "has often taken a different approach," one that operates "more like a common-law analysis [regarding abstention] than a task of statutory interpretation." Pet. App. 12a-13a.

The opinion text offers no support for this "different approach" (which implies the overruling of or at least departure from prior precedent), other than in a footnote. As the Fourth Circuit describes it there:

> This switch from the "no law to apply" test to a more common-law approach [got] extensive treatment in a dissent by Justice Scalia in *Webster*. . . This understanding of § 701(a)(2) was adopted by a majority of the Court in *Lincoln*. And this approach to § 701(a)(2) has often been reiterated in the years since—though not often used to find new categories. *See, e.g., Dep't of Com.*, 139 S. Ct. at 2568[;] *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018).

Pet. App. 13a-14a, n.7.

While the Fourth Circuit cites *Weyerhauser* and *Dep't of Commerce* as supporting the purported "shift" away from the "no law to apply" standard, in each case the Court applied the "no law to apply" standard as the basis for its holding. *See Dep't of Commerce*, 139 S. Ct. at 2569 ("Because this is not a case in which there is 'no law

to apply,' *Overton Park*, 401 U.S. at 410, the Secretary's decision is subject to judicial review."); *Weyerhaeuser*, 139 S. Ct. at 371–72 ("Section 4(b)(2) requires the Secretary to consider economic impact and relative benefits before deciding . . . The statute is, therefore, not drawn so that a court would have no meaningful standard against which to judge the [Secretary's] exercise of [his] discretion").[4] The Fourth Circuit does not cite any other court decisions or secondary sources for the conclusion that the "meaningful standard" test no longer is good law, or explain how or why pre-APA common law should override the presumption of reviewability expressed by Congress through its enactment of the APA.

Nevertheless, after rejecting this Court's settled precedents, the Fourth Circuit next crafts its own two-part test for identifying categories of unreviewable agency decisions. Crucially, this test functions in a manner that avoids asking the very question that this Court always views as determinative, to wit: did Congress provide the agency with a meaningful standard against which courts can measure the agency's exercise of discretion?

---

4. It was a lone *dissenting* opinion in *Dep't of Commerce* that advanced a "common-law" basis for non-review, not the majority. *See id.*, 139 S. Ct. at 2597 (Alito, J., concurring and dissenting) (identifying multi-factor approach; dissenting from majority by finding court review precluded under APA Section 701(a)(2)). Unlike the Fourth Circuit, however, that dissenting opinion incorporated a "meaningful standard" analysis, albeit as one part of a multi-factor test. *Id.,* 139 S. Ct. at 3597(Alito, J.) (evaluating, first, whether the "text and structure of the relevant statutes leave a court with any meaningful standard against which to judge the agency's exercise of discretion").

Instead, in the first part of the Fourth Circuit analysis, the court looks to various extraneous factors to create a presumption *vel non* of unreviewability. These factors include whether the decision involves balancing (which, in the case of bureaucratic decision-making, is almost always the case), and whether lower court decisional law prior to the APA had excepted the particular agency function from review. In contrast, the court does not look to whether the function at issue is considered unreviewable under this Court's modern precedent, or whether there is a clear reason that a presumption of unreviewability might apply.

The wide range of agency decision-making that might be swept up by this "different approach" is reflected in its application here. Only a single, unreported, trial-court-level Conclusion of Law had ever found TVA rate-making unreviewable prior to the APA, in a case that had nothing to do with TVA ratemaking. *See* Pet. App. 18a (quoting unreported Conclusion of Law from case later decided at *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 21 F. Supp. 947 (E.D. Tenn. 1938), *aff'd* 306 U.S. 118 (1939) (dismissing suit by eighteen power companies to enjoin further construction of Tennessee Valley Authority dams)).

Accordingly, to find support for its presumption of unreviewability, the Fourth Circuit looked to a mishmash of purportedly analogous older cases where lower courts, both before and after enactment of the APA, had found a basis to avoid review.[5] Pet. App. 19a. But as the Fourth

5. Only two of the cases cited by the Fourth Circuit were issued by this Court. *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309 (1958), which was decided prior to *Overton Park*, involved a dispute about an accounting issue that arose between the President and Congress relating to tariffs in the Panama

Circuit itself acknowledged, even in the pre-APA period, courts "regularly intervened" in government regulation of utility ratemaking. Pet. App. 20a, n.12. In the modern era, courts routinely review both government ratemaking and rate regulation, in such disparate circumstances as Medicaid rates (*Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022)); coal rates (*Arizona Elec. Power Co-op., Inc. v. United States*, 816 F.2d 1366, 1368 (9th Cir. 1987)); oil pipeline rates (*Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984)); public parkland fees (*Maryland Nat. Cap. Park & Plan. Comm'n v. Lynn*, 514 F.2d 829 (D.C. Cir. 1975)); and communications (*Sorenson Commc'ns, Inc. v. F.C.C.*, 765 F.3d 37, 48 (D.C. Cir. 2014)), to name but a few.

The Fourth Circuit reasoned however that TVA's rate-setting nevertheless should be immune from review because the TVA is "setting the price for something it is selling itself." Pet. App. 20a, n.12. It certainly is true that in order to implement the purposes of the TVA Act, Congress assigned to the TVA a dual role, in which it acts as a commercial enterprise when it sells electricity at wholesale and acts as regulator by setting the resale rates

---

Canal. *Id.* This Court applied a rational basis test to approve the tariffs. *See* Berger, *Administrative Arbitrariness: A Synthesis*, 78 Yale L.J. 965, 971 n.32 (1969). *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940), which also involved a tariff imposed by the President, is a pre-APA decision which reflects an approach entirely at odds with this Court's current jurisprudence. *See, e.g., id.*, 310 U.S. at 946 ("Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts").

that its wholesale purchasers must then pass through. But each of these individual roles is routinely subject to judicial review. The fact that both roles are exercised by the TVA makes it more imperative that the TVA's allegedly unlawful exercise of these functions be subject to judicial review; it is not a reason to create a presumption of unreviewability. Certainly, Congress never expressed such a view, and the Fourth Circuit never explained why that should be the case.

Once the presumption of unreviewability is applied, the analysis effectively reaches its end: this presumption of unreviewability can be overcome only when the Congressional enactment admits of no discretion at all. Thus, for example, in this case, the relevant clause – "sales to and use by industry shall be . . . utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates" – plainly directs TVA to set rates by leveraging the two identified inputs into an outcome goal. Nevertheless, the Fourth Circuit found the phrase "will permit" does not satisfy its requirements for a "command," because the use of future tense indicated the goal was "aspirational." But under traditional rules of statutory interpretation, this clause must be given effect. The text and structure of Section 831j therefore provide a sufficient basis for judicial review to ensure that TVA remains faithful to Congress' direction in Section 831j. *See Pol'y & Rsch., LLC v. United States Dep't of Health & Hum. Servs.*, 313 F. Supp. 3d 62, 67 (D.D.C. 2018), *appeal dismissed*, No. 18-5190, 2018 WL 6167378 (D.C. Cir. Oct. 29, 2018) ("it is . . . clear beyond cavil that an agency acts arbitrarily and capriciously if it acts in a manner that is contrary to . . . a congressional statute").

The Fourth Circuit's new judicial-abstention approach stands this Court's jurisprudence on its head. Under this approach, even where Congress has specified how agencies are to exercise their discretion, agencies are free to disregard Congress, abuse their discretion, and act arbitrarily and capriciously in derogation of Congress' explicit directions, all without threat of judicial review.

By applying its new-found judicial-abstention approach, the Fourth Circuit thus created a "new category" of decision making – how TVA establishes rates – exempt from judicial review under the APA. Pet. App. 13a, n.7. Its approach finds no support in this Court's precedents, which always require judicial review where, as here, Congress has supplied a meaningful standard to apply.

E. In Conflict with the Federal Circuit, the Fourth Circuit Erroneously Dismissed Holbrook's Claim as an Express Intended Beneficiary of the TVA Contract.

Congress specifically authorized the TVA to implement the purposes of the Act through the terms and conditions of its contracts with local power companies. 16 U.S.C. § 851i. TVA in turn utilized that authority to incorporate its statutory rate-setting obligations into those contracts. JA 105-06. As the Fourth Circuit acknowledged (Pet. App. 27a-28a, n.16), TVA also expressly made consumers such as Holbrook the intended third-party beneficiaries of those contracts. JA 10; TVA-BVU Power Contract at 1.

The Fourth Circuit nevertheless dismissed Holbrook's breach of contract claim on the ground that Holbrook sought to enforce a government form contract for which

Congress had not provided a private cause of action. Pet. App. 28a, *citing Astra, supra* (no third-party breach of contract action available against pharmaceutical manufacturers who entered form statutory ceiling-price agreements with federal government).

The Fourth Circuit misconstrued *Astra*. The Court in *Astra* left open the question whether a contracting agency such as TVA may authorize third-party suits to enforce a government contract, as the TVA Act permitted and as TVA did here. *Id.*, 563 U.S. at 119, n.4. And, as the Federal Circuit has explained, while *Astra* prohibits private parties from displacing the enforcement role of the Government, "[t]hat concern . . . is inapplicable where, as here, the third party is not seeking to supplement or displace the role of the government as the enforcing party but is seeking to enforce rights against the government." *Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330, 1347 (Fed. Cir. 2021) (hospital stated third-party beneficiary claim against FEMA).

The Fourth Circuit opinion, in conflict with the Federal Circuit, precludes the courts' exercise of jurisdiction over TVA's rate setting in derogation of Congress' instruction. Certiorari is warranted for this reason, and to resolve the conflict between the Fourth Circuit opinion and *Columbus Reg'l*.

F. In Conflict with the Federal Circuit, the Fourth Circuit Erroneously Dismissed Holbrook's Unlawful Exaction Claim.

The Fourth Circuit also dismissed Holbrook's claim that the overcharges he paid constituted an illegal exaction because "a voluntary payment for services rendered is not an exaction, illegal or otherwise." Pet. App. 29a.

This conclusion conflicts with the Federal Circuit's decision in *Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1349 (Fed. Cir. 2020). In that case, the Federal Circuit held that the plaintiff had stated a claim by alleging that the government's PACER fees had exceeded the statutorily authorized amount. As the Federal Circuit held:

> because . . . the government is alleged to have illegally collected more than the authorized fee, the necessarily implied remedy for any violation through overcharging is that the government must return the excess fees collected.

Id., 968 F.3d at 1349.

Under *Nat'l Veterans*, a voluntary payment of an unlawful government fee still may constitute an illegal exaction. Here too, the Fourth Circuit opinion, in conflict with the Federal Circuit, improperly precludes the exercise of jurisdiction over TVA's rate setting in derogation of Congress' instruction.

G. Certiorari Is Necessary Because the Fourth Circuit Opinion Improperly Enables TVA to Evade Compliance with Congress' Instructions Governing Its Core Function and Affecting More Than 10 million Customers.

The Fourth Circuit's decision precluding court review of TVA rate-setting decisions leaves TVA free to set rates in arbitrary and capricious fashion and in derogation of Congress' intent. It impacts directly the electricity rates paid by TVA's resale ratepayers each month. The Court

therefore should grant certiorari to determine whether court review is available to ensure that TVA is complying with the requirements of Sections 831i and 831j when it leverages its $50 billion worth of public property to distribute more than $10 billion worth of electricity annually for the benefit of more than 10 million customers.

Review of this very case is especially necessary because TVA rate-setting is not subject to review in any other forum. Indeed, absent review of this very case, it is unlikely that another plaintiff will entertain the financial and legal risks of bringing a similar suit in the future, or possible Rule 11 motions in the Sixth or Fourth Circuits.

Congress has not repealed federal court jurisdiction for actions against the TVA; to the contrary, it specifically authorized such actions through the sue-and-be-sued clause, carved it out from the immunity provided under the Tort Claims Act, and made it subject to the APA. Petitioner has adequately alleged that he pays excessive rates as a direct result of TVA's *ultra vires* setting of his electricity rates.

Nevertheless, the Fourth Circuit dismissed all claims against the TVA, and created a new category of unreviewable agency decision. The Fourth Circuit approach requires courts to abstain from considering an otherwise properly pleaded complaint. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). This judge-made abstention doctrine finds no support in the TVA Act or Congressional sanction. By eliminating the possibility of review, the lower court has empowered TVA to act in derogation of Congress' instructions without the possibility of "consequences" necessary for when "legal

lapses and violations occur." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).

POINT II.

CERTIORARI IS NECESSARY BECAUSE THE FOURTH CIRCUIT ENDOWED THE TVA WITH UNREVIEWABLE AND UNACCOUNTABLE LEGISLATIVE AND EXECUTIVE POWERS IN CONTRAVENTION OF THE SEPARATION-OF-POWERS DOCTRINE.

Certiorari also is necessary because the ruling below eliminated the sole remaining check that Congress and the Constitution placed on the independently operated, commercially driven, and government-empowered TVA. The Fourth Circuit's opinion empowers TVA to act without the oversight provided by judicial review. Absent review by this Court, the unaccountable enterprise empowered by the Fourth Circuit would operate radically at odds with the system of Government devised by the Founders.

A. Certiorari Is Necessary to Prevent TVA from Operating as a Commercial-Governmental Entity with Unchecked Power to Distribute Government Benefits.

There is a clearly intelligible purpose in Congress' creation of the TVA as a government-empowered but commercially operated power company. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (Congress required to lay down intelligible purpose to which agency is directed to conform.). The second sentence of Section 831j, whatever its precise contours, directly addresses that

question: It says that the purpose of TVA power projects is to benefit consumers, and that sales to industry should be used to support consumers by leveraging load factors and revenue returns to enable consumers to receive the lowest possible rates.

TVA performs its rate setting functions by fiat, without informal or notice-and-comment rulemaking, without being subject to administrative hearings, and without supervision of state regulatory agencies. *See supra* at 6-8. Nor, unlike private enterprises, are there shareholders who may hold the Board and executives accountable. The only potential check on TVA's commercial and regulatory powers is court review in a case such as this one.

Absent the possibility of review, the TVA Board acts as the sole arbiter in determining how to allocate the benefits generated by its vast economic enterprise – whether by preferring industrialists and bitcoin miners, for populist purposes, to benefit or harm competitors, or otherwise -- even though Congress clearly vested it with its broad powers in order to achieve a specified goal. The aggregation of power in the unaccountable TVA is inconsistent with our Constitutional scheme and presents a serious threat to individual liberty. *See* McConnell, *Socialism and the Constitution*, Hoover Institution (2020) (federal checks-and-balances constrain potential excesses of federal agencies, such as TVA, endowed with power over significant enterprises or sectors of the economy); Anders Aslund, Russia's Crony Capitalism: The Path from Market Economy to Kleptocracy (Yale University Press, May 21, 2019).

Certiorari therefore is necessary to ensure that Congress' delegation of powers to the TVA remains within Constitutional limits. *See Indus. Union Dep't, AFL-CIO,* 448 U.S. 607, 646 (1980) (if statute had delegated unreviewable authority, it "would make such a sweeping delegation of legislative power that it might be unconstitutional") (internal quotations omitted).

B. This Case Is an Excellent and Necessary Vehicle to Address Constitutional Limitations on Economically Independent Agencies.

This Court recently has granted certiorari and otherwise acted to address instances in which federal agencies arguably exceeded the powers authorized by Congress or permitted under the Constitution. *See, e.g., W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022) (Congress did not grant EPA authority to devise certain emissions regulations); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (for-cause restriction of President's executive power to remove CFPB's single Director violated constitutional separation of powers).

The unreviewable power arrogated to the TVA by the Fourth Circuit presents issues as consequent as any at issue in those cases. This case therefore presents an excellent vehicle to describe the limitations that apply to delegations of economic power to such independent agencies, including the need for Congress to identify an intelligible principle for its activities; the requirement that it is for Congress to set policy goals; and that courts must be available to review whether the agency properly took into account Congress' priorities.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

DATED: January 5, 2023

Respectfully submitted,

MARTIN BIENSTOCK
Counsel of Record
BIENSTOCK PLLC
1629 K. Street NW, Suite 300
Washington, DC 20006
(202) 908-6600
mbienstock@bienstockpllc.com

MARK T. HURT
THE LAW OFFICES OF MARK T. HURT
159 West Main Street
Abingdon, VA 24210
(276) 623-0808

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED SEPTEMBER 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1415

DAVID HOLBROOK,

Plaintiff-Appellant,

v.

TENNESSEE VALLEY AUTHORITY;
BVU AUTHORITY,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. James P. Jones, Senior District Judge. (1:20-cv-00025-JPJ-PMS)

Argued: January 27, 2022 Decided: September 7, 2022

Before RICHARDSON, RUSHING, and HEYTENS, Circuit Judges.

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Rushing and Judge Heytens joined.

Appendix A

RICHARDSON, Circuit Judge:

The Tennessee Valley Authority sells its power to the BVU Authority in Virginia, one of its many customers. The BVU Authority in turn sells its power to local consumers who need electricity. Among those local consumers is David Holbrook, and Holbrook thinks he has been paying too much for power. He believes that the TVA has a statutory duty to use the fruits of its sales to large industrial buyers to subsidize consumers' electricity consumption. He bases this view largely on § 11 of the Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, § 11, 48 Stat. 58, 64-65 (codified at 16 U.S.C. § 831j). That provision gives the TVA two goals: The first goal is to operate "primarily . . . for the benefit of the people . . . particularly the domestic and rural consumers to whom the power can economically be made available," and a "secondary" goal is to use sales to industry "principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates." Holbrook reads that language as a command to the TVA to subsidize consumers from the pockets of industry. Under that reading, Holbrook believes that a string of TVA rate changes, shifting costs from industry to consumers, were illegal. So he sued BVU Authority and TVA under three theories, which all more or less amount to claims that the TVA failed to live up to its statutory duties under § 11. The district court dismissed all three claims because TVA's ratemaking authority is committed to agency discretion and thus unreviewable. We affirm.

Appendix A

I. Background

A. The Tennessee Valley Authority

"Congress created the TVA—a 'wholly owned public corporation of the United States'—in the throes of the Great Depression to promote the Tennessee Valley's economic development." *Thacker v. TVA*, 139 S. Ct. 1435, 1439, 203 L. Ed. 2d 668 (2019) (quoting *TVA v. Hill*, 437 U.S. 153, 157, 98 S. Ct. 2279, 57 L. Ed. 2d 117) (1978)).[1] Congress created the TVA through the Tennessee Valley Authority Act of 1933.[2] And Congress gave the TVA a lot to do. It was tasked with improving the navigability of

1. The TVA is a unique federal agency. *See North Carolina ex rel. Cooper v. TVA*, 515 F.3d 344, 349 (4th Cir. 2008). For it is also a corporation and can sue and be sued in its corporate name. TVA Act, § 4(b). Consequently, it has been exempted from many provisions that govern other agencies. The TVA is explicitly exempt from suit in the Court of Federal Claims. 28 U.S.C. § 1491(c). That's why we, and not the Federal Circuit, are hearing this case. The TVA is also exempt from many rules that govern other federal agencies, including civil service laws, TVA Act, § 3, purchasing requirements, § 9, and systematic review under 5 U.S.C. § 305(a)(2), (b) ("[E]ach agency shall review systematically the operations of each of its activities, functions, or organization units, on a continuing basis."). But the provision on judicial review of agency action in the Administrative Procedure Act does not exempt the TVA. 5 U.S.C. § 704. And § 701 of the APA lays out the meaning of "agency" for the purposes of agency review, and the TVA is not listed among the types of entities exempt from review. § 701(b).

2. We adopt the practice of the parties who refer to the TVA's provisions by their original section titles in the Public Law. The most important provision for our purposes is § 11, which is codified at 16 U.S.C. § 831j.

the Tennessee River, preparing for flood control along the river, reforesting parts of the Valley, and putting other areas to more productive use. TVA Act, §§ 1, 22-23. It was even told to act "in the interest of the national defense" by operating a fertilizer plant in Muscle Shoals, Alabama. §§ 1, 5, 11.[3]

What matters for our purposes is 16TVA's role in producing electricity. To this day, the TVA is a major purveyor of electricity to the Tennessee Valley.[4] It sells electricity wholesale to federal agencies, industrial users, localities, local governments, and co-ops who do the retail selling to consumers (or use the power themselves).

B. Holbrook's Claims and TVA Rate-Setting

David Holbrook is one of those consumers. He lives in Bristol, Virginia, and buys his power from the BVU Authority, a power company created by the State of

---

3. The Muscle Shoals plant produced nitrates — a primary ingredient in both fertilizer and explosives. § 5(g). So in peacetime, those nitrates were used to make fertilizer, but they could be directed to explosives manufacturing during wartime.

4. A note on why the Fourth Circuit is hearing this case. The Tennessee Valley is the drainage basin of the Tennessee River, which is—you guessed it—mostly in the state of Tennessee. Tennessee, of course, sits in our sister circuit, the Sixth. But the River and the Valley and therefore the TVA dip into other states in the Sixth Circuit (Kentucky), the Fifth Circuit (Mississippi), the Eleventh Circuit (Alabama and Georgia), and parts of the Fourth Circuit (North Carolina and Virginia). This case comes to us from the Western District of Virginia.

Virginia. The TVA sells power to the BVU Authority who serves local customers. Holbrook's suit here focuses on the rates that TVA requires BVU Authority, as a wholesale buyer, to charge Holbrook, as a retail power consumer.

When the TVA sets rates, it aims to meet a slew of policy objectives that Congress laid out in the Act. To start, § 10 of the Act instructs the TVA to give preferences to "States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members."

Section 11 of the Act is of particular importance to this suit:

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

> rates and in such manner as to encourage increased domestic and rural use of electricity.

Holbrook reads this piece of the statute as a directive to use industry sales to subsidize "domestic and rural consumers." *See* § 11.

Holbrook's claims concern several revenue-neutral rate changes implemented through BVU Authority contracts under a new TVA policy called the "Strategic Pricing Plan." J.A. 107. To understand that claim, we need to understand how the TVA sets its rates. To grossly simplify, when the TVA sets rates, it takes two distinct steps. First, it determines the amount of revenue it needs to collect from all its sales. Then, it determines how to assign prices to various customers to meet that overall goal. When the TVA changes that total amount it needs, that's called a "rate adjustment." In contrast, a "rate change" occurs when the TVA rearranges or otherwise changes the various rates among customers while keeping its overall revenue goal the same. So rate *changes* must be revenue neutral.

The TVA sets its rates largely through entering power contracts with local power companies, who then resell the power to different classes of customers at different rates as required by the power contracts with TVA.

Back to the Strategic Pricing Plan. In 2010, the TVA began putting the Plan, which focused on "TVA's long-term pricing," into motion in power contracts with local power companies. J.A. 249. The Plan aimed to

achieve fairness in pricing and increase competitiveness by charging customers based on their proportion of total cost of service. The TVA aimed to change rates so "that revenue [would] be recovered in proportion to costs by customer class." J.A. 187. Because supplying power to industry is cheaper, TVA sought to create new benefits and discounts for industrial consumers, things like manufacturing credits and high-volume discounts. TVA hoped the Plan would better transform the TVA's savings from efficient, industrial-energy use into savings for the industrial consumers who made those efficiencies possible. But Holbrook alleges that all those changes to benefit industrial customers unjustifiably shifted costs onto consumers.

To illustrate the effect of these changes, Holbrook says that in 2015, compared to its rivals, TVA had industrial rates in the cheapest quartile and consumer rates around the median, which already suggests that consumers were not top priority. But then the TVA added a "General Manufacturing Credit," which reduced industry rates by an average of 6.4% and increased consumer rates by 1.1%. By 2016, Holbrook says this shifted nearly half a billion dollars in costs from industry to consumers, and that has only increased since then.

Holbrook's power supplier BVU entered contracts with TVA over the past decade, carrying out the rate structure envisioned by the Strategic Pricing Plan. Based on his theory that TVA was illegally requiring his electric company to charge him too much for power, Holbrook brought this Complaint on behalf of "[a]ll

persons who within the statute of limitations period were domestic customers of TVA" and "[a]ll persons who within the statute of limitations period were domestic customers of BVU and who received energy pursuant to a contract between the TVA and the BVU." J.A. 119. The Amended Complaint focuses on three claims: a third-party breach of contract claim against both TVA and BVU, an Administrative Procedure Act claim under 5 U.S.C. § 702 against TVA alone, and an "Unlawful Exaction" claim against both TVA and BVU, which alleges that TVA caused Plaintiffs to pay more for electricity than "could lawfully be charged under the TVA Act." J.A. 121-22.

While we do not have the exact contracts used during the relevant period since the district court dismissed the case by granting a motion to dismiss, we do have an example of a similar contract from 2006. Holbrook alleges that this contract is representative of the contracts they have used since. The 2006 contract reiterates many of the TVA's goals and purposes as laid out in the TVA Act. It may be more accurate to say that the statutory language is copied into the contract. And importantly, the contract includes the § 11 language that "power shall be primarily for the benefit of the people of the section as a whole and particularly the domestic and rural consumers, to whom it is desired to make power available at the lowest possible rates." J.A. 10.

The district court relied on precedent from courts in the Sixth Circuit to hold that TVA's ratemaking authority is "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2). And because § 701(a)(2) precludes judicial review over issues committed to agency discretion, the

district court dismissed Holbrook's APA claims. From there, the court dismissed the contract and exactions claims for the same reason, finding that the contract and exaction claims were essentially the same claim as the APA challenge and were therefore barred by § 701(a)(2) just the same. *See Holbrook v. TVA*, 527 F. Supp. 3d 853, 858 (W.D. Va. 2021).

II. Discussion

We review the dismissal of these claims de novo. *Demetres v. E.W. Constr., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015). We take each claim—the APA claim, the breach-of-contract claim, and the unlawful-exaction claim—in turn.

A. APA Claim

Under the APA, "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. That language sets up a "basic presumption of judicial review" of agency action. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). But the APA's text lays out two exceptions to that basic principle: first, where "statutes preclude judicial review," § 701(a)(1), and second, where "agency action is committed to agency discretion by law," § 701(a)(2). Only the second exception might apply here, so we must figure out whether TVA ratemaking is "committed to agency discretion by law."[5]

5. One influential administrative law scholar had this to say about the task of figuring out what § 701(a)(2) means: "I don't see how anybody can find the meaning of those words. The words seem

Courts have dealt with two initial puzzles about what it means under the APA for something to be "committed to agency discretion by law." The first puzzle is how to differentiate the two exceptions to judicial review. At a glance, it's hard to see the difference between a statute that precludes judicial review and law that commits decisions to agency discretion (thereby precluding judicial review). Yet the Supreme Court has given us some guidance. The Court tells us the § 701(a)(1) exception for statutes precluding judicial review "applies when Congress has expressed [its] intent" and the § 701(a)(2) standard for agency discretion applies when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). So the first exception is for explicit statutory limitations on review, and the second exception—the one at issue—is for implicit limitations on review. *See* Dep't of Just., *Attorney General's Manual on the Administrative Procedure Act* 94 (1947) ("A statute may in terms preclude, or be interpreted as intended to preclude, judicial review altogether.").[6]

---

to contradict themselves; they don't make any sense; if they do, what might the sense be? Nobody can extract from the words an answer to this simple question: When discretionary power is conferred by statute on an agency, when, if ever, may a court review for abuse of discretion?" *Present at the Creation: Regulatory Reform Before 1946*, 38 Admin. L. Rev. 507, 519 (1986) (remarks of Kenneth Culp Davis). Well, that's our task.

6. The Attorney General's Manual on the APA has often been relied on by the Supreme Court in interpreting the Act. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978). Because the

The second puzzle arises from the seeming tension between the second exception, § 701(a)(2), and § 706, the APA's provision defining the scope of agency review. Under § 706(2)(A), courts are instructed to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . an abuse of discretion." One might wonder how courts can set aside something as abuse of discretion when discretionary questions committed to the agency by law are insulated from judicial review in the first place. The Supreme Court's solution to this puzzle has been to focus on the suitability of the agency action for judicial review—"if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Chaney*, 470 U.S. at 830. If courts can naturally review for an abuse of discretion, they should; if they can't, § 701(a)(2) tells them to steer clear. *See Lincoln v. Vigil*, 508 U.S. 182, 190-91, 113 S. Ct. 2024, 124 L. Ed. 2d 101 (1993). So the main task under § 701(a)(2) is to determine when there are or are not "judicially manageable standards" for judging an agency's exercise of discretion.

Department of Justice played an unusually important role in the drafting of the APA, *id.*, the Court has been willing to cite this contemporaneous guide. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2419, 204 L. Ed. 2d 841 (2019). Even Justice Scalia, ever the opponent of legislative history, found that the Attorney General's Manual is often a "persuasive" source in expounding the meaning of the APA given its unique status. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004). While of course it cannot overcome the plain text of the Act, we consider it.

Early cases applying this subsection used a "no law to apply" test drawn from the legislative history of the APA. *See Chaney*, 470 U.S. at 830 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)). The test asks whether this is one of "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Overton Park*, 401 U.S. at 410 (quoting S. Rep. No. 79-752, at 26 (1945)). The problem with that test is that there is nearly always some law to apply— "beginning with the fundamental constraint that the decision must be taken in order to further a public purpose rather than a purely private interest." *Webster v. Doe*, 486 U.S. 592, 608, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (Scalia, J., dissenting). Remember § 706 and abuse-of-discretion review as well: Arbitrary-and-capricious review only involves "articulat[ing] a satisfactory explanation for [agency] action including a rational connection between the facts founds and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962)); *see* Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 708 (1990) ("Pure abuse of discretion inquiries do not depend on the contents of the statute under which an agency acts."). We could always apply that legal test by making sure the agency had offered reasoned explanation of its actions.

Because the "no law to apply" test is so difficult to meet, the Supreme Court has often taken a different approach

to § 701(a)(2), one that operates more like a common-law analysis than a task of statutory interpretation. The aim of this common-law approach has been to determine categories of administrative action that "courts traditionally have regarded as 'committed to agency discretion.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2568, 204 L. Ed. 2d 978 (2019) (quoting *Lincoln*, 508 U.S. at 192).[7] Once we are in a traditional category, the

7. This switch from the "no law to apply" test to a more common-law approach was implied in *Chaney* but got a more extensive treatment in a dissent by Justice Scalia in *Webster*, 486 U.S. at 606-21. There, Justice Scalia argued that § 701(a)(2) cannot be limited to situations when there is no law to apply for the reasons we've just pointed out. He argued instead, as the Court had hinted at in *Chaney*, that § 701(a)(2) was meant to refer to a preexisting body of common law of judicial review of agency action that the APA was meant to embrace and carry on. *Id.* at 609 ("The intended result of § 701(a) is to restate the existing law as to the area of reviewable agency action." (quoting AG's Manual, *supra*, at 94)). In essence, "committed to agency discretion by law" means action that is "of the sort that is traditionally unreviewable," which includes looking at past practice, practical consequences, and whether the decision involves inherently discretionary judgment calls. *Id.* at 609.

This understanding of § 701(a)(2) was adopted by a majority of the Court in *Lincoln*, 508 U.S. at 191 (citing *Webster*, 486 U.S. at 609 (Scalia, J., dissenting)), where the Court found that "the allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion." *Id.* at 192. And this approach to § 701(a)(2) has often been reiterated in the years since—though not often used to find new categories. *See, e.g.*, *Dep't of Com.*, 139 S. Ct. at 2568 ("We have generally limited the exception to certain categories of administrative decisions that courts traditionally have regarded as committed to agency discretion." (cleaned up)); *Weyerhauser Co. v. U.S. Fish & Wildlife*

"presumption of reviewability" under the APA flips, and the agency action becomes "presumptively unreviewable." *Chaney*, 470 U.S. at 831-32. But only presumptively. Even in an area that has been traditionally insulated from review, "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833.

We take all this to create a two-part inquiry. We begin by considering whether TVA ratemaking is the kind of agency action that "has traditionally been 'committed to agency discretion.'" *Id.* at 832. We hold that it is. From there, we determine whether the TVA Act intentionally limits agency discretion by setting guidelines or otherwise providing a limit. We hold that it does not. So we affirm the district court's decision that TVA ratemaking is "committed to agency discretion by law."

1. Traditional Categories Committed to Agency Discretion

No clean rule materializes for determining whether an agency action is the kind of action that has traditionally been committed to agency discretion. But the Supreme Court has looked to a few factors that characterize such action. First, these actions involve "complicated balancing

---

Serv., 139 S. Ct. 361, 370, 202 L. Ed. 2d 269 (2018) ("The few cases in which we have applied the § 701(a)(2) exception involved agency decisions that courts have traditionally regarded as unreviewable." (citing *Lincoln*, 508 U.S. at 191)).

of a number of factors which are peculiarly within [the agency's] expertise," *Lincoln*, 508 U.S. at 193 (quoting *Heckler*, 470 U.S., at 831), especially decisions that involve resource allocation and the need for flexibility to "adapt to changing circumstances," *Lincoln*, 508 U.S. at 192. Next, these are areas that often do not involve the use of coercive power, which means they will not trigger the traditional rights-protecting duties of the federal courts. *Chaney*, 470 U.S. at 832. And perhaps most importantly, these areas enjoy a tradition of nonreviewability. *Id.* at 832. Past practice should guide us. And an unbroken practice of judicial deference that predates the APA is strong evidence of an area where judicial review is inappropriate. *See ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282, 107 S. Ct. 2360, 96 L. Ed. 2d 222 (1987).[8]

TVA ratemaking has each of these characteristics. To start, TVA price setting is a balancing act that demands significant expertise and involves complicated, counterfactual questions of resource allocation. As we explain below, the TVA Act tasks the TVA with several

8. The Attorney General's Manual on the APA offers a few examples of unreviewable action under the "committed to agency discretion" provision. AG's Manual, *supra*, at 94. One such example is *United States v. George S. Bush & Co.*, 310 U.S. 371, 60 S. Ct. 944, 84 L. Ed. 1259 (1940), which dealt with the President's powers to adjust tariffs under the Tariff Act of 1930. *Id.* at 375-76. In finding that "[n]o question of law is raised when the exercise of [the President's] discretion is challenged," the Court appealed in part to a long history of discretionary tariff adjustments. *Id.* at 379-80 (citing *Norwegian Nitrogen Prods. v. United States*, 288 U.S. 294, 308, 53 S. Ct. 350, 77 L. Ed. 796, Treas. Dec. 46331 (1940)). That history was central to the holding that tariff adjustments are not subject to review.

goals that necessarily require trade-offs, including a focus on self-sufficiency, equitable service across States, building up capacity, repaying the Treasury, supporting consumers, and more. And as a look through the TVA's 2018 Wholesale Rate Change shows, the practical difficulties of electricity pricing are even more complicated, including additional hurdles like "distributed generation, energy efficiency, technological advances, shifts in customer behavior, and regulatory requirements," not to mention the interplay between price (which is calculated to the quarter cent) and demand. J.A. 170-71. All that suggests a "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Lincoln*, 508 U.S. at 193 (quoting *Chaney*, 470 U.S. at 831).[9] Setting a price is complicated, and it is not a task on which judges are traditionally expected to be experts. Indeed, the opposite may be closer to the truth.

---

9. Holbrook suggests that TVA's competing goals can be harmonized. Remember that rate setting involves rate adjustments (the grand total) and rate changes (shifting around who owes what). So at step one, TVA might say, "We need $X billion to meet all costs." Then it would look to the likely sales and set prices for each kind of sale to try to add up to that $X billion figure. Holbrook argues that at that second step you could tend toward higher prices for industry.

But his argument ignores the feedback loop between those two steps. Supply and demand are dynamic processes, and the cost of producing power for different customers can vary. So making power more expensive for some group means they will buy less of it, which changes TVA's costs and requires a different revenue goal, meaning you have to readjust step two, and so on and so on. Finding the right equilibrium can be complicated.

And price setting isn't coercive either. It does not exercise power over "an individual's liberty or property rights." *Chaney*, 470 U.S. at 832. Prices are agreed-to, not enforced. Therefore, these issues will rarely implicate the traditional rights-protecting duties of the federal courts. *See id.* Any argument that Holbrook is somehow forced to buy from BVU because of limited options would stretch the idea of coercive power beyond recognition. When the government disposes of its own property, it will seldom be acting coercively.[10]

Finally, federal courts in the Tennessee Valley region have a long history of declining to review TVA ratemaking. *See, e.g.*, *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 407 (6th Cir. 2006); *4-County Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132, 1138 (S.D. Miss. 1996); *Carborundum Co. v. TVA*, 521 F. Supp. 590, 593 (E.D. Tenn. 1981); *Mobil Oil v. TVA*, 387 F. Supp. 498, 506-07 (N.D. Ala. 1974); *see also Matthews v. Town of Greeneville*, 932 F.2d 968, 1991 WL 71414, *4 (6th Cir.

10. In its discussion of coercion, *Chaney* focuses in part on the agency's refusal to act, as distinct from affirmative agency action. In those circumstances, the agency "generally does not exercise its coercive power over an individual's liberty or property rights" because the agency has done nothing. 470 U.S. at 832. And on the flip side, where there is action, there is usually a "focus for judicial review." *Id.* But *Chaney*'s focus was on coercion, not inaction—inaction was useful to prove coercion, not the other way around. While rate-setting is action of a kind—and while we concede that action is more likely to be reviewable than inaction and more likely to be coercive—rate-setting still does not influence any coercive power over liberty or property rights, which we take to be the more important takeaway from *Chaney*'s coercion discussion.

1991) (unpublished). This trend reaches back at least 84 years to a case decided just a few years after the TVA Act was passed. *Tenn. Elec. Power Co. v. TVA*, 21 F. Supp. 947 (E.D. Tenn. 1938), *aff'd*, 306 U.S. 118, 59 S. Ct. 366, 83 L. Ed. 543 (1939). "The Tennessee Valley Authority Act authorizes the Board of Directors of the Authority to fix the rates at which the electric energy generated at the dams authorized by the Tennessee Valley Authority Act may be sold. The statute vests discretion in the board in fixing such rates, and the exercise of this discretion is not subject to judicial review." *Mobil Oil*, 387 F. Supp. at 508 (quoting *Tenn. Elec. Power Co.*, 21 F. Supp. 947 (Conclusion of Law 33) (unpublished)). And *Tennessee Electric Power Company* was decided eight years before the APA was passed, which makes this tradition a part of the "existing law" that the APA was understood to embrace and "preserve." *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 282; *see Chaney*, 470 U.S. at 832 (quoting 5 Davis, *Administrative Law* § 28:6 (1984), for the proposition that the "APA did not significantly alter the 'common law' of judicial review of agency action"). In fact, Holbrook has not provided—nor have we found—*any* case in which a federal court has subjected the TVA's ratemaking to judicial scrutiny in the way that is requested here.[11] Given

11. Holbrook mentions that some TVA action has been found reviewable at the Supreme Court, citing *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 88 S. Ct. 651, 19 L. Ed. 2d 787 (1968) (holding that a TVA decision to provide power to a certain area was subject to review under § 15(d) of the TVA Act); *cf. id.* at 13 (Harlan, J., dissenting). But that case was about where the TVA could operate—i.e, whether it could expand into two towns near the Tennessee-Kentucky border—a meaningfully different question from how they set their prices. And

the TVA is going on a century old, this long tradition counsel against reviewing TVA's rates here.

We also draw more support for this principle by zooming out from TVA ratemaking to electric ratemaking by government-owned utilities generally, *see, e.g.*, *V.I. Hotel Ass'n v. V.I. Water & Power Auth.*, 465 F.2d 1272, 1274-75, 8 V.I. 580 (3d Cir. 1972); *Electricities of North Carolina, Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1265-67 (4th Cir. 1985); and then zooming out further to government-utility ratemaking generally, *see Pan. Canal v. Grace Line*, 356 U.S. 309, 318-19, 78 S. Ct. 752, 2 L. Ed. 2d 788 (1958); *Rural Electrification Admin. v. N. States Power Co.*, 373 F.2d 686, 700-01 (8th Cir. 1967); *Hahn v. Gottlieb*, 430 F.2d 1243, 1250-51 (1st Cir. 1970); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 304 (2d Cir. 1970); *cf. United States v. George S. Bush & Co.*, 310 U.S. 371, 379, 60 S. Ct. 944, 84 L. Ed. 1259 (1940) ("No one has a legal right to the maintenance of an existing rate or duty." (quoting *Norwegian Prods. Co. v. United States*,

---

the TVA Act contains a clear rule about the corporation's geographic scope, the sort which permits judicial review. Section 15(a) of the TVA Act—added in twenty-five years after the TVA Act's initial passage—says, "Unless otherwise specifically authorized by Act of Congress the [TVA] shall make no contracts for the sale or delivery of power which would have the effect of making the Corporation or its distributors, directly or indirectly, a source of power supply outside the area for which the [TVA] or its distributors were the primary source of power supply on July 1, 1957." The case dealt with determining the boundaries of that forbidden "area." *Hardin*, 390 U.S. at 8. The Court did not defer, but determined for itself whether the towns were in that area. But this says nothing about a tradition of reviewing TVA rates.

288 U.S. 294, 318, 53 S. Ct. 350, 77 L. Ed. 796, Treas. Dec. 46331 (1933)).[12]

Holbrook responds with an argument based on the language of the APA. Holbrook argues that (1) under the APA, "the approval or prescription for the future of rates [or] prices [or] costs" is defined as a kind of "rule," 5 U.S.C. § 551(4); (2) all "rules" are "agency action," § 551(13); and (3) that all "agency action" is subject to judicial review, § 704. By adding these premises up, Holbrook argues that TVA ratemaking must not be one of the traditional categories we are talking about.

But that argument misses the point. No one has questioned, and we do not deny, that TVA ratemaking is agency action or that the general rule is that agency action is presumptively reviewable. *See Abbott Lab'ys*, 387 U.S. at 140. The question here is whether this is the kind of agency action where that presumption is flipped because of § 701(a)(2), which is separate from the analytically antecedent answer that this was an "agency action." After all, *Chaney* dealt with "agency decisions to refuse enforcement," 470 U.S. at 831, and we know that "failure to act" is defined as "agency action" under § 551(13). But the Court there found refusal to enforce to be "committed to agency discretion" under § 701(a)(2) anyway. To say the

12. This is a different context than government regulation of private utility companies' ratemaking, where courts often intervened. *See, e.g.*, *Missouri ex rel. S.W. Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 287, 43 S. Ct. 544, 67 L. Ed. 981 (1923) (collecting cases). Here the government is setting the price for something it is itself selling.

TVA's actions were agency action is to make an obvious point about why the APA applies at all; we instead focus on § 701(a)(2)'s specific exception, which immunizes certain "agency action" from judicial review.

In sum, given the complexity of the task, the lack of coercive power, and the long, unrebutted history of courts refusing to review these prices, we hold that TVA ratemaking is a decision committed by tradition to agency discretion. That tradition brings with it a presumption against judicial review, which can still be overcome by showing that Congress intended to cabin the exercise of that traditional discretion. We now turn to that question.

2. Congressional Guidelines or Limits on Traditional Discretion

Congress may overcome the presumption against review by providing "guidelines for the agency to follow in exercising its enforcement powers," by "setting substantive priorities, or by otherwise circumscribing an agency's power." *Chaney*, 470 U.S. at 833. Because the question is about what Congress did, it amounts to a question of statutory interpretation. *See Webster*, 486 U.S. at 600 ("[Section] 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based"). The only argument that Holbrook makes here is based on the twin goals of TVA Act § 11, but we do not read that provision to provide the kind of clear guidance or instruction that would overcome the presumption against judicial review.

An example will help illustrate the kind of language we are looking for. The *Chaney* Court uses *Dunlop v. Bachowski*, 421 U.S. 560, 95 S. Ct. 1851, 44 L. Ed. 2d 377 (1975), as a prototype. At issue there was the Secretary of Labor's decision to decline to prosecute a violation of the Labor-Management Reporting and Disclosure Act. As *Chaney* makes clear, decisions about whether to prosecute are traditionally insulated from judicial review, but in *Dunlop*, the statute provided the kind of command that overcomes that presumption. The statute said that after a union member files suit in the agency, "[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action." *Id.* at 563 n.2 (quoting 29 U.S.C. § 482(b)). Because the statute "quite clearly withdrew discretion from the agency," judicial review was appropriate. *Chaney*, 470 U.S. at 834. So even in the quintessentially insulated prosecutorial-discretion arena, plain statutory commands will provide meaningful standards for judicial review.

Holbrook focuses on § 11 of the TVA Act, arguing that the provision "includes both a statement of purpose and a directive." Appellant's Op. Br. 5. But § 11 cannot be read as a clear directive and therefore will not overcome the presumption against a review.

Section 11 has two relevant sentences.[13] The first sentence reads: "It is declared to be the policy of the Government so far as practical to distribute and sell the

13. The third sentence of § 11 is important but irrelevant here. It deals with fertilizer.

surplus power . . . equitably among the States, counties, and municipalities within transmission distance." The next sentence elaborates on that policy by laying out a primary and a secondary purpose:

> This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates . . . .

Holbrook argues that this is a command that the TVA use industry sales to subsidize consumer sales. He argues that this provision provides a "directive" to the TVA by giving both a goal—"lowest possible rates" for consumers—and a methodology for achieving that goal—using industry for its load factor and revenue returns—and that taken together this provides enough "law to apply" to invite judicial review. We disagree. Instead, we read this provision as a general policy statement and, in places, as a kind of aspiration about what Congress hopes will be accomplished.

Start with the fuzzy language in the provision: "so far as practical," "primarily," "economically," "sufficiently."

Each of those words suggests room for discretion. And all that discretion adds up. Taken together, the mass of discretionary lingo suggests that, far from being a provision that withdraws discretion, this provision acknowledges and accentuates that discretion. *Webster*, 486 U.S. at 600 ("This standard fairly exudes deference").[14]

Next, consider a phrase we've already mentioned: "so far as practical." Notice that the first sentence of the provision suggests that the policy should be carried out only "so far as practical," and notice further that the second sentence of § 11 begins "This policy is further declared to be . . .," before then discussing consumer and industry sales. Read together, this suggests that both sentences are referencing the same policy, and that the policy should only be pursued "so far as practical." That is not a directive. Since the Act does not define "practical," determining the limits of what is and what is not practical must be a matter of discretion.

Finally, turn to the discussion of sales to industry: "[S]ale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns *which will permit* domestic and rural use at the lowest possible rates." § 11 (emphasis added). Holbrook wants this to mean that sales to industry must be used to subsidize consumers, but we do not agree. The text says that sales to industry are to be

14. Holbrook points out that this passage includes "shall" twice, and that this word choice suggests a directive. "Shall" does often mandate behavior. But here the shalls are attached to broad policy goals. "The agency shall have this goal" is not a command in the same way as "the agency shall prosecute if they have probable cause."

used to secure high load factors and strong revenues. And then it says those things "will permit" better treatment for consumers, in the form of "the lowest possible rates." The "will permit" suggests that this isn't really a command or a "methodology" for achieving a specified "goal" as Holbrook argues. Rather, the text suggests that Congress had an expectation, that by selling to industry, the TVA would get higher load factors, allowing more consistent energy usage, which in turn would bring in revenues to the company, which would help to increase returns to scale, and all of that "will" naturally make sales to consumers easier and cheaper. "Will permit" highlights how this policy is an aspiration not a command. And even if we read that as something more than an aspiration, we would be confronted again by the discretionary phrases "sufficiently high" and "lowest possible" which do little to cabin the agency's actions.

We cannot read § 11 as the kind of guideline or command that would overcome the presumption against judicial review here. Because TVA ratemaking is a category that has traditionally been insulated from judicial review and because Congress has not provided clear limits on the exercise of that discretion, we hold that TVA ratemaking is "committed to agency discretion by law." So the district court was correct to dismiss the APA claim under § 701(a)(2).

B. The Other Claims

We also affirm the district court's dismissal of Holbrook's two other causes of action, but we must take a moment to explain our different reasoning. The district

court held that it lacked jurisdiction over all three legal theories because they were all various flavors of the same claim—challenges to the discretionary ratemaking decisions of the TVA. *Holbrook*, 527 F. Supp. 3d at 858 (citing *McCarthy*, 466 F.3d at 407 ("If we were to review the Cooperatives' actions in enforcing the contract, we would still be reviewing the TVA's actions and thus ignoring the APA's prohibition on judicial review.")). But § 701(a)(2) of the APA says only that "*This chapter applies* . . . except to the extent that agency action is committed to agency discretion by law." (Emphasis added.) By focusing on "this chapter" only, Congress did not go so far as to preempt any judicial review anywhere in the vicinity of a discretionary agency judgment. The § 701(a)(2) bar only prevents us from hearing claims under the APA itself.

It's not clear why this should prevent courts from reviewing other claims—even other claims that look a lot like the APA claims they tag along with—so long as those claims themselves are otherwise cognizable.[15] So even though we will not generally review TVA rates, once the TVA signs a contract, it's possible we may have—as Holbrook claims here—contract "law to apply." *See Portland GE Co. v. Bonneville Power*, 501 F.3d 1009, 1032 (9th Cir. 2007). Or if there is a claim that the TVA's discretionary ratemaking was racially discriminatory, we

15. The Attorney General's Manual on the APA provides more support. *See* AG's Manual, *supra*, at 95. It imagines a time when a civil servant challenges their discretionary firing. In that case, the employee could not demand arbitrary-and-capricious or substantial-evidence review under the APA, but they could still challenge the firing to ensure the Civil Service Act procedures were followed. *Id.* (citing *Levine v. Farley*, 107 F.2d 186 (D.C. Cir. 1939)).

might have federal civil-rights "law to apply." *Cf. Angelex Ltd. v. United States*, 723 F.3d 500, 508 (4th Cir. 2013).

So while we agree with the district court that the APA claim was properly dismissed under § 701(a)(2), we do not agree that strips us of jurisdiction to consider any other claims that happen to look like the APA challenge to TVA ratemaking. We must consider the other claims separately. In the end, however, this quibble won't help Holbrook; we will affirm those dismissals individually instead of en mass. *See Willner v. Dimon*, 849 F.3d 93, 103 (4th Cir. 2017) ("We may affirm on any grounds supported by the record, notwithstanding the reasoning of the district court." (cleaned up)).

First to the contract claim. As a member of a class of intended beneficiaries of the contract between TVA and BVU Authority, Holbrook argues that TVA has violated the contract provision which includes the same statutory duties to provide the lowest feasible rates.[16] While not

16. Even though Holbrook was not a party to the TVA contracts, it is possible he had standing to bring a contract action as an intended beneficiary—assuming that the relevant contract here, which is not in the record, includes the same language as the 2006 contract in the record. TVA contracts are governed by federal law. *See Salary Pol'y Empl. Panel v. TVA*, 731 F.2d 325, 330 (6th Cir. 1984); *Stock Equip. Co. v. TVA*, 906 F.2d 583, 585 n.1 (11th Cir. 1990); *see also Priebe & Sons v. United States*, 332 U.S. 407, 411, 68 S. Ct. 123, 92 L. Ed. 32, 109 Ct. Cl. 870 (1947). And under federal law, a nonparty to a contract has standing to bring a contract action when the contract "reflects the express or implied intention of the parties to benefit the third party." *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (cleaned up). "The intended beneficiary need not be specifically or individually identified in the contract, but must fall

barred by § 701(a)(2), this attempt fares no better than the APA claim. The Supreme Court has held that, where a statute provides no cause of action and where an agency signs a contract including those statutory obligations as boilerplate, a breach of contract suit alleging violation of those statutory-but-also-contractual provisions "is in essence a suit to enforce the statute itself." *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 118, 131 S. Ct. 1342, 179 L. Ed. 2d 457 (2011). A nonparty to the contract cannot evade Congress's decision to not include a statutory cause of action by casting themselves as a third-party beneficiary of the identically worded contract. *Id.* In this case, the self-styled contract action is, instead, an attempted cause of action under § 11 of the TVA Act—which has no private cause of action. "The statutory and contractual obligations, in short, are one and the same." *Id.* We therefore affirm the dismissal of the contract claim.

Finally, to the exactions claim.[17] An illegal exaction claim is ultimately a claim under the Due Process Clause

---

within a class clearly intended to be benefited thereby." *Id.* Here, the 2006 contract between TVA and BVU Authority expressly states that the contract was "primarily for the benefit of the consumers of electricity." J.A. 10. So we proceed on the assumption that Holbrook is an intended beneficiary of the contract with BVU.

17. Illegal exactions claims are often brought in the Court of Federal Claims but claims against the TVA are specifically exempted from that court's jurisdiction. 28 U.S.C. § 1491(c) ("Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction. . . of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.").

of the Fifth Amendment that there was a deprivation of property without due process of law. *See Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005). In layman's terms, an exaction claim is when the government takes your things without justification. So an exactions claim asks "for recovery of monies that the government has required to be paid contrary to law." *Elec. Welfare Tr. Fund v. United States*, 907 F.3d 165, 170 (4th Cir. 2018) (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996)). Holbrook cannot make out an exaction here because "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." *United States v. Sperry Corp.*, 493 U.S. 52, 63, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989); *see Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). In short, a voluntary payment for services rendered is not an exaction, illegal or otherwise. And even if it were an exaction, Holbrook's payments were not illegal because the TVA Act cannot be read to require subsidies to consumers as we have already said. So again, we affirm the dismissal of Holbrook's exactions claim.

* * *

Section 11 of the TVA Act lays out broad policies and goals that operate more like aspirations than commands. It does not support any of the claims that Holbrook offers against TVA or BVU Authority. TVA ratemaking is a presumptively unreviewable category of agency action under 701(a)(2), and the policy-laden language of § 11 does not provide any guidelines or limits to overcome that presumption. Because the TVA-BVU contract simply

repeats the vague statutory language, Holbrook's contract claim is really a statutory claim in disguise, and § 11 of the TVA Act does not provide a private cause of action. And finally, because Holbrook voluntarily bought power from BVU Authority, nothing was exacted or taken from him at all. So the district court is

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ABINGDON DIVISION, FILED MARCH 19, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

Case No. 1:20CV00025

By: James P. Jones
United States District Judge

DAVID HOLBROOK,

Plaintiff,

v.

TENNESSEE VALLEY AUTHORITY, *ET AL.*,

Defendants.

OPINION

In this proposed class action concerning electricity rates charged by the Tennessee Valley Authority (TVA), the defendants have filed motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). For the reasons that follow, the motions will be granted.

I.

The Amended Class Action Complaint alleges the following facts, which I must accept as true for purposes of deciding the motions to dismiss.

Appendix B

TVA is the nation's largest public power provider. It was formed during the Great Depression at a time when most rural American households could not access electricity. Currently, TVA sells electricity directly to about 60 large industrial customers and to 154 local power companies, who in turn distribute the electricity to industrial, commercial, and residential customers in the southeastern United States.

The Tennessee Valley Authority Act (TVA Act) includes the following provision:

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

> Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this chapter.

16 U.S.C. § 831j (emphasis added).

Beginning in 2010, through its Strategic Pricing Plan, TVA adopted a series of rate changes that were intended to be revenue neutral. In other words, TVA anticipated that the rate changes would neither increase nor decrease its total revenue but would result in some customers paying more and others paying less for the same amount of electricity used. "The rate changes included manufacturing credits, discounts for high-volume users and other changes that had the intent and effect of shifting costs from industrial users to consumers." Am. Class Action Compl. ¶ 7, ECF No. 27. TVA's purpose in adopting these rate changes was to further its stated objective that revenue collected from each customer class should be proportional to the costs associated with that customer class. One of TVA's goals was to make its industrial rates more competitive.

In 2010, TVA implemented a rate change that sought to adjust pricing based on the time of year electricity was used. TVA expected that this change would be nearly cost-neutral for classes of end-users, but in practice, it shifted costs from industrial customers to domestic customers. TVA documents attached to the Amended Complaint suggest that this is so because industrial customers tend to use more electricity in milder seasons, while commercial

and residential customers tend to use less electricity when the weather is mild. By 2013, domestic customers were paying approximately 10% more than they had in 2010, while industrial customers were paying approximately 10% less.

In 2013, TVA gave industrial customers a rate reduction for two years. This change, too, was designed to be revenue neutral, and domestic rates correspondingly increased. As a result, "TVA achiev[ed] an industry-wide ranking for industrial rates that was better than TVA's industry-wide ranking for domestic consumer rates." *Id.* ¶ 74.

"By 2015, the TVA's industrial rates were more competitive than its domestic rates, according to the TVA's own analysis." *Id.* ¶ 75. In 2015, TVA's industrial customers were charged electricity rates within the top 25% of those charged by TVA's competitors, and TVA's residential customers were charged rates that were approximately at the median of those charged by TVA's competitors. TVA then instituted another manufacturing credit and made other rate changes. As a result, the rates TVA charged to industrial consumers were reduced by 6.4% on average, and direct-serve industrial consumer rates were decreased by 9%, while the rates TVA charged to domestic consumers increased by 1.1%. "By 2016, the TVA's rate changes had shifted approximately $439 million in rates per annum from domestic consumers to industry. Changes subsequent to 2016 increased the shift in rates." *Id.* ¶ 12.

TVA adopted additional revenue-neutral rate changes in 2018. It reduced rates for large general service

customers and increased rates for other customers, including domestic consumers. TVA also reduced wholesale energy rates for all users and instituted a Grid Access Charge. "This action shifted approximately $600 million in revenue from charges based on customers' electricity usage to fixed charges under which a portion of customers' electricity rates are set regardless of electricity use." *Id.* ¶ 94. The change benefitted industrial users to the detriment of domestic users.

TVA enters into standard form contracts with its distributors, one of which is defendant BVU Authority (BVU). Expressly incorporated into these contracts is the statutory directive that sale of electricity to industry should be used primarily to ensure the provision of electricity to domestic consumers at the lowest possible rates. TVA sets the resale rates that distributors like BVU charge their customers. Different classes of customers — industrial users, commercial users, and domestic users — are charged different rates, but all customers within a user class are charged the same rate. Local power companies and TVA can attempt to agree on changes to rates and charges, but if they are unable to reach agreement, TVA is empowered to change rates unilaterally.

Plaintiff David Holbrook is a customer of BVU. He alleges that he has paid higher rates for electricity than he would have paid had TVA not implemented the aforementioned rate changes, which he contends violate the TVA Act's directive that rates should be set to ensure the lowest possible rates for domestic consumers. He brings this action on behalf of a class of TVA residential

customers and a subclass of BVU residential customers who received electricity pursuant to a contract between TVA and BVU.

Count One of the Amended Class Action Complaint asserts a breach of contract claim against both defendants. Holbrook avers that he is an intended third-party beneficiary of the contract between TVA and BVU. He claims that TVA and BVU have violated the "lowest possible rates" provision contained in the contract.

Count Two claims that TVA has violated the Administrative Procedure Act (APA), 5 U.S.C. § 702, by acting arbitrarily and capriciously in setting rates that were not the lowest possible rates for domestic consumers of energy. He contends that TVA's rate changes exceeded TVA's statutory jurisdiction and authority.

Count Three is a claim of unlawful exaction. Here, Holbrook alleges that TVA caused him to pay rates that exceeded the amount that could lawfully be charged under the TVA Act.

The defendants have moved to dismiss the Amended Class Action Complaint. They contend that this court lacks subject-matter jurisdiction over the plaintiff's claims because TVA's rate-setting decisions are judicially unreviewable due to the broad discretion the TVA Act grants to TVA. They further argue that even if this court had jurisdiction, Holbrook's claims are barred by the statute of limitations, and he has failed to state viable claims of breach of contract, violation of the APA, or

exaction. The motions have been fully briefed and orally argued.

II.

Federal courts have limited jurisdiction and are empowered to act only in the specific instances authorized by Congress. *Bowman v. White*, 388 F.2d 756, 760 (4th Cir. 1968). The court must determine questions of subject-matter jurisdiction before it can address the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Thus, when a party moves to dismiss for lack of subject-matter jurisdiction and for failure to state a claim, the court must address the question of subject-matter jurisdiction first. *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946). The party asserting federal jurisdiction bears the burden of proving jurisdiction. *See Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). A district court must grant a Rule 12(b)(1) motion to dismiss "if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* at 768.

"A long line of precedent exists establishing that TVA rates are not judicially reviewable." *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 405 (6th Cir. 2006) (citation omitted). While the APA generally provides for judicial review of agency actions, such an action is unreviewable if it is "committed to agency

discretion by law." 5 U.S.C. § 701(a)(2).[1] That exception is read narrowly. *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 370, 202 L. Ed. 2d 269 (2018). "It applies only in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Electricities of North Carolina, Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1266 (4th Cir. 1985) (internal quotation marks and citations omitted).

In *Electricities of North Carolina*, the Fourth Circuit held that a statutory directive to distribute power "in

1. There is a circuit split regarding whether the APA's exemption from judicial review of actions committed to agency discretion affects a court's subject-matter jurisdiction. The D.C. Circuit has concluded that "a complaint seeking review of agency action 'committed to agency discretion by law,' 5 U.S.C. § 701(a)(2), has failed to state a claim under the APA, and therefore should be dismissed under Rule 12(b)(6), not under the jurisdictional provision of Rule 12(b)(1)." *Sierra Club v. Jackson*, 648 F.3d 848, 854, 396 U.S. App. D.C. 297 (D.C. Cir. 2011). The Sixth Circuit considered the issue and reached the opposite conclusion in an unpublished opinion, finding, "In classes of cases where we have no meaningful standard by which to evaluate the agencies' exercise of discretion, we have no jurisdiction." *Sheldon v. Vilsack*, 538 F. App'x 644, 649 n.4 (6th Cir. 2013) (unpublished). Most courts of appeals considering such challenges have addressed them as jurisdictional issues. *See, e.g., Gentile v. Sec. & Exch. Comm'n*, 974 F.3d 311, 320 (3d Cir. 2020); *Vela-Estrada v. Lynch*, 817 F.3d 69, 71-72 (2d Cir. 2016); *Animal Legal Def. Fund v. U.S. Dept. of Agric.*, 789 F.3d 1206, 1214 (11th Cir. 2015) ("Whether an agency action is reviewable under § 701(a)(2) is a matter of subject matter jurisdiction."); *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 237-28 (5th Cir. 2015). I agree that whether an agency's action is reviewable under § 701(a)(2) raises a question of subject-matter jurisdiction, for the reasons stated in *Sheldon*.

such a manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles" essentially granted the agency unfettered discretion and was too vague to supply a standard for judicial review of agency decisions. *Id.* at 1264, 1266 (quoting 16 U.S.C. § 825s). The language considered in that case is analogous to the "lowest possible rates" provision of the TVA Act, and I conclude that it, too, sets forth no meaningful standard for courts to apply.

Holbrook characterizes the "lowest possible rates" clause as a subsidy mandate, but that is an overly simplistic reading of the statute. The TVA Act does not state that industrial rates must be lower than residential rates or that industrial users must bear more than their pro rata share of the costs of delivering electricity in order to subsidize residential consumers. Section 831j sets forth several polices – to equitably distribute power, to benefit the people as a whole and domestic and rural consumers in particular – and tempers them with phrases such as "so far as practical" and "economically." Sale of electricity to industry is to be utilized not only to secure revenue returns, but also to secure "a sufficiently high load factor." *Id.* The statute contemplates that sale to industry will be used to permit domestic and rural use not only "at the lowest possible rates," but also "in such manner as to encourage increased domestic and rural use of electricity."[2] *Id.*

2. As the Fourth Circuit noted more than 35 years ago, "The goals of rural electrification hav[e] been, by and large, realized." *Elecs. of N.C.*, 774 F.2d at 1267 n.4.

Based on the environmental assessments, responses to public comments, and other documents attached to the Amended Complaint, TVA appears to have concluded that reducing rates for industry would encourage a sufficiently high load factor as well as a more consistent demand for electricity, and perhaps greater overall use by industry. This would, in TVA's estimation, satisfy the statutory "objective that power shall be sold at rates as low as are feasible." 16 U.S.C. § 831n-4. TVA could reasonably have decided that reducing industry rates would have the ultimate effect of lowering electricity bills for all users, including rural and domestic users.

It is unnecessary at this junction to delve into the weeds of TVA's thought processes. The statute simply does not say what the plaintiff suggests it says. A review of § 831j and the TVA Act as a whole reveals that TVA is tasked with balancing a number of objectives that are not cabined by clear criteria. This is the essence of commitment to agency discretion by law. There is no law this court could apply to determine whether TVA has complied with § 831j. "[D]eterminations about the level of rates necessary to recover the various costs of operating TVA's power system, as well as the terms and conditions of TVA's power contracts, . . . are part of TVA's unreviewable rate-making responsibilities." *McCarthy*, 466 F.3d at 407 (quoting *4-Cnty. Elec. Power Ass'n v. TVA*, 930 F. Supp. 1132, 1138 (S.D. Miss. 1996)).

Holbrook cannot escape dismissal of this case by rebranding his claims under different legal theories. The court lacks subject-matter jurisdiction over all three

counts of the Amended Class Action Complaint, including the plaintiff's claims of breach of contract and exaction, because they all seek review of TVA's discretionary rate-making decisions. *See id.* at 407 ("If we were to review the Cooperatives' actions in enforcing the contract, we would still be reviewing the TVA's actions and thus ignoring the APA's prohibition on judicial review."). The statute ensures that Holbrook's only remedy is a legislative one. Because the court lacks jurisdiction over the plaintiff's claims, the case must be dismissed.

III.

For the foregoing reasons, it is **ORDERED** that the defendants' Motions to Dismiss, ECF Nos. 20, 22, are GRANTED. It is further **ORDERED** that the plaintiff's Request for Judicial Notice, ECF No. 39, is DENIED AS MOOT because the court considered the referenced statements as true in accord with the applicable standard of review. A separate Final Order of Dismissal will be entered.

ENTER: March 19, 2021

/s/ JAMES P. JONES
United States District Judge

APPENDIX C — RELEVANT STATUTORY PROVISIONS

16 U.S.C. § 831i (TVA Act § 10)

§ 831i. Sale of surplus power; preferences; experimental work; acquisition of existing electric facilities

The Board is empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the Board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided,* That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to

make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further,* That the Board is authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: *Provided further,* That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: *Provided further,* That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further,* That the terms "States", "counties", and "municipalities" as used in this chapter shall be construed to include the public agencies of any of them unless the context requires a different construction.

Appendix C

16 U.S.C. § 831j (TVA Act § 11)

§ 831j. Equitable distribution of surplus power among States and municipalities; improvement in production of fertilizer

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