

No. 22-629

In the
Supreme Court of the United States

DAVID HOLBROOK,
Petitioner,

v.

TENNESSEE VALLEY AUTHORITY; AND BVU AUTHORITY,
Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fourth Circuit**

BRIEF IN OPPOSITION

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**COUNTERSTATEMENT OF
QUESTION PRESENTED**

Courts have concluded that TVA's ratemaking is committed to agency discretion by law in every case that has considered that issue. The question presented is whether the Fourth Circuit Court of Appeals properly affirmed the District Court for the Western District of Virginia's dismissal of Petitioner's claim under section 701(a)(2) of the Administrative Procedure Act because Section 11 of the TVA Act does not contain a directive on TVA ratemaking, and consequently properly affirmed the dismissal of Petitioner's related breach of contract and unlawful exaction claims.

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INTRODUCTION

In this matter, Petitioner, an electric customer of Respondent BVU Authority (“BVU”), attempted to challenge TVA’s ratemaking. BVU is an afterthought to Petitioner in the Amended Complaint and is hardly mentioned at all in the petition here.

Petitioner’s arguments stand and fall upon the shaky foundation of his incorrect reading of 16 U.S.C. § 831j (Section 11 of the TVA Act). As both the Fourth Circuit Court of Appeals and District Court for the Western District of Virginia held, Petitioner’s application of Section 11 is not what Congress said. Section 11 is not a directive, but rather is aspirational. Because Congress committed electric ratemaking to TVA’s discretion by law, there is no jurisdiction under the Administrative Procedures Act. Likewise, Petitioner has no claim for breach of contract or unlawful exaction because these claims rest upon Petitioner’s misinterpretation of the TVA Act. Finally, Petitioner has no claim for unlawful exaction because he voluntarily paid for electric services.

The Fourth Circuit correctly decided this matter and there is no basis for this Court to issue a writ of certiorari.

STATEMENT OF THE CASE

Petitioner’s Amended Complaint purported to state claims under the APA, a breach of contract, and unlawful exaction. The fundamental allegation is Petitioner’s claim that “[t]he Lowest Possible Domestic Rates provision [Section 11 of the TVA Act]” mandates that TVA sell electricity to industry at rates

that maximize the subsidy that domestic users receive so that they can be charged the lowest possible rates. JA 36a. As to BVU, the Petitioner admitted that TVA and not BVU set rates and did not allege what contract duties BVU had or breached. JA 36a-37b. Petitioner's unlawful exaction claim is not directed against BVU either. JA 37b.

The district court dismissed the Petitioner's claims for lack of subject matter jurisdiction because TVA's ratemaking was unreviewable under the APA, and consequently the contract and exaction claims also failed because they were based upon the same faulty premise. The Fourth Circuit affirmed after a fulsome discussion of the APA and clarified the basis for dismissal of the contract and exaction claims.

The Fourth Circuit did not create any new law. Instead, the Fourth Circuit fundamentally affirmed for the same reason that the district court had dismissed the Petitioner's claims: because "TVA's ratemaking authority is committed to agency discretion and thus unreviewable." JA 2a. The TVA Act did not create a directive as argued by Petitioner. Moreover, the Fourth Circuit's opinion did not raise any issues that warrant a grant of certiorari.

REASONS FOR DENYING CERTIORARI**I. PETITIONER HAS NOT RAISED ANY BASIS FOR GRANT OF CERTIORARI.**

Petitioner attempted to frame a nonexistent issue in his Complaint. Despite a vast level of detail regarding TVA's considerations to make rates, Petitioner never passed the threshold issue that, as the district court held, the TVA Act "simply does not say what the [Petitioner] suggest it says." JA 40a. The Fourth Circuit likewise noted in its opinion "[Petitioner] 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." JA 18a (emphasis in original).

The Fourth Circuit analyzed Petitioner's APA claim under the statute and long-standing precedent of this Court and held that TVA's ratemaking was not subject to review under 5 U.S.C. § 701(a)(2). Relying on *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), the court reviewed whether there is "no meaningful standard against which to judge the agency's exercise of discretion." JA 10a.

Thoroughly analyzing the complexity and mechanics of TVA ratemaking, lack of coercive power, and the history of courts not reviewing - not just TVA's rates, but other agencies' rates - the Fourth Circuit held that TVA ratemaking is historically committed to agency discretion. JA 21a. The Fourth Circuit also held that Section 11 did not provide an exception to overcome the presumption against judicial review. Instead, similar to the district court, the Fourth Circuit "read this provision as a general policy

statement and, in places, as a kind of aspiration about what Congress hopes will be accomplished.” JA 23a. As a result, the Fourth Circuit affirmed the dismissal of Petitioner’s APA claim.

Petitioner here does not raise anything novel that would warrant this Court’s review. Rather, Petitioner recycles the same arguments as below. Petitioner has not highlighted a meaningful standard and he has not shown a Congressional directive. There is no circuit split. The Fourth Circuit held like every other court before it had: that Congress intended that TVA’s ratemaking be left solely to TVA. The Fourth Circuit explained the many rationale for Congress deciding to not involve courts in those decisions, given, among others, the complexity of the task and history of ratemaking. This result is not new, but rather is contemplated by Congress in the APA itself. Congress can decide to leave complex issues to the discretion of the agency as it did here.

Similarly, the appeals court’s decision explained that Petitioner had no contract or exaction claim because the TVA Act did not create a contractual right and that voluntary electric payments could not be exactions. JA 28a-29a.

As to BVU, Petitioner admitted from the outset that TVA and not BVU set electric rates. Petitioner never claimed that BVU had a Congressional directive to do anything. Also, Petitioner made no allegations against BVU in its exaction claim. But because Section 11 did not create a directive and TVA’s ratemaking is unreviewable, all claims fail against BVU in any event. Petitioner claiming that his

electric bills should be lower is not the type of issue contemplated to be decided by this Court.

Thus, the Petitioner has failed to properly pose a conflict between the circuits or any important question of law to this Court. *See* U.S. Sup. Ct. R. 10(a) and 10(c).

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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