"Not Just Another Utility": The Tennessee Valley Authority and Public Power in the Energy Transition

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ABSTRACT: Support for public ownership of utilities as a means of decarbonizing energy systems is rising. Yet good models for how to institutionally structure publicly owned utilities to accomplish this mission are scarce. In fact, many point to the disappointing track record of the United States' largest publicly owned utility, the Tennessee Valley Authority ("TVA"), as evidence that publicly owned power is a poor institutional model for the energy transition. This Essay interrogates this argument, tracing how TVA's institutional design relates to its sectoral performance. As we show, TVA's record is decidedly mixed: In some ways, it is overperforming its private-sector peers, delivering cheaper and cleaner electricity than investor-owned utilities ("IOUs") in the region. Yet the agency remains intransigent and nontransparent in the face of clean energy developments, causing it to lag on solar and wind development and to over-rely on planned gas additions in comparison to private sector peers.

Our core argument is that TVA's modern struggles should be understood as consequences of accretive choices in its institutional design. Mechanisms for politically controlling TVA from above and below have eroded over time, as it has faced mounting pressure to run and perform like a private sector company. The modern TVA is operating under a muddled theory of accountability that mixes theories of corporate governance with theories of presidential control of agency action. The resultant hodgepodge is incoherent, ineffective, and deficient in realizing the democratic ethos of the TVA Act. For

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TVA to be rendered more effective, these muddled theories of accountability must be parsed. We trace two paths forward, one focused on instilling more competition and the other on transforming TVA into a laboratory of clean energy innovation. We close by contending that a more careful understanding of TVA's institutional dynamics does not disprove the potential potency of public power as a tool of the energy transition—but it does suggest design guardrails necessary for its success. Public power is a creature of democratic will rather than profit-making potential. It can succeed only when its democratic mandate is clear, channeled wisely, and maintained over time through concrete results and sustained practices of democratic engagement.

INTRODUCTION

Support for public ownership in the energy sector is rising. In 2023, New York enacted legislation giving its public power authority far more responsibility.[1] In 2023, Mainers waged a hotly contested though ultimately unsuccessful campaign to take over the state's private utilities.[2] In the United

1. *See NYPA Renewables*, N.Y. POWER AUTH., https://www.nypa.gov/renewables [https://perma.cc/L8M7-DWNE]; Aliya Uteuova, *New York Takes Big Step Toward Renewable Energy in 'Historic' Climate Win*, GUARDIAN (May 3, 2023, 6:00 AM), https://www.theguardian.com/us-news/2023/may/03/new-york-renewable-energy-public-utilities [https://perma.cc/CUW8-XN3E].

2. *See* Stephen Singer, *Effort to Create Maine Publicly Owned Electric Utility Fails*, PORTLAND PRESS HERALD (Nov. 8, 2023), https://www.pressherald.com/2023/11/07/pine-tree-power-question-propels-voter-turnout [https://perma.cc/MNR7-JP3J].

Kingdom, the Labour Party campaigned to decisive 2024 victory on a new national public power entity.[3] Long seen as a historical relic, public power's recent ascent has been fueled by people fed up with their private energy companies' prices, service, and intransigence in addressing the critical challenge of climate change.

The summer of 2024 was again the hottest on record as global carbon emissions continue to rise.[4] Although U.S. carbon emissions are decreasing, they are not decreasing nearly fast enough.[5] The utility sector exemplifies this steady-but-insufficient progress, with many private utilities suggesting that change at the pace demanded by planetary imperatives is impossible if we want to keep the lights on.[6]

One hope for public power is that it can embrace a public mandate for climate action and illustrate how decarbonization can be done rapidly, affordably, and reliably. But public power has its own detractors, who point most centrally to the modern record of the Tennessee Valley Authority ("TVA"). Unique among federal agencies in its mission and status, TVA is a federal government corporation that has grown to become the third largest generator of electricity in the United States, distributing power to 153 local power companies ("LPCs") and ten-million people across seven states in the Tennessee Valley.[7]

When the Biden Administration took office and adopted a one-hundred percent clean electricity goal by 2035, many hoped that TVA—as a federally owned utility—would enthusiastically embrace the mission.[8] As we describe,

3. *See Labour's Plan for GB Energy*, LABOUR (Sept. 28, 2023), https://labour.org.uk/updates/stories/labours-plan-for-gb-energy [https://perma.cc/3U2M-T53V].

4. *Earth Had Its Hottest August in 175-Year Record*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Sept. 12, 2024), https://www.noaa.gov/news/earth-had-its-hottest-august-in-175-year-record [https://perma.cc/68RP-ZWLC]; Kate Abnett, *Global CO2 Emissions to Hit Record High in 2024, Report Says*, REUTERS (Nov. 12, 2024, 6:03 PM), https://www.reuters.com/business/environment/global-co2-emissions-hit-record-high-2024-report-says-2024-11-13 [https://perma.cc/43BB-P2TR].

5. *See* Benjamin Storrow & E&E News, *U.S. Carbon Emissions Set to Fall Again, a Key Sign of Progress*, SCI. AM. (Nov. 21, 2023), https://www.scientificamerican.com/article/u-s-carbon-emissions-set-to-fall-again-a-key-sign-of-progress [https://perma.cc/E39U-DR2P].

6. *See* Alexandra Klass, Joshua Macey, Shelley Welton & Hannah Wiseman, *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 974–75 (2022).

7. Caroline Cox & Madeline Flynn, *The TVA Effect: Clean Energy Goals & Public Power* 5 (Vanderbilt Univ. L. Sch., Working Paper No. 23-54, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4588086 [https://perma.cc/D2W6-GG7T]; Athens Utils. Bd. v. Tenn. Valley Auth., 177 FERC ¶ 61,021, at 6 (2021) [hereinafter *Athens Utils. Bd.*]; *What TVA Does*, TENN. VALLEY AUTH., https://www.tva.com/kids/what-is-tva/what-tva-does [https://perma.cc/BL2A-5E9S]. TVA also sells electricity directly to more than sixty large industrial customers, comprising about eight percent of its total sales. *Public Power for the Valley*, TENN. VALLEY AUTH., https://www.tva.com/energy/public-power-partnerships [https://perma.cc/G3BT-CM4J].

8. Maggie Shober, *Biden's Hand-Picked Regulators Okay Most Anti-Climate Utility Plan in Country*, S. ALL. FOR CLEAN ENERGY (Apr. 17, 2024), https://www.cleanenergy.org/blog/bidens-hand-picked-regulators-okay-most-anti-climate-utility-plan-in-country [https://perma.cc/MNB2-2TCY].

that has not been the case. Instead, TVA has undertaken one of the largest planned fossil gas buildouts in the country, despite mounting calls from the White House, federal agencies, Congresspeople, the public, and major TVA LPCs for the agency to embrace its multifaceted mission and serve as a national leader in decarbonizing its energy supply.[9] This trajectory has caused Tennessee state representative Justin Pearson to suggest that "TVA is a bad corporation."[10]

Is TVA "bad"? How do its shortcomings relate to its public power status? What lessons should scholars and advocates of public power take from TVA? This Essay aims to answer these questions from an institutional perspective, tracing TVA from its early days of democratic promise and significant social accomplishments to its modern instantiation as a behemoth electric utility. As we show, in some ways TVA is overperforming its private-sector peers, delivering below-average electricity rates and below-average carbon emissions as compared to IOUs in the region.[11] Yet it has remained intransigent to shifting political priorities and economics in the energy sector, resisting wind and solar resources that would be cheaper *and* cleaner for the Valley. Indeed, its planned gas buildout stands in marked contrast to the rest of the country, where eighty-one percent of planned new generation in 2024 came from renewable energy and energy storage.[12]

Our core argument is that TVA's modern struggles should be understood as consequences of accretive choices in its institutional design. Even in its early days, TVA's mission rested on contradictions and open questions—leaving considerable room for its leadership to interpret and apply guiding principles. Its creators, however, imagined that these details would be worked out under multiple forms of democratic oversight: from Congress, its funder; from the

9. *See, e.g.*, Letter from Edward J. Markey, United States Senator, et al., to William Kilbride, Chair, Bd. of Dirs., Tenn. Valley Auth., & Jeffrey J. Lyash, President & Chief Exec. Officer, Tenn. Valley Auth. (Aug. 16, 2023), https://www.markey.senate.gov/imo/media/doc/letter_to_tva_leadership_on_clean_energy.pdf [https://perma.cc/YVH8-U7ZS]; CLEAN UP TVA, https://cleanuptva.org [https://perma.cc/BA47-CMSB]; Julian Spector, *Is the Biggest US Public Utility Finally Catching Up on Clean Energy?*, CANARY MEDIA (July 26, 2023), https://www.canarymedia.com/articles/clean-energy/is-the-biggest-us-public-utility-finally-catching-up-on-clean-energy [https://perma.cc/JK7N-AVJ5]; MATT BRUENIG, FIGHTING CLIMATE CHANGE WITH A GREEN TVA 7 (2019), https://www.peoplespolicyproject.org/wp-content/uploads/GreenTVA.pdf [https://perma.cc/T3GJ-HWC2]; Press Release, Ctr. for Biological Diversity, Energy Department Pushed for Roadmap on TVA's Transition to 100% Just, Renewable Energy (July 29, 2021), https://biologicaldiversity.org/w/news/press-releases/energy-department-pushed-for-roadmap-on-tvas-transition-to-100-just-renewable-energy-2021-07-29 [https://perma.cc/TKR4-KQLQ].

10. Appalachian Voices, *The People's Voice on TVA's Energy Plan: Public Hearing*, YOUTUBE (Jan. 25, 2024), https://www.youtube.com/watch?v=5A48gDJqOOk (recording remarks of Rep. Justin J. Pearson at 05:17:40).

11. *See infra* pp. 2249–52.

12. *See Solar and Battery Storage to Make Up 81% of New U.S. Electric-Generating Capacity in 2024*, U.S. ENERGY INFO. ADMIN. (Feb. 15, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61424 [https://perma.cc/PNW9-K77E].

President, who selected its board of directors; and from local communities, who would have a voice in shaping TVA's objectives and methods.[13]

These accountability mechanisms have eroded over time. Amendments to the TVA Act in 1959 and 1998 loosened congressional oversight by decoupling TVA from appropriations and requiring it to fully self-fund its operations.[14] Further changes to the Act in 2005 intended to "professionalize" the organization—that is, make it run more like a private corporation—have limited the board's and the President's ability to steer the agency.[15] Divergences in regional and national political preferences on energy have compounded the difficulties of presidential control. Simultaneously, a mix of legislative, administrative, and judicial decisions have restricted the ability of local communities to bargain with TVA over the terms of their power procurement or otherwise participate effectively in decision-making.[16]

Consequently, TVA's institutional structure today is a hollowed-out version of its beginnings as a democratic economic engine. At the same time, the corporatization of the TVA has handed the agency an impossible mission, demanding economic performance on par with the private sector while insisting on the continued vitality of its public mandate. Thus, we contend that those disappointed by the *substance* of TVA's decisions should look to its *structure* for both explanation and remedy. The core reason that neither the Biden Administration nor LPCs have been able to realize their visions for the agency is because its modern governance structure has diminished their ability to shape decisions at TVA.[17] What's more, there is no single, shared vision for what TVA should be—different entities, all with some claim to democratic legitimacy, want different things from the agency.[18]

The modern TVA is thus operating under a muddled theory of accountability that mixes theories of corporate governance with theories of presidential control of agency action. The resultant hodgepodge is incoherent, ineffective, and deficient in realizing the democratic ethos of the TVA Act. TVA is nominally a government "corporation," but as the Supreme Court has explained with regard to another government corporation, that label "does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely

13. *See infra* pp. 2238–39.

14. *See infra* pp. 2240–41, 2244–45.

15. *See infra* p. 2245.

16. *See infra* Section II.B.

17. *See* Cox & Flynn, *supra* note 7, at 16–18 (discussing power of LPCs over TVA decisions).

18. *See* Michael P. Vandenbergh, Jim Rossi & Ian Faucher, *The Gap-Filling Role of Private Environmental Governance*, 38 VA. ENV'T L.J. 1, 26–31 (2020) (comparing potential support for TVA decarbonization efforts in cities with the lack of support for such efforts at the state level in the TVA service area).

Governmental purposes."[19] Consequently, "corporatization" has failed at TVA because as an agency, TVA lacks core structural features (namely, shareholders and a board with fiduciary duties) that would enable the accountability mechanisms of corporate law to keep it in check.[20] At the same time, efforts to make TVA function more like a private corporation have undermined the reinforcing mechanisms for political accountability that originally checked the agency.

We argue that for TVA to be rendered more effective, these muddled theories of accountability must be parsed. We trace two paths forward: Reformers could embrace a more robust theory of corporatization that ends TVA's electricity supply monopoly in the region and requires it to compete for LPC customers. These reforms would essentially transform the agency from a regional economic developer into just another transmission utility, for better or for worse. Although sympathetic to those frustrated enough with the agency to advocate for its dismemberment, we outline several reasons to disfavor this suite of reforms.

Alternatively, reformers could reclaim TVA's public potential as a laboratory of clean energy innovation via significant governance reforms. We outline three sets of changes that could revivify TVA: (1) enhanced political accountability through a re-empowered board; (2) increased public participation in strategic and resource planning decisions; and (3) a clear mission backed by sustained regional buy-in (which, we argue, is likely to require a return to some congressional funding).[21]

In setting out this diagnosis and possible paths forward, we join a handful of articles evincing mounting interest in TVA. Recent valuable contributions have considered the conditions under which entities like TVA innovate,[22] the history of TVA's contractual practices with its LPCs,[23] and possible private governance pressures that could be brought to bear on TVA to force more rapid decarbonization.[24] We take a complementary approach, using an institutionalist lens that considers how legal structures and cultural practices relate to substantive outcomes. Our approach is particularly illuminating on

19. Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539 (1946) (considering the nature of the Reconstruction Finance Corporation); *see also* KEVIN R. KOSAR, FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW 1 (2011) ("As defined in this report, a federal government corporation is an agency of the federal government, established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures.")

20. *See infra* pp. 2258–59.

21. *See infra* pp. 2265–68.

22. *See* Arjuna Dibley, *When Does "Leviathan" Innovate? A Legal Theory of Clean Technological Change at Government-Owned Electric Utilities*, 47 HARV. ENV'T L. REV. 135, 160–80 (2023) (using TVA as a case study of innovation in public power).

23. *See generally* Rachel Neuburger, *Power and Politics in the Tennessee Valley*, 45 ENERGY L.J. 251 (2024).

24. *See* Vandenbergh, Rossi & Faucher, *supra* note 18, at 32–54.

the fundamental question that many have about the modern TVA: Why, despite its public status, it has resisted responding to evolving federal goals and shifting economic trends in the energy sector. Our answers offer lessons regarding potential future directions for TVA and also highlight several institutional changes TVA could itself make to bolster its regional and national legitimacy.

This Essay goes to press at an uncertain moment for TVA. President Trump fired two of its board members in April 2025 without explanation, leaving the agency without a board quorum to guide its decision-making.[25] Some speculate that the Trump Administration might support divestiture of TVA as part of its broad dismantling of federal bureaucracy.[26] Others, however, have tied the firings to an opinion piece written by the two U.S. senators from Tennessee (both Republicans),[27] which encouraged the President to embrace TVA's public status by launching it as a new nuclear energy powerhouse, thereby transforming the agency to "be to the nuclear race what NASA was to the space race."[28] However these changes play out, the analysis we offer here of potential methods of reform, and their benefits and costs, should be of value in these discussions.

Beyond TVA, our analysis serves a broader purpose in debates over the role of public power in today's energy system. We contend that a more careful understanding of TVA's institutional dynamics does not disprove public power's potential as a tool of the energy transition—but it does suggest design guardrails that are necessary for its success. Public power is a creature of democratic will rather than profit-making potential. It can succeed only when its democratic mandate is clear, channeled wisely, and maintained over time through concrete results and sustained practices of democratic engagement.

25. *See* Daniel Dassow, *Trump Fires TVA Board Chair, Stripping Power from Governing Body of Largest US Public Utility*, KNOX NEWS (Apr. 2, 2025, 4:13 PM), https://www.knoxnews.com/story/news/politics/2025/04/01/trump-fires-tva-board-chair-joe-ritch-largest-us-public-utility/82747833007 [https://perma.cc/9QU8-KW9P]; *see also* Tennessee Valley Authority Act of 1933 § 2(e)(1), 16 U.S.C. § 831a(e)(1) (2018) (requiring a five-person quorum for the board to act).

26. *See* Stephen Smith, *The Future of TVA: Status Quo or Time to Go*, S. ALL. FOR CLEAN ENERGY (Apr. 8, 2025), https://www.cleanenergy.org/blog/the-future-of-tva-status-quo-or-time-to-go [https://perma.cc/5M3N-R3VR].

27. *See* Daniel Dassow, *Trump Fires TVA Board Member One Week After Blackburn, Hagerty Attacked Utility Leadership*, KNOX NEWS (Mar. 28, 2025, 1:19 PM), https://www.knoxnews.com/story/news/politics/2025/03/28/trump-fires-tva-board-member-after-blackburn-hagerty-op-ed/82700800007 [https://perma.cc/3RF6-35UJ].

28. Marsha Blackburn & Bill Hagerty, *America's Nuclear Renaissance: How the TVA Can Lead Our Energy Future*, POWER (Mar. 20, 2025), https://www.powermag.com/americas-nuclear-renaissance-how-the-tva-can-lead-our-energy-future [https://perma.cc/9T2E-6YAS].

I. THE INSTITUTIONAL EVOLUTION OF TVA

Congress created TVA as part of the "alphabet soup" of agencies erected to respond to the exigencies of the Great Depression.[29] Questions of how to manage the Tennessee Valley's extreme poverty, chronic flooding, and land degradation merged with a debate over how best to handle the disposition of government property in Muscle Shoals, Alabama—the site of a nitrate plant and hydroelectric dam used for munitions during World War I.[30] After years of debate, Congress's answer in 1933 was TVA, which President Franklin Delano Roosevelt envisioned as "a corporation clothed with the power of Government but possessed of the flexibility and initiative of a private enterprise."[31] Roosevelt also championed the concept of "yardstick[ing]," whereby TVA and other public power entities would serve as a benchmark for private utilities and thereby "prevent extortion against the public and . . . encourage the wider use of that servant of the people — electric power."[32]

The TVA Act of 1933 lays out broad regional development goals, including "to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins."[33] The Act also authorizes TVA's board of directors to "sell the surplus power not used in its operations" and "construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates."[34]

The TVA Act's broad conferral of authority gave TVA a unique mission for a federal agency, charging it with the responsibility for development across a region rather than giving it a single mission-driven focus.[35] How to operationalize this responsibility fell to TVA's first three-man board of directors.[36] Inaugural board member David Lilienthal, a public utility lawyer with an extensive background in electricity regulation, pushed for the agency to prioritize its public power mission.[37] After fractious board debates, Lilienthal's

29. *See* TONYA BOLDEN, FDR'S ALPHABET SOUP: NEW DEAL AMERICA, 1932–1939, at 27 (2010).

30. RICHARD A. COLIGNON, POWER PLAYS: CRITICAL EVENTS IN THE INSTITUTIONALIZATION OF THE TENNESSEE VALLEY AUTHORITY 46–47 (1997).

31. President Franklin D. Roosevelt, Message to Congress Suggesting the Tennessee Valley Authority (Apr. 10, 1933), https://www.presidency.ucsb.edu/documents/message-congress-suggesting-the-tennessee-valley-authority [https://perma.cc/J4G2-ZGG4].

32. 1 FRANKLIN D. ROOSEVELT, *"A National Yardstick to Prevent Extortion Against the Public and to Encourage the Wider Use of that Servant of the People—Electric Power." Campaign Address on Public Utilities and Development of Hydro-Electric Power, Portland, Ore. September 21, 1932*, *in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN DELANO ROOSEVELT 727, 740 (Samuel I. Rosenman ed., 1938).

33. Tennessee Valley Authority Act of 1933 § 1, 16 U.S.C. § 831.

34. *Id.* § 10.

35. *See* COLIGNON, *supra* note 30, at 112 (describing TVA as having "no specified goals or structure"); STEVEN M. NEUSE, DAVID E. LILIENTHAL: THE JOURNEY OF AN AMERICAN LIBERAL 69 (1996) ("[N]o one knew exactly what the president wanted from TVA.").

36. COLIGNON, *supra* note 30, at 114, 116, 129.

37. NEUSE, *supra* note 35, at 70.

vision won out, and TVA focused much of its early energy on growing its electric generation and transmission infrastructure across the region.[38]

Lilienthal insisted that he wanted to do big electric power in a "democratic way,"[39] extolling a "grass roots" governance approach to TVA's power management where TVA would work cooperatively with local power distributors to build an interconnected system and grow both electricity supply and demand.[40] However, even early on, critics noted a "lack of well-defined channels by which local interests could actually influence TVA."[41] Nevertheless, TVA's first decades as an electric utility were widely hailed as a success, as it rapidly built hydropower dams that spread cheap public power across the Valley in partnership with LPCs that constructed distribution systems to tie into TVA's power supply. These systems helped lift per capita income in the region from forty-four percent of the national average to sixty-one percent in TVA's first twenty years.[42]

Once its mission of electrification was largely complete, a new era of questions descended on TVA. TVA had been conceived as the first of a series of regional development institutions for the country.[43] By the early 1950s, enthusiasm for this model had soured as Cold War tensions and McCarthyite

38. *See* NEUSE, *supra* note 35, at 69, 73–79. Because of our focus, we highlight the power side of the agency's history; for a classic examination of its other functions, see PHILIP SELZNICK, TVA AND THE GRASS ROOTS 85–205 (1949).

39. NEUSE, *supra* note 35, at 125.

40. *Id.* at 131, 142; ERWIN C. HARGROVE, PRISONERS OF MYTH 125 (1994) (describing Lilienthal's strategy to increase electrical usage).

41. *Id.* at 140 (discussing Selznick's critiques); *see also* WALTER L. CREESE, TVA'S PUBLIC PLANNING: THE VISION, THE REALITY 66, 115 (1990); Brent Cebul, *Creative Competition: Georgia Power, the Tennessee Valley Authority, and the Creation of a Rural Consumer Economy, 1934–1955*, 105 J. AM. HIST. 45, 49 (2018) (arguing that Lilienthal's approach caused TVA's goals to become "decoupled from popular democracy and almost wholly slanted toward consumerism and industrial development").

42. *The Great Compromise*, TENN. VALLEY AUTH., https://www.tva.com/about-tva/our-history/tva-heritage/the-great-compromise [https://perma.cc/RQ7N-KF7U]; *see also* Patrick Kline & Enrico Moretti, *Local Economic Development, Agglomeration Economies, and the Big Push: 100 Years of Evidence from the Tennessee Valley Authority*, 129 Q.J. ECON. 275, 279 (2014) ("find[ing] that the TVA's direct productivity effects were substantial."). The early TVA also had well-documented challenges, including racist labor practices and disproportionate displacement of low-income communities and communities of color in its dam construction projects. *See* Cebul, *supra* note 41, at 61 (recounting racist labor practices); AVIGAIL SACHS, THE GARDEN IN THE MACHINE: PLANNING AND DEMOCRACY IN THE TENNESSEE VALLEY AUTHORITY 6 (2023) ("TVA was a federal project, but its directors and professionals did not counteract southern segregation."); LAURA BETH DAWS & SUSAN L. BRINSON, THE GREATER GOOD: MEDIA, FAMILY REMOVAL, AND TVA DAM CONSTRUCTION IN NORTH ALABAMA 4 (2019) (displacement); Melissa Walker, *African Americans and TVA Reservoir Property Removal: Race in a New Deal Program*, 72 AGRIC. HIST. 417, 423 (1998) (observing that referrals to Agricultural Extension Service or Resettlement Administration programs were rarely granted to Black households).

43. *See* William E. Leuchtenburg, *Roosevelt, Norris and the "Seven Little TVAs,"* 14 J. POL. 418, 418–19 (1952).

fears of socialism rose.[44] In 1953, amid regional debates about creating other river valley authorities, Congress established a task force to explore the federal government's involvement in managing the nation's water and power resources.[45]

President Dwight D. Eisenhower appointed former President Herbert Hoover to head the task force, often called the "Second Hoover Commission."[46] In 1955, the task force recommended decommissioning TVA, characterizing public power as "an unnecessary Federal function competitive with private enterprise."[47] Contemporary scholars pushed back, arguing that TVA had driven industrial development "beyond the capacity of private utilities" in regions that previously lacked electric power.[48] Ultimately, a Democrat-controlled Congress refused to green light the task force's recommendations to sell off TVA's assets.[49]

Yet debates over the TVA model persisted. When TVA requested appropriations to fund an expansion of its system to meet growing demand, Congress refused, bowing to pressure from regional utilities to stop TVA's growth.[50] It further forbade TVA from financing expansions in generation from surplus earnings.[51] This bind caused TVA's board to realize that continued dependence on Congress for funding was an existential threat, and thus it asked Congress to make the agency self-funding.[52] Utilities in the region, however, opposed this amendment, worried that without congressionally-imposed constraints, TVA would spread cheap public power beyond the Valley.[53]

In 1959, Congress reached a compromise, giving TVA its financial independence but at a price: Congress "fenced in" TVA by prohibiting it from expanding geographically beyond its existing service territory as of July 1, 1957.[54] These changes finally settled the longstanding question of TVA's

44. *See* HARGROVE, *supra* note 40, at 141 (noting that President Eisenhower referred to TVA as "creeping socialism").

45. 1 TASK FORCE ON WATER RES. & POWER, U.S. COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, REPORT ON WATER RESOURCES AND POWER, at iii (1955).

46. Albert W. Stone, *The Hoover Reports on Water Resources and Power–A Commentary*, 43 CALIF. L. REV. 747, 747 n.1 (1955).

47. 1 TASK FORCE ON WATER RES. & POWER, *supra* note 45, at 212.

48. Stone, *supra* note 46, at 761–62.

49. A HISTORY OF THE TENNESSEE VALLEY AUTHORITY 25 (Sybil Thurman ed., 1983), https://permanent.fdlp.gov/gpo152887/AHistoryofTheTennesseeValleyAuthority.pdf [https://perma.cc/6BMA-67A3].

50. Estes Kefauver, *What's Wrong with Dixon-Yates*, ATLANTIC (Jan. 1955), https://www.theatlantic.com/magazine/archive/1955/01/whats-wrong-with-dixon-yates/642999 [https://perma.cc/WD7P-EQAC]; *see* Dibley, *supra* note 22, at 165.

51. Government Corporations Appropriation Act, ch. 358, 61 Stat. 574, 577 (1947) (repealed by Act of Aug. 6, 1959, Pub. L. No. 86-137, 73 Stat. 280, 280).

52. *The Great Compromise*, *supra* note 42.

53. *See* HARGROVE, *supra* note 40, at 151.

54. Act of Aug. 14, 1959, Pub. L. No. 86-157, 73 Stat. 338, 338; Wilmon H. Droze, *The TVA, 1945–80: The Power Company*, *in* TVA: FIFTY YEARS OF GRASS-ROOTS BUREAUCRACY 74 (Erwin C.

relationship to private utilities in the region, opting at last for the strict territorial separation long favored by surrounding IOUs.

The 1959 amendment left TVA largely independent—financially and administratively—from the federal government.[55] The amendment enabled TVA to raise capital by selling bonds, up to an established debt ceiling, and ended TVA's reliance on appropriations from Congress.[56] Over time, Congress gradually increased TVA's debt limit from $750 million in 1959 to $30 billion in 1979, where it remains today.[57] With Congress no longer responsible for TVA's power funding, the federal government largely lost interest in TVA.[58] By 1961, the political controversy surrounding TVA faded, as did calls for creating additional river authorities in other regions of the United States.[59]

TVA thus began a new era as a more prototypical electric utility, with a monopoly service territory and financing capabilities that would allow it to grow along with regional power demand. It met this surging demand by expanding into two new energy sources: nuclear power and coal. By the 1950s, dams proved an insufficient power source, especially as the federal Atomic Energy Commission at Oak Ridge National Laboratory and Paducah soaked up as much as one-half of TVA's total electricity output.[60] To enhance its supply, TVA began to exploit the region's substantial coal resources.[61] TVA went from consuming no coal in the 1930s, to 1.2 million tons per year in 1951, to twelve million tons of coal per year in 1955.[62] By 1970, almost eighty percent of TVA's power came from coal.[63]

As environmental concerns about coal mounted, TVA frequently pitted itself against environmentalists that sought new technological controls on coal-fired power plants.[64] It required a series of enforcement actions by the Environmental Protection Agency to force TVA in the 1970s to adopt scrubbing technology to improve air quality in the Valley, which TVA

Hargrove & Paul K. Conkin eds., 1983); DUB TAFT & SAM HEYS, BIG BETS: DECISIONS & LEADERS THAT SHAPED SOUTHERN COMPANY 193–94 (2011).

55. HARGROVE, *supra* note 40, at 117; Dibley, *supra* note 22, at 167 ("These changes disentangled TVA's financial structure from the federal government and led to a slight weakening of the government's influence over the firm.").

56. Neuburger, *supra* note 23, at 269. TVA bonds are not *technically* backed by the full faith and credit of the U.S. government, but many investors see them as implicitly backed. *See TVA Consumer Protection Act: Hearing on S. 1323 Before the S. Comm. on Env't & Pub. Works*, 106th Cong. 1, 27 (1999) [hereinafter *TVA Consumer Protection Act Hearing*] (quoting Bruce Upbin, *The Tennessee Valley Anachronism*, FORBES, May 19, 1997).

57. Neuburger, *supra* note 23, at 269, 271.

58. *See* HARGROVE, *supra* note 40, at 154.

59. *Id.*; Leuchtenburg, *supra* note 43, at 441.

60. CREESE, *supra* note 41, at 120.

61. *Id.* at 119–20.

62. *Id.* at 120.

63. HARGROVE, *supra* note 40, at 178.

64. *See id.* at 127.

argued would be too expensive to justify the benefits.[65] Another famous environmental lawsuit during this time period challenged TVA's decision to build the Tellico Dam in light of evidence it would harm an endangered fish species.[66] Cherokee citizens, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians also requested injunctive relief against the project on grounds that flooding the Little Tennessee River and the ancestral capital of Chota would infringe on spiritual relationships to land sacred to the Cherokee religion.[67] Although TVA ultimately won congressional authorization to build the dam, political scientist Erwin Hargrove suggests that the incident "did great damage to TVA's public credibility."[68]

TVA's struggles over coal-fired pollution enhanced the attractiveness of another burgeoning energy source: nuclear power.[69] In 1965, TVA decided to build its first three nuclear reactors, declaring nuclear a less costly alternative than coal.[70] In short order, the agency planned another *seventeen* nuclear reactors at eight sites by 1985—the biggest commitment to nuclear power of "any . . . utility *in the world*."[71] This level of investment was justified on an "if you build it, they will come" mentality.[72] As Lilienthal had done decades earlier, TVA leadership placed its faith in the ability of cheap electricity to continue to drive economic growth in the Valley.[73] This faith was bolstered by widespread congressional and regional support for nuclear power[74]—support that drove Congress to authorize an increase in TVA's debt ceiling to $30 billion to fund this nuclear expansion.[75]

In the late 1970s, a change in TVA leadership occurred, the results of which are particularly relevant for purposes of our analysis. After President Carter was elected, he made it clear that he wanted to shift TVA's anti-environmental reputation and appointed a board chair, David Freeman, who championed environmental concerns.[76] Freeman desired to make TVA the "energy laboratory" of the nation, pursuing a range of initiatives including energy efficiency, solar power, and electric vehicles.[77]

65. *See* Robert F. Durant, Michael R. Fitzgerald & Larry W. Thomas, *When Government Regulates Itself: The EPA/TVA Air Pollution Control Experience*, 43 PUB. ADMIN. REV. 209, 211–12 (1983).

66. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 157, 164 (1978).

67. Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1160 (6th Cir. 1980); *see also* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1070–73 (2005).

68. HARGROVE, *supra* note 40, at 171–72.

69. *Id.* at 127.

70. *Id.* at 161.

71. *Id.* at 185, 187 (emphasis added).

72. *See* FIELD OF DREAMS (Universal Pictures 1989); HARGROVE, *supra* note 40, at 225.

73. *See* HARGROVE, *supra* note 40, at 186–87.

74. *Id.*

75. *Id.* at 226; Act of Oct. 31, 1979, Pub. L. No. 96-97, 93 Stat. 730, 730.

76. HARGROVE, *supra* note 40, at 180; *see* Dibley, *supra* note 22, at 170.

77. HARGROVE, *supra* note 40, at 195–97, 200.

Freeman tried to gin up enthusiasm for this vision with TVA staff and within the Valley more broadly by explaining: "We are not just another utility. . . . We were created to try to help people."[78] Not everyone agreed; distributors and customers in the Valley viewed Freeman's programs as a dangerous and expensive distraction during a time of rapidly escalating rates.[79]

As it happened, these rate increases were largely due to TVA's overzealous nuclear development.[80] By the late 1970s, nuclear expansion at TVA ran into the same problems it had at utilities across the country: cost overruns, coupled with lower-than-projected demand growth.[81] Yet nuclear power remained popular in the Valley and thus TVA power distributors, "[i]nstead of blaming the nuclear program for increasing rates . . . attacked conservation programs and Freeman himself."[82] Ultimately, after considerable increases in the cost of electricity, Freeman and his board colleagues made several difficult decisions to cancel nuclear plants, reining in TVA's expansionary tendencies and working to limit rate increases.[83] Nevertheless, Freeman never really got traction on the "energy laboratory" concept.[84]

Ironically, aggressive pursuit of Freeman's conservation programs might well have worked as an antidote to increasing rates. But a pivot toward efficiency and clean energy was too extreme a shift for stakeholders in the region.[85] As the Reagan Administration entered with different priorities, dreams of TVA as an energy laboratory evanesced.[86]

Around this time, the electricity industry entered a period of upheaval. Influenced by deregulatory movements across other industries (including airlines, trucking, and natural gas), scholars and policymakers pushed to restructure electricity.[87] In place of vertically integrated IOUs, reformists championed "open access" systems and markets in which electricity generators would compete to sell power to utilities or retailers.[88] For a time, it looked as

78. *Id.* at 198.

79. *See id.* at 203.

80. *See id.* at 192.

81. *Id.* at 188–89; W. DAVID MONTOMERY & JAMES P. QUIRK, COST ESCALATION IN NUCLEAR POWER 16–17, 42–43 (1978), https://www.osti.gov/biblio/7101095 [https://perma.cc/E6LR-FUYC].

82. HARGROVE, *supra* note 40, at 225.

83. *Id.* at 227, 244, 245, 266.

84. *Id.* at 231–34.

85. *Id.* at 183–84, 204–05, 232–33.

86. *See id.* at 236–37, 241.

87. *See generally* David B. Spence, *Can Law Manage Competitive Energy Markets?*, 93 CORNELL L. REV. 765 (2008) (arguing policymakers have underappreciated the role politics plays in the deregulation process); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries*, 98 COLUM. L. REV. 1323 (1998) (arguing interest groups and ideological alignment among elites led to deregulation).

88. *See* Spence, *supra* note 87, at 771–74; Kearney & Merrill, *supra* note 87, at 1352 (comparing open-access requirements in the regulation of the telecommunications industry and the electric industry).

though TVA would be caught up in these trends toward competition. One commentator prognosticated: "The fence that has long separated the Tennessee Valley Authority from the private power producers won't stand much longer. What then for this New Deal dinosaur?"[89]

Through an "artful amendment," one LPC got the chance to reach beyond the TVA fence, thus revealing how TVA might behave as a market competitor. When the Energy Policy Act of 1992 ("EPAct") was hashed out in Congress, TVA secured for itself an "anti-cherry-picking" exemption, which excluded TVA from FERC's new authority to order utilities to allow other electricity generators to use their transmission lines to deliver power.[90] But the Bristol Virginia Utilities Board, the municipal LPC serving the town of Bristol, Virginia, tapped its local congressperson to get an exemption from the exemption.[91] Bristol then terminated its relationship with TVA and entered a contract to buy power from a local IOU, cutting its costs by around "$70 million over seven years."[92] TVA retaliated forcefully, threatening legal action to recover stranded costs, seeking to poach large industrial customers from Bristol's utility, and warning that leaving TVA could cause the town to suffer blackouts.[93] Bristol nevertheless managed to source its power from outside TVA for a decade, but ultimately returned to TVA service in 2008 under pressure from rising wholesale costs in the deregulated market.[94] TVA punished Bristol as a warning to other to other LPCs contemplating an exit[95]—but its behavior added fuel to calls for change at TVA.

Various proposals were floated to "bring some reform to the agency, and prepare it for the future."[96] TVA came in for particular criticism for the $26 billion in debt it had amassed, largely due to its nuclear construction program.[97] Tennessee Senator Bill Frist introduced an amendment to "modernize" the Board's structure in 1997, hoping "to increase accountability and oversight" at TVA.[98] In 1999, Kentucky Senators Mitch McConnell and Jim Bunning introduced a bill, the "TVA Customer Protection Act," that

89. *TVA Consumer Protection Act Hearing*, *supra* note 56, at 26 (quoting *Change Needed: TVA Must Prepare for Competition*, PADUCAH SUN, July 7, 1999).

90. John J. Fialka, *Town Cuts Its Electric Bill by Standing Up to the TVA*, WALL ST. J. (May 27, 1997, 10:58 PM), https://archive.ph/81IXi [https://perma.cc/5N2B-4TU6]; 16 U.S.C. § 824k(j); Athens Utils. Bd., *supra* note 7, at 5 (explaining that this provision "is sometimes referred to as the Anti-Cherry-picking Amendment and provides that the Commission may not compel TVA to wheel power if such power will be consumed within the Fence").

91. Fialka, *supra* note 90; 16 U.S.C. § 824k(j).

92. Fialka, *supra* note 90.

93. *Id.*

94. *Virginia Distributor Rejoins TVA System*, NWTN TODAY (Jan. 7, 2008), https://www.nwtntoday.com/2008/01/07/virginia-distributor-rejoins-tva-system [https://perma.cc/WR9T-79SH].

95. *See TVA Consumer Protection Act Hearing*, *supra* note 56, at 46.

96. *Id.* at 12.

97. *Id.* at 2; Dibley, *supra* note 22, at 173.

98. Editorial, *TVA Needs Upgrading*, LEAF-CHRON., Nov. 21, 2003, at A10.

would have designated TVA as a public utility underneath FERC's regulatory oversight and subjected it to various antitrust laws.[99] Others proposed tearing down TVA's fence to allow competition within the region.[100]

Ultimately, electricity deregulation did not come to the South and TVA's fence held.[101] Yet the impulse to make TVA run more like a private utility resulted in two noteworthy changes during the 1990s. The EPAct added a requirement to the TVA Act that TVA engage in least-cost resource planning to select which energy resources to include in its energy mix.[102] This requirement mirrored "integrated resource planning" requirements already in place for many state-regulated IOUs.[103] The Act also required TVA to provide the public with an opportunity to review and comment before TVA adds any "major new energy resource" to TVA's energy mix.[104]

Congress further changed TVA's institutional dynamics in 1998, when it ended appropriations for non-power activities.[105] These activities include integrated management of the Tennessee River System and its dams, reservoirs, and shorelines for recreation, water supplies, flood mitigation, and habitat protection and economic development programming to recruit businesses to the Tennessee Valley.[106] Since 1999, Congress has made no appropriations to TVA for any of its operations, and TVA has been required to fund these activities with power sector revenue or other user fees.[107]

99. TVA Customer Protection Act of 1999, S. 1323, 106th Cong.; *see TVA Consumer Protection Act Hearing*, *supra* note 56, at 40–41 (statement of Robert M. Hewett, President, Kentucky Utilities Company) (arguing the advantages TVA reaps from being free from FERC regulation and the antitrust laws were unfair).

100. *TVA: Electricity Restructuring and General Oversight: Hearing Before the Subcomm. on Water Res. & Env't of the H. Comm. on Transp. & Infrastructure*, 106th Cong. 12 (1999) (statement of Larry Fleming, President and CEO, Knoxville Utilities Board).

101. *See* Conor Harrison & Shelley Welton, *"Why Change?" Monopoly and Competition in the Southeastern U.S. Electricity System*, 113 ANNALS AM. ASS'N GEOGRAPHERS 1402, 1402–03 (2023) [hereinafter Harrison & Welton, *"Why Change?" Monopoly and Competition in the Southeastern U.S. Electricity System*]; Conor Harrison & Shelley Welton, *The States that Opted Out: Politics, Power, and Exceptionalism in the Quest for Electricity Deregulation in the United States South*, 79 ENERGY RSCH. & SOC. SCI., Sept. 2021, at 1, 1–3 [hereinafter Harrison & Welton, *The States that Opted Out: Politics, Power, and Exceptionalism in the Quest for Electricity Deregulation in the United States South*].

102. Energy Policy Act of 1992, Pub. L. No. 102-486, § 113, 106 Stat. 2776, 2798 (codified as amended at 16 U.S.C. § 831m-1); *see also infra* Section II.C.

103. 16 U.S.C. § 831m-1(b)(1); *see infra* notes 167–69 and accompanying text.

104. 16 U.S.C. § 831m-1(d).

105. *See* Energy and Water Development Appropriations Act, 1998, Pub. L. No. 105-62, 111 Stat. 1320, 1338 (1997) (limiting funding for stewardship and water activities as of 1999 to that derived from TVA revenues and mandating that "the net spending authority and resulting outlays for these activities shall not exceed $0 in fiscal year 1999 and thereafter").

106. *See* TENN. VALLEY AUTH., FY 2025 BUDGET PROPOSAL & MANAGEMENT AGENDA AND FY 2023 ANNUAL PERFORMANCE REPORT 13 (2024), https://www.tva.com/docs/default-source/about-tva/guidelines-reports/tva-annual-performance-report-fy2025-fy-2023.pdf [https://perma.cc/7L4C-JZ7W].

107. JOEL YUDKEN, ECON. POL'Y INST., IF IT AIN'T BROKE, DON'T FIX IT! POTENTIAL IMPACTS OF PRIVATIZING THE TENNESSEE VALLEY AUTHORITY 12–13 (2015), https://www.epi.org/publicati

An even more significant change to TVA governance occurred in 2005, when Congress voted to overhaul its leadership structure.[108] The aim of these changes was to make TVA's board work "more like a corporation's board."[109] Amendments shifted TVA's leadership from a three-person, full-time board of directors to a nine-person, part-time board and introduced a full-time Chief Executive Officer.[110] The board chooses TVA's CEO, to serve at the board's pleasure, with preference given to someone "with expertise in the electric industry and with strong financial skills."[111]

These changes culminated efforts towards TVA's "professionalization" championed by many during the 1990s.[112] The Tennessee Valley Public Power Association (TVPPA), the trade association representing the LPCs that buy power from TVA, endorsed the change.[113] More strikingly, Bill Baxter, the chairman of TVA's Board at the time, also endorsed the change, arguing that it would bring a wider bank of expertise to the Board and that a strong executive could "respond more quickly in the marketplace, much as a private utility does today."[114] Long gone were the heady days of TVA Board leaders proclaiming the agency an example of "Democracy on the March."[115]

II. THE MODERN MISSION IMPOSSIBLE AND THE STRUGGLE TO DEFINE SUCCESS

In some ways, TVA's restructuring handed it an impossible mission. The agency must run itself professionally as a modern electric utility while still fulfilling its broader regional missions to provide affordable power and manage natural resources and economic development. In this Part, we outline

on/potential-impacts-of-privatizing-the-tennessee-valley-authority/#_note8 [https://perma.cc/LD3U-XMPX].

108. *See* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, §§ 601–604, 118 Stat. 2809, 2963–67 (2004) (codified as amended at 16 U.S.C. § 831).

109. Dibley, *supra* note 22, at 176–77 (quoting 107 Cong. Rec. S4254 (daily ed. May 3, 2001)).

110. Consolidated Appropriations Act, 2005 § 601. Seven of these board members, each of whom has a five-year term, 16 U.S.C. § 831a(d)(1), must be legal residents of TVA's service area, *id.* § 831a(a)(1), and all must "have management expertise relative to a large for-profit or nonprofit corporate, government, or academic structure," *id.* § 831a(b)(2).

111. 16 U.S.C. § 831a(h)(2)(B).

112. *See* LAZARD, LAZARD REPORT TO THE TENNESSEE VALLEY AUTHORITY 5 (2021), https://tva.q4ir.com/lazard-report-information [https://perma.cc/FXW9-U5JG]; James W. Brosnan, *Reluctant Frist Basks in Victory*, COM. APPEAL, Nov. 28, 2003, at A14 ("[Senator Frist] inserted an amendment into the Energy Bill that restructures the TVA board from three members to nine, without debate in the House or Senate or consulting some valley congressmen like Wicker.").

113. *TVA Board Expanded to 9 Members: New Panel to Hire Chief Executive Officer*, CHATTANOOGAN.COM (Nov. 20, 2004), https://www.chattanoogan.com/2004/11/20/58934/TVA-Board-Expanded-To-9-Members.aspx [https://perma.cc/7FTD-C6D9].

114. Richard Powelson, *Congress Powers Bill to Expand TVA Board*, KNOXVILLE NEWS SENTINEL, Nov. 15, 2003, at A9.

115. *See* DAVID E. LILIENTHAL, TVA: DEMOCRACY ON THE MARCH (1944).

TVA's successes and struggles in navigating the tensions of its modern mission and institutional structure.

Measured as an electric utility, TVA has performed reasonably well across several metrics in recent decades. The agency has faced intense pressure to limit its perceived "debt problem" that accrued over the latter half of the twentieth century, as it has consistently run debts close to its $30 billion statutory limit.[116] As Arjuna Dibley describes, TVA CEOs have responded with a "mantra" of debt reduction, "a cost-cutting paradigm" that has "dominate[d]" the agency in the twenty-first century.[117] In 2022, TVA reported that it had "reduce[d] its debt to the lowest level in 30 years."[118]

At the same time, TVA's performance on rates has improved from the 1990s. A 2021 evaluation of TVA by the consultancy Lazard found that TVA had decreased wholesale rates over the previous five years, and residential rates had risen a comparatively modest five percent.[119] As of 2019, residential rates in TVA's service territory were lower than over fifty percent of utilities both nationally and regionally.[120] TVA's industrial rates are lower than seventy-five percent of regional and national peers, having dropped eleven percent between 2014 and 2019.[121]

Shrinking debt and competitive rates are all the more impressive given that TVA has not been divested of its statutory mission as a regional planning and development organization. But since 1998, the agency has had to self-fund these activities.[122] This dynamic creates a tension: Cost-slashing to professionalize utility operations necessarily eviscerates the agency's ability to pursue ambitious broader regional objectives. However, if TVA were to aggressively pad its electric rates to accomplish this mission, it would arguably

116. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-343, TENNESSEE VALLEY AUTHORITY: ACTIONS NEEDED TO BETTER COMMUNICATE DEBT REDUCTION PLANS AND ADDRESS BILLIONS IN UNFUNDED PENSION LIABILITIES 14 (2017), https://www.gao.gov/assets/gao-17-343.pdf [https://perma.cc/7H9D-374R] (showing debt from 2006–2016); U.S. GEN. ACCT. OFF., GAO/AIMD/RCED-95-134, TENNESSEE VALLEY AUTHORITY: FINANCIAL PROBLEMS RAISE QUESTIONS ABOUT LONG-TERM VIABILITY 3–5, 26–29 (1995), https://www.gao.gov/assets/aimd/rced-95-134.pdf [https://perma.cc/FQ67-2WDT].

117. Dibley, *supra* note 22, at 166, 176.

118. Letter from Jeffrey J. Lyash, President & CEO, Tenn. Valley Auth., to Frank Pallone, Jr., Bobby L. Rush, Diana DeGette & Paul Tonko, Comm. on Energy & Com., U.S. House of Representatives, at 3–4 (Feb. 2, 2022), https://www.tva.com/docs/default-source/database/energy-and-commerce-committee-response-feb-2-2022c573da01-bc7c-4c41-8292-570212079b32.pdf?sfvrsn=40ce5fd0_3 [https://perma.cc/F5QY-HDPN].

119. LAZARD, *supra* note 112, at 10, 34.

120. *Id.* at 36.

121. *Id.* at 34, 37. However, significant residential rate increases in 2023 and 2024 may shift this ranking. *See* Hope McAlee, *TVA Approves Rate Increase for Fall 2024 – Here's How Much More You May Pay*, 6 NEWS ON YOUR SIDE (Aug. 22, 2024, 2:11 PM), https://www.wate.com/news/top-stories/tva-approves-rate-increase-for-fall-2024-heres-how-much-more-you-may-pay [https://perma.cc/Z83P-ETKL].

122. *See* Energy and Water Development Appropriations Act, 1998, Pub. L. No. 105-62, 111 Stat. 1320, 1338 (1997).

fail to comply with the agency's charge to set rates "as low as are feasible."[123] This tension is on display in the limited budget available for non-power activities today: From around $141 million in the late 1990s, non-power activity funding shrank to $65 million in 2010, before climbing back up to around $75 million in more recent years—which amounts to about 0.73% of TVA's overall budget.[124]

TVA also celebrates its long track record of working with union labor—a notable accomplishment in the notoriously anti-union Southeast.[125] TVA has a long history of involving employees in decisions affecting wages and other working conditions, reinforced by the Davis–Bacon Act's requirement to pay prevailing wages for TVA "laborers and mechanics."[126] Although concerns have been raised over time about TVA's exemption from several laws otherwise governing federal sector employee collective bargaining rights and resultant labor relations,[127] union presence remains strong at the agency. Today, seventeen different unions represent sixty percent of TVA's ten-thousand employees and contractors.[128]

Environmentally, TVA defends its record as a balanced approach to the energy transition. As of 2023, it sourced fifty-three percent of its electricity from carbon-free sources: thirty-nine percent nuclear energy, ten percent hydropower, and four percent wind and solar.[129] It has reduced its carbon

123. 16 U.S.C. § 831n-4(f); *see also* HARGROVE, *supra* note 40, at 183 (describing how TVA's Office of Power long took this position).

124. TENN. VALLEY AUTH., NATURAL RESOURCE PLAN 28 (2020), https://tva-azr-eastus-cdn-ep-tvawcm-prd.azureedge.net/cdn-tvawcma/docs/default-source/environment/environmental-stewardship/nepa-environmental-reviews/tva-2020-natural-resource-plan.pdf [https://perma.cc/L62A-SQRV] (showing yearly non-power expenditures increased from $65 million to $75 million in 2014); U.S. GEN. ACCT. OFF., GAO/RCED-98-133R, TENNESSEE VALLEY AUTHORITY: INFORMATION ON NONPOWER PROGRAMS 3, 19 (1998), https://www.gao.gov/assets/rced-98-133r.pdf [https://perma.cc/5SLC-VEZJ] (showing non-power expenditures in 1997 were $141 million); *see* TENN. VALLEY AUTH., *supra* note 106, at 16 (FY 2023–2025 total expenditures data).

125. *See Union Partnerships*, TENN. VALLEY AUTH., https://www.tva.com/careers/union-partnerships [https://perma.cc/4FBV-TJ5V]; *see also* Matt Huber & Fred Stafford, *In Defense of the Tennessee Valley Authority*, JACOBIN (Apr. 4, 2022), https://jacobin.com/2022/04/new-deal-tennessee-valley-authority-electricity-public-utilities-renewables-green-power [https://perma.cc/LG9H-8C2D] (discussing the TVA's relationship with labor unions in relation to green energy programs).

126. U.S. GEN. ACCT. OFF., GAO/GGD-91-129, LABOR-MANAGEMENT RELATIONS: TENNESSEE VALLEY AUTHORITY SITUATION NEEDS TO IMPROVE 12 (1991), https://www.gao.gov/assets/ggd-91-129.pdf [https://perma.cc/NXK7-RGKT]; 40 U.S.C. § 3142 (general prevailing wage requirements).

127. *See, e.g.*, *infra* notes 249–51 and accompanying text (describing labor dispute under President Trump).

128. *Union Partnerships*, *supra* note 125; *The Strength of TVA Is Its People*, TENN. VALLEY AUTH., https://www.tva.com/about-tva/learn-about-tva/the-strength-of-tva-is-its-people [https://perma.cc/D97C-USA4].

129. Tenn. Valley Auth., PowerPoint Presentation of the 2024 Integrated Resource Plan (IRP) Update: Public Educational Webinar, at slide 10 (Dec. 14, 2023), https://tva-azr-eastus-cdn-ep-tvawcm-prd.azureedge.net/cdn-tvawcma/docs/default-source/environment/environment

emissions fifty-three percent since 2005, largely via coal retirements that have been replaced with gas and nuclear power.[130] Looking ahead, TVA has publicly committed to an eighty percent reduction in carbon emissions by 2035 and, more obliquely, to "working to achieve its aspiration of net-zero carbon emissions by 2050."[131] The agency has announced plans for expansions in both solar and gas in the coming years. Its latest plans include adding ten thousand megawatts of solar capacity by 2035, although most of this will be procured from private partners.[132] TVA also plans to expand gas by around seven-thousand megawatts, which it explains as necessary "to achieve energy security for its customers" and "to balance . . . intermittency of the solar resources."[133]

On the whole, TVA's percentage of carbon-free generation is substantially higher than IOUs in the Southeast, including American Electric Power (twenty percent carbon-free); Dominion Energy (thirty-nine percent); Duke Energy (thirty-eight percent); Entergy (thirty-one percent); NextEra Energy (twenty-three percent); and Southern Company (twenty-seven percent).[134] There is a certain irony, however, in the fact that this relatively low carbon intensity is due largely to the agency's nuclear investments—investments that have been widely derided from a fiscal standpoint.[135] Moreover, most of TVA's renewable generation comes from legacy hydro-power investments.[136]

Judged next to southern investor-owned utility peers, then, TVA is not performing out of step along fiscal, rate, labor, or environmental metrics *as a corporation*. The problem, of course, is that a private corporation is not what TVA was charged or designed to be.[137] Reflective of these tensions, external criticism of the agency's modern performance has been widespread, bipartisan, and mounting, as we describe below.

al-stewardship/integrated-resource-plan/2024/irp-public-webinar-presentation-dec-14.pdf [https://perma.cc/QDV3-E6TL].

130. TENN. VALLEY AUTH., BUILDING A SUSTAINABLE FUTURE 21 (2024), https://tvawcma.com/environment/environmental-stewardship/sustainability/sustainability-report-fy-2023 [https://perma.cc/JML4-4LKZ]; LAZARD, *supra* note 112, at 17.

131. TENN. VALLEY AUTH., *supra* note 130, at 15, 20.

132. *Solar*, TENN. VALLEY AUTH., https://www.tva.com/energy-system-of-the-future/solar [https://perma.cc/2SLX-X2V3].

133. TENN. VALLEY AUTH., *supra* note 130, at 28; Protect Our Aquifer v. Tenn. Valley Auth., 654 F. Supp. 3d 654, 674 (W.D. Tenn. 2023).

134. LAZARD, *supra* note 112, at 30.

135. *See* Dibley, *supra* note 22, at 173–75.

136. *Id.* at 17.

137. *See supra* note 19 and accompanying text.

A. LEANING INTO GAS, RESISTING LOW-COST RENEWABLES

The most vociferous criticism of TVA has been its "laggard" status on renewable energy and energy efficiency.[138] For example, TVA ranks beneath most regional IOU peers in solar capacity and solar capacity per capita:

Table 1: Solar in the Southeast as of 2023[139]

Utility	Installed Solar Capacity (MW)	Solar Watts per Customer[140]
TVA	1098	200
Dominion Energy SC	1207	1531
Georgia Power	3000[141]	1168
Florida Power & Light	5150	815
Duke Energy	7057	1710/930/781[142]

Looking ahead, TVA has celebrated its plans to add considerable solar energy to its mix. In late 2024 the agency released a draft Integrated Resource Plan ("IRP") modeling six scenarios (future states of the world) and five strategies (focusing on various resource types) to come up with a suite of possible future resource portfolios.[143] The results suggest that the agency will build between four and nineteen gigawatts ("GW") of new gas resources and between three and twenty gigawatts of new solar by 2035.[144] At one extreme, these projections might result in a tenfold increase in TVA solar capacity—but at another, they might only slightly more than double solar while heavily

138. Robert Zullo, *Tennessee Valley Authority Faces a Push to Get Greener and More Transparent*, NEWS FROM THE STATES (July 17, 2024, 12:00 PM), https://www.newsfromthestates.com/article/tennessee-valley-authority-faces-push-get-greener-and-more-transparent [https://perma.cc/9DBC-RKGK].

139. HEATHER POHNAN, S. ALL. FOR CLEAN ENERGY, SOLAR IN THE SOUTHEAST 6–7 (7th ed. 2024), https://www.cleanenergy.org/wp-content/uploads/Solar-in-the-Southeast-Seventh-Edition-Report-July-2024.pdf [https://perma.cc/A5EN-WHC4].

140. Solar watts per customer allows for comparing utilities of different sizes to each other. *See id.* at 6.

141. Southern Alliance for Clean Energy did not separate out Georgia Power data from Southern Company in calculating total solar capacity; the figure here comes from *Energy Sources: Solar Energy*, GA. POWER, https://www.georgiapower.com/about/energy/sources/solar.html [https://perma.cc/GS98-H3Z9].

142. Respective figures for Duke Energy Progress, Duke Energy Florida, and Duke Energy Carolinas. POHNAN, *supra* note 139, at 7.

143. TENN. VALLEY AUTH., INTEGRATED RESOURCE PLAN 2025, at ES-6 (2024), https://tva-azr-eastus-cdn-ep-tvawcm-prd.azureedge.net/cdn-tvawcma/docs/default-source/environment/environmental-stewardship/integrated-resource-plan/2025/draft-2025-irp-volume-1-092324.pdf [https://perma.cc/3BEX-33B3].

144. *Id.* at 4–5.

investing in new fossil fuel infrastructure.[145] Notably, any additional gas proposed in the IRP scenarios comes on top of 6.9 GW of gas capacity TVA has already proposed since 2020, some of which is already operational or under construction to replace retiring coal facilities.[146]

Regional critics have decried TVA's methodology in the draft IRP, observing that it leaves the agency almost completely unfettered discretion in how to proceed.[147] Other critics have focused on the substance of TVA's plans, arguing that a greater regional clean energy buildout would be both cost-effective and beneficial for citizens of the Valley, directly saving its residents and businesses up to $255 billion through 2050.[148] Finally, others have emphasized the relative cost-competitiveness of purchasing out-of-region wind, questioning why TVA does not consider investing in transmission to import this wind instead of additional gas resources.[149]

TVA's hesitancy to invest in renewable energy generation may have been exacerbated by its CEO compensation plan. As part of the 2005 amendments to the TVA Act intended to "professionalize" the agency, the Board is empowered to set a compensation plan for the CEO that includes bonuses and other incentives, similar to executive compensation at an IOU.[150] Until recently, the Board's plan rewarded TVA's CEO specifically based on the reliability and availability of coal, nuclear, and combined cycle gas generation, thereby disincentivizing additions of renewables and storage.[151] Recent

145. *See id.* at 3–12 (showing slightly over two gigawatts of renewable energy in TVA's mix at present); *see also TVA Sets Summer 2024 Record Power Demand*, TENN. VALLEY AUTH. (Aug. 30, 2024), https://www.tva.com/news-media/releases/tva-sets-summer-2024-record-power-demand [https://perma.cc/77YN-DWJD] ("TVA . . . has made great progress by completing 1,400 megawatts and securing [eight hundred] megawatts of solar [in] just [2024].").

146. Caroline Eggers, *TVA Plans 9th Gas Plant Since 2020*, 90.3 WPLN NEWS (Sept. 20, 2024), https://wpln.org/post/tva-plans-9th-gas-plant-since-2020 [https://perma.cc/HA78-5RJH]; Daniel Dassow, *TVA's Energy Complex of Gas and Batteries Is Replacing the Kingston Coal Plant. See the Progress*, KNOX NEWS (Mar. 13, 2025, 8:34 AM), https://www.knoxnews.com/story/news/local/2025/03/13/tva-builds-kingston-energy-complex-to-replace-coal-plant-with-gas/81989720007 [https://perma.cc/FSB8-6A32].

147. *E.g.*, Maggie Shober, *TVA Draft IRP—Exceedingly Broad Planning Is Meaningless*, S. ALL. FOR CLEAN ENERGY (Sept. 23, 2024), https://www.cleanenergy.org/blog/tva-draft-irp-exceedingly-broad-planning-is-meaningless [https://perma.cc/C4AX-GSB3].

148. *See, e.g.*, CTR. FOR BIOLOGICAL DIVERSITY, TVA'S CLEAN ENERGY FUTURE: POLICY BRIEF 2 (2023), https://www.biologicaldiversity.org/programs/energy-justice/pdfs/TVA-Clean-Energy-Roadmap_Policy-Brief.pdf [https://perma.cc/6CDK-56YB].

149. *E.g.*, Taylor McNair, Program Manager, GridLab Corp., Testimony at the TVA People's Hearing 4 (Jan. 25, 2024), https://www.cleanenergy.org/wp-content/uploads/Gridlab_McNair_TVA-Peoples-Hearing_Testimony.pdf [https://perma.cc/R4QM-MQVD].

150. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 601, 118 Stat. 2809, 2965–66 (2004) (codified at 16 U.S.C. § 831a(i)).

151. Dorothy Slater, *The Tennessee Valley Authority's Incentive Structure Keeps Residents Hooked on Fossil Fuels*, NEW REPUBLIC (Dec. 13, 2022), https://newrepublic.com/article/169464/tennessee-valley-authority-jeff-lyash [https://perma.cc/38HH-7K3M]; Tenn. Valley Auth., Annual Report (Form 10-K), at 185 (Nov. 12, 2021), https://s25.q4cdn.com/191816265/files/doc_financials/2021/12/02/2021-10K-Final-Draft.pdf [https://perma.cc/UG4H-YWYX].

changes amend the bonus structure to tamp down skewed incentives, although it is too soon to evaluate their effect.[152]

TVA's record on energy efficiency has also come in for criticism. The agency has slashed its energy efficiency programs over the last decade, such that *rates* remain competitive in TVA's territory but residents' electricity bills exceed the national average.[153] A 2023 analysis found that TVA lagged far behind the efficiency performance of utilities nationwide and in the Southeast: Whereas the average utility saved around 0.68% of annual electric retail sales, and southeastern utilities 0.19%, TVA saved only 0.01%.[154] In other words, the average utility outperformed TVA sixty-eight times over, in no small part due to state mandates that require these utilities to invest in energy efficiency.[155] Since 2023, TVA has redoubled its energy efficiency efforts, pledging to spend $1.5 billion on energy efficiency and demand management through 2027 and to achieve 0.21% savings in 2024, rising to 0.32% annual savings in 2026.[156]

In place of aggressive investments in energy efficiency and renewable energy, TVA has pursued gas and advanced nuclear reactors. Critics, including the U.S. Environmental Protection Agency ("EPA"), have particularly attacked TVA's plans to build gas, suggesting that TVA has inflated the costs of clean energy alternatives and failed to consider important regulatory risks

152. *See* Caroline Eggers, *TVA Will Soon Give Bonuses to Its Executives for Adding Solar, Batteries to the Valley*, WKMS (Sept. 29, 2024, 8:46 AM), https://www.wkms.org/energy/2024-09-29/tva-will-soon-give-bonuses-to-its-executives-for-adding-solar-batteries-to-the-valley [https://perma.cc/U77W-ZUBQ].

153. Letter from Frank Pallone, Jr., Chairman, H. Comm. on Energy & Com., Bobby L. Rush, Chairman, Subcomm. on Energy, Diana DeGette, Chair, Subcomm. on Oversight & Investigations, & Paul D. Tonko, Chairman, Subcomm. on Env't. & Climate Change, to Jeffrey J. Lyash, President & CEO, Tenn. Valley Auth. 2 (Jan. 13, 2022), https://www.cleanenergy.org/wp-content/uploads/TVA-Letter-re-business-practices-and-adherence-to-TVA-Act-1.pdf [https://perma.cc/S9FD-3XYK]; BRI KNISLEY, NIKKI LUKE, RORY MCILMOIL & JAMES BARRETT, APPALACHIAN VOICES, SAVE ENERGY, GROW JOBS IN THE TENNESSEE VALLEY 9 (2022), https://www.appvoices.org/resources/reports/TVA_Jobs_Report_07_14_22.pdf [https://perma.cc/C2GH-2FQB].

154. Stephen Smith, *Rising Up from the Bottom, TVA's $1.5 Billion Efficiency Announcement*, S. ALL. FOR CLEAN ENERGY (Nov. 17, 2023), https://www.cleanenergy.org/blog/rising-up-from-the-bottom-tvas-1-5-billion-efficiency-announcement [https://perma.cc/3KBU-R3ZU]; *see* SAGARIKA SUBRAMANIAN ET AL., AM. COUNCIL FOR ENERGY-EFFICIENT ECON., 2022 STATE ENERGY EFFICIENCY SCORECARD 33–37, https://www.aceee.org/sites/default/files/pdfs/u2206.pdf [https://perma.cc/HN2M-ET6S].

155. *See* JASMINE MAH, STEVEN NADEL & SAGARIKA SUBRAMANIAN, NEXT GENERATION ENERGY EFFICIENCY RESOURCE STANDARDS UPDATE, at iv (2025), www.aceee.org/research-report/u2501 [https://perma.cc/9FKE-VK4H] (finding that states with energy efficiency targets "usually achieve much higher energy savings").

156. Smith, *supra* note 154.

associated with gas.[157] Nevertheless, TVA's draft IRP persists in offering TVA the option to expand the largest planned natural gas buildout in the nation.[158]

More complex is TVA's pursuit of advanced nuclear power, itself a carbon-free energy source. Nuclear proponents hope that "small modular reactors" ("SMRs") might prove a lower-cost, more nimble alternative to larger nuclear reactors, which have been chronically plagued with massive cost overruns.[159] TVA has tentatively embraced SMRs, with its board approving a $200 million investment for TVA to partner with General Electric to develop the "BWRX-300, a 300-megawatt light-water reactor."[160] TVA has begun planning to build SMRs at two sites,[161] although the agency has made no firm commitments yet.[162]

TVA's previous CEO, Jeff Lyash, lauded SMRs as "hold[ing] a great deal of promise as a dispatchable, carbon-free technology."[163] But they are also likely to be an expensive technology—particularly for those who are first to build them. An attempted SMR in Utah was abandoned in early 2024 due to

157. Letter from Jeaneanne M. Gettle, Acting Reg'l Adm'r, EPA, to Chevy Williams, NEPA Specialist, Tenn. Valley Auth., Re: EPA Comments on the Final Environmental Impact Statement for the Kingston Fossil Plant Retirement, Roane County, Tennessee; CEQ No: 20240031, at 1–3 (Mar. 25, 2024), https://www.cleanenergy.org/wp-content/uploads/EPA-letter-to-TVA-on-Kingston-FEIS-March-2024.pdf [https://perma.cc/3PMK-UP65]; *see also* Peter Hubbard, Ga. Ctr. for Energy Sols., Testimony to Public Hearing: The People's Voice on TVA's Energy Plan 6–10 (Jan. 25, 2024), https://www.cleanenergy.org/wp-content/uploads/GCES-Hubbard-Testimony_Peoples-Hearing-on-TVA-2024-IRP_25Jan2024.pdf [https://perma.cc/4HER-RTTZ].

158. Press Release, Sierra Club, Dirty Truth Report: TVA Worst in the Nation for Planned Methane Gas (Oct. 10, 2023), https://www.sierraclub.org/press-releases/2023/10/dirty-truth-report-tva-worst-nation-planned-methane-gas [https://perma.cc/JUU5-X6NF]; Press Release, S. All. for Clean Energy, Community Leaders, Bill McKibben, Call on TVA to Stop Gas Buildout Ahead of Nashville Board Meeting (May 9, 2024), https://www.cleanenergy.org/news-and-resources/community-leaders-bill-mckibben-call-on-tva-to-stop-gas-buildout-ahead-of-nashville-board-meeting [https://perma.cc/XS9U-GG6S] ("TVA is moving forward with the largest gas build out by 2028 of any utility in the country under an out-of-date IRP . . . .").

159. W.R. Stewart & K. Shirvan, *Capital Cost Estimation for Advanced Nuclear Power Plants*, RENEWABLE & SUSTAINABLE ENERGY REVS. 1–2 (2022), https://www.sciencedirect.com/science/article/pii/S1364032121011473 (on file with the *Iowa Law Review*); Michael J. Ford, Ahmed Abdulla & M. Granger Morgan, *Evaluating the Cost, Safety, and Proliferation Risks of Small Floating Nuclear Reactors*, 37 RISK ANALYSIS 2191, 2191–92 (2017).

160. Spector, *supra* note 9.

161. Clinch River Nuclear Site Advanced Nuclear Reactor Technology Park Final Programmatic Environmental Impact Statement, 87 Fed. Reg. 59860 (Oct. 3, 2022), https://www.federalregister.gov/documents/2022/10/03/2022-21319/clinch-river-nuclear-site-advanced-nuclear-reactor-technology-park-final-programmatic-environmental [https://perma.cc/6VKM-EEG5].

162. *See* Sonal Patel, *TVA Unveils Major New Nuclear Program, First SMR at Clinch River Site*, POWER (Feb. 10, 2022), https://www.powermag.com/tva-unveils-major-new-nuclear-program-first-smr-at-clinch-river-site [https://perma.cc/2ZS7-94G6] (detailing plans and status).

163. Alexander C. Kaufman, *A Century-Old Company the Government Owns Wants to Solve a Big Energy Problem: If Congress Lets It*, HUFFPOST (May 4, 2024), https://www.huffpost.com/entry/tva-nuclear-power-debt-ceiling_n_66352e7de4b00b1eab534aca [https://perma.cc/KFA5-KZ5J].

surging costs,[164] and no IOUs are currently constructing SMRs.[165] This fact leads many to question whether TVA is wise to invest in a technology that companies disciplined by shareholders eschew, especially as wind, solar, and batteries provide cheaper alternatives that TVA has underexplored.[166]

B. LOCAL CONTRACTUAL TERMS AND THE TVA "FENCE"

In recent years, LPCs have voiced significant concerns about how TVA wields its monopoly control over local partners. Under the terms of its legal "fence,"[167] TVA acts as the monopoly supplier and transmission provider in its territory (but not beyond), and is exempted from having to offer transmission service to competitors.[168] Accordingly, TVA operates on the assumption that most of its LPCs have no option but to purchase TVA power and it has offered contractual terms that reflect this superior bargaining position.[169] Most recently, in 2019 TVA tried to force all LPCs into its "Long-Term Partnership Proposal."[170] This proposal offers contracts with twenty-year terms that renew annually and require twenty-years' notice to cancel, leading critics to call the agreements "never ending."[171] The proposal also offers LPCs a 3.1% wholesale rate discount and the ability to source 5% of power from non-TVA sources such as distributed renewable energy.[172]

Many LPCs resisted being forced into these long-term contracts, contending they could receive both cleaner and cheaper power from other sources.[173] Yet the structure of TVA leaves them little recourse. When several utilities filed a complaint at FERC to force TVA to provide them open access

164. M.V. Ramana, *The Collapse of NuScale's Project Should Spell the End for Small Modular Nuclear Reactors*, UTIL. DIVE (Jan. 31, 2024), https://www.utilitydive.com/news/nuscale-uamps-project-small-modular-reactor-ramanasmr-/705717 [https://perma.cc/564Z-3C2G].

165. Spencer Kimball & Gabriel Cortés, *Small Nuclear Reactors Could Power the Future — The Challenge Is Building the First One in the U.S.*, CNBC (Sept. 7, 2024, 10:43 AM), https://www.cnbc.com/2024/09/07/how-small-modular-reactors-could-expand-nuclear-power-in-the-us.html [https://perma.cc/2XUE-5PB3].

166. *See* Kaufman, *supra* note 163 (quoting opponents questioning these investments).

167. *See supra* note 54 and accompanying text.

168. 16 U.S.C. §§ 824i–824k; Cox & Flynn, *supra* note 7, at 7.

169. *See* Neuburger, *supra* note 23, at 253 (describing TVA "all-requirements" contracts that force LPCs to buy all power from TVA).

170. LAZARD, *supra* note 112, at 25; *see* Neuburger, *supra* note 23, at 279–302 (detailing the buildup to this proposal and its implementation and noting how "TVA used its existing monopoly power and strategies familiar from its history to shepherd its customers into a maximally restrictive, long-term relationship").

171. Cox & Flynn, *supra* note 7, at 9; Press Release, S. Env't L. Ctr,, SELC Challenges TVA's Long-Term Contract Decision (Aug. 18, 2020), https://www.southernenvironment.org/press-release/groups-challenge-tvas-monumental-decision-to-lock-power-distributors-into-contracts [https://perma.cc/YPH2-Y33D].

172. Cox & Flynn, *supra* note 7, at 9–10; Neuburger, *supra* note 23, at 280.

173. *See* Daniel Tait, *TVA's Latest Long-Term Partnership Contract Cedes No Ground to Local Power Companies*, ENERGY & POL'Y INST. (Jan. 20, 2020), https://energyandpolicy.org/tva-long-term-partnership-contract-cedes-no-ground [https://perma.cc/8ZL6-2JHE].

to its transmission system so they could buy electricity from outside sources, FERC declined to exercise its potential authority to do so.[174]

In the wake of this decision, most LPCs have bowed to the pressure to sign TVA's long-term contracts. As of September 2023, 147 of the 153 LPCs had signed contracts.[175] TVA characterizes the contracts as "strengthening the relationship between TVA and [its] communities"[176] and argues that the contracts give LPCs rate certainty.[177]

But localities report feeling bullied and pressured into these arrangements, which leave them with no economic leverage to demand more or different things out of TVA.[178] Only LPCs at the edge of TVA's territory that have a plausible exit threat, such as Memphis Light, Gas and Water ("MLGW"), have been successful in resisting twenty-year arrangements.[179]

A lack of collaboration between TVA and LPCs also inhibits the integration of more renewable energy and distributed energy resources. Historically, TVA's "all-requirements" contracts established a unidirectional flow of power.[180] While the newer flexibility provisions authorize LPCs to self-generate up to five percent of their need, it has been challenging to integrate this local generation into the larger TVA system, such that it can flow back to TVA in the case of surplus.[181] Further expanding the use of local renewable energy will require considerably more coordination and integration of TVA and LPC

174. Athens Utils. Bd., *supra* note 7.

175. TENN. VALLEY AUTH., *supra* note 106, at 7.

176. *Id.*

177. Adrian Sainz, *Memphis Power Company Rejects TVA's Long-Term Deal*, ASSOCIATED PRESS (Dec. 7, 2022), https://apnews.com/article/business-memphis-fb4a788b22667f586d9cd8610dc37deo [https://perma.cc/DWQ3-5TGA].

178. *See* Daniel Tait & Joe Smyth, *TVA Attempts to Chain Local Power Companies to Longer Contracts in Effort to Prevent Defection Risk*, ENERGY & POL'Y INST. (Sept. 22, 2019), https://energyandpolicy.org/tva-local-power-companies-defection [https://perma.cc/QH29-9XVX]; Tait, *supra* note 174.

179. *See* NAT'L RURAL UTILS. COOP. FIN. CORP., TVA POWER SUPPLY ANALYSIS 17, 28 (2019), https://www.documentcloud.org/documents/6362229-CFC-TVA-Power-Supply-Analysis-20190228#document/p19/a522028 (on file with the *Iowa Law Review*) (noting MLGW's proximity to MISO, another electricity provider, in discussion of potential exit); Press Release, MLGW, MLGW Board Unanimously Rejects 20-year Contract with TVA (Dec. 7, 2022), https://www.mlgw.com/news/news_dec2022TVA [https://perma.cc/NAL4-9GQZ].

180. *See* Neuburger, *supra* note 23, at 279.

181. Revised proposed rules under "Flex 2.0" promise additional flexibility, including allowing multiple LPCs to aggregate their flex provisions, contract projects outside of an LPC's service jurisdiction, and "allow for generation to exceed the substation load, with any over-generation treated by TVA as credit to the benefit of the LPC tied to the project." Matt Brown, *TVA's "Flex 2.0" Program Provides New Opportunities to LPCs*, SILICON RANCH (Sept. 19, 2023), https://www.siliconranch.com/stories/silicon-ranch-flex-2-0-new-program [https://perma.cc/SDL8-NRVU]; *see Board Meeting Minutes*, KNOXVILLE UTILS. BD. 12088, 12094 (Sept. 21, 2023), https://www.kub.org/uploads/20231019155517.pdf [https://perma.cc/AAL2-E364] (flexibility agreement between TVA and Knoxville Utilities Board).

systems, in an atmosphere in which trust-building is challenging.[182] All to say, early challenges with instantiating "grass roots" democracy into TVA's institutional structure[183] persist today, rendered more complex by divergent views within the region on clean energy.

C. A DEARTH OF PUBLIC PROCESS IN RESOURCE PLANNING

Many regional stakeholders are disillusioned not just by the substance of TVA decisions, but by the processes through which TVA makes them. Prominent concerns include TVA's integrated resource planning and TVA board oversight practices.

The TVA Act requires the agency to engage in "least-cost planning," a requirement that TVA fulfills through an IRP process.[184] IRP is a form of least-cost planning whereby a utility strategizes its future energy mix by evaluating supply-side energy resources and demand-side alternatives to new generation to meet predicted demand in the utility's service territory.[185] Typical IRP processes for IOUs include extensive vetting and ultimate approval or disapproval by a state public utilities commission, with opportunities for stakeholders to influence processes and outcomes through discovery requests, written submissions, and adversary hearings.[186]

Participation in TVA's IRP is, by contrast, substantially circumscribed: As one regional advocate describes, this public power agency has "the least public planning process of any utility in the United States."[187] TVA has decided to

182. Some steps have been taken toward such integration through TVA's announcement of its first ever Integrated Transmission Planning process to coordinate future investment in transmission with LPCs to improve integration of solar, and through a recent award from the Department of Energy Grid Resilience and Innovation Partnerships Program to bring TVA and ten LPCs together to build eighty-four resilience projects. *See* POHNAN, *supra* note 139, at 18; Press Release, U.S. Dep't of Energy Grid Deployment Off., System Hardening for Coalition of Local Power Companies and Tennessee Valley Authority 1 (Oct. 2024), https://www.energy.gov/sites/default/files/2024-10/TVA_GRIP2_Fact_Sheet.pdf [https://perma.cc/2KYF-C3JW].

183. *See supra* notes 39–42 and accompanying text.

184. TENN. VALLEY AUTH., ENERGY VISION 2020: INTEGRATED RESOURCE PLAN ENVIRONMENTAL IMPACT STATEMENT 1.5 (1995), https://www.nrc.gov/docs/ML1217/ML12170A163.pdf [https://perma.cc/FV2B-NDP7]; *see also* Ky. Coal Ass'n, Inc. v. Tenn. Valley Auth., 68 F. Supp. 3d 703, 721 (W.D. Ky.), *aff'd*, 804 F.3d 799 (6th Cir. 2015) (upholding TVA's IRP process as conforming to the TVA Act).

185. Clinton A. Vince, Sherry A. Quirk & Stuart J. Rabin, *Integrated Resource Planning: The Case for Exporting Comprehensive Energy Planning to the Developing World*, 25 CASE W. RES. J. INT'L L. 371, 373 (1993).

186. Nina Peluso, Evolving Paradigms in State-Level Integrated Resource Planning 13–14 (May 14, 2021) (M.S. thesis, Massachusetts Institute of Technology), https://dspace.mit.edu/bitstream/handle/1721.1/139486/peluso-npeluso-sm-tpp-2021-thesis.pdf [https://perma.cc/W66G-JAPE].

187. Vanderbilt University, *2024 EELU State of the Environment Conference Pt.4 - State of Energy*, YOUTUBE, at 42:00 (Mar. 1, 2024), https://www.youtube.com/watch?v=1wJD1PYVPr4 [https://perma.cc/DPG5-2DX4] (including, as quoted, the remarks of Stephen Smith, Executive Director of the Southern Alliance for Clean Energy).

merge its IRP public participation with its required processes under the National Environmental Policy Act ("NEPA"), which mandates that federal agencies (including TVA) prepare an environmental impact statement ("EIS") when taking actions that have significant environmental impacts.[188] TVA uses the notice-and-comment process that NEPA requires to simultaneously satisfy the public review and comment requirements of its least-cost planning mandate.[189] This substantially limits the scope of IRP participation, as NEPA excludes several concerns most germane to IRP processes, including reliability and affordability.[190]

In place of intervention opportunities or robust formal hearings, TVA relies largely on a twenty-four-person "IRP Working Group" to guide its IRP process, with membership by invitation only and subject to non-disclosure.[191] TVA at times holds discretionary public hearings but not formal, adversary hearings with the ability to present evidence and expert witnesses.[192] Moreover, TVA requires the public to use the Freedom of Information Act ("FOIA") process to procure documents and information about the IRP.[193] The constraints these processes place on effective outside participation mean that when TVA's board evaluates TVA staff's proposed IRP, the board lacks a robust and diverse record to guide its decision-making—and instead is largely tethered to the internal findings of TVA itself.[194]

These IRP process concerns have surfaced most recently in TVA's ongoing 2024 IRP (since delayed to 2025).[195] Per usual, TVA used the more limited EIS process to give the public a six-week opportunity to comment on

188. 42 U.S.C. § 4332(c).

189. Integrated Resource Plan and Environmental Impact Statement, 88 Fed. Reg. 32265, 32265–67 (May 19, 2023).

190. *See, e.g.*, Ky. Coal Ass'n, Inc. v. Tenn. Valley Auth., 804 F.3d 799, 806 (6th Cir. 2015) (observing that "economic or social effects" are outside of the considerations of NEPA (quoting 40 C.F.R. § 1508.14 (2012))).

191. *See* Zullo, *supra* note 138; *Engagement in the 2025 IRP*, TENN. VALLEY AUTH., https://www.tva.com/environment/integrated-resource-plan/working-groups [https://perma.cc/N4CW-HU87]; CLEAN UP TVA, WHAT IS AN INTEGRATED RESOURCE PLAN (IRP)? 2 (2024), https://cleanuptva.org/wp-content/uploads/2024/10/Final_Intro-to-TVAs-IRP-1.pdf [https://perma.cc/8JT7-E6LG].

192. *See* Maggie Shober, *TVA: NEPA Is Not a Stand-In for Public Input in an IRP*, S. ALL. FOR CLEAN ENERGY (Feb. 12, 2024), https://www.cleanenergy.org/blog/tva-nepa-is-not-a-stand-in-for-public-input-in-an-irp [https://perma.cc/4EGU-YWLG].

193. 40 C.F.R § 1501.9(c)(6) (2025).

194. *See* Shober, *supra* note 192.

195. *See* Integrated Resource Plan and Environmental Impact Statement, 88 Fed. Reg. 32265, 32266–67 (May 19, 2023); Letter from Jeffrey J. Lyash, President & CEO, Tenn. Valley Auth., to Tim Burchett, Representative, U.S. House of Representatives (Mar. 27, 2024), https://burchett.house.gov/sites/evo-subsites/burchett.house.gov/files/evo-media-document/Q2%20Board%20Letter%20from%20JLyash_Mar%2027%20-%20Burchett.pdf [https://perma.cc/7LSD-U68K] (announcing a delay in TVA's draft IRP to create "additional time for analysis, review and stakeholder engagement").

the IRP.[196] Although TVA held several open houses and webinars about the draft IRP in which it took written questions,[197] it refused to hold a full hearing allowing for expert testimony to the board. Nonprofits in TVA's service territory, frustrated with TVA's lack of transparency and unwillingness to engage with the public, sent TVA a "Motion to Intervene" in the style of a motion filed with a public utility regulator in a typical IRP process.[198]

When TVA still declined to hold a public hearing on the IRP, those nonprofits organized their own in protest.[199] At the "People's Voice for TVA's Energy Plan," state and federal lawmakers joined community members in criticism of TVA's planned gas buildout and lack of transparency in an unofficial IRP-style hearing.[200] After the hearing, U.S. Representative Steve Cohen highlighted a new bill he is cosponsoring that would require TVA to follow public engagement procedures that more closely resemble typical state IRP processes, including intervention, discovery, and evidentiary hearings.[201]

Oftentimes, consequential resource decisions at TVA are made without even the minimal process of its anemic IRP regime. In particular, TVA has sequentially proposed to replace several retiring coal plants with natural gas plants through one-off proceedings.[202] In a fashion that regional stakeholders find particularly troubling, TVA's Board has begun a practice of delegating decision-making authority over specific power plant projects to TVA's CEO. For example, the Board has delegated weighty decisions about how to replace retiring coal plants, with TVA's CEO then controversially opting for gas over renewables-plus-storage in several instances.[203] Critics suggest that these

196. Integrated Resource Plan and Environmental Impact Statement, 88 Fed. Reg. at 32266.

197. *Engagement in the 2025 IRP*, *supra* note 191.

198. Jen Lawhorne, *The People's Voice on TVA: Advocates Create Forum for Public Input and Expert Testimony on TVA's Long-Term Energy Plan*, APPALACHIAN VOICES (Feb. 16, 2024), https://appvoices.org/2024/02/16/tva-peoples-hearing-3 [https://perma.cc/6EV8-72DX].

199. *See* Maggie Shober & Bryan Jacob, *TVA, Our Nation's Largest "Public" Utility Has the Least Public Planning Process*, S. ALL. FOR CLEAN ENERGY (Feb. 2, 2024), https://www.cleanenergy.org/blog/tva-our-nations-largest-public-utility-has-the-least-public-planning-process [https://perma.cc/EQ7A-N4HP].

200. Lawhorne, *supra* note 198.

201. Press Release, Steve Cohen, Representative, U.S. House of Representatives, Congressmen Cohen and Burchett Introduce the TVA Increase Rate of Participation (IRP) Act (Mar. 8, 2024), https://cohen.house.gov/media-center/press-releases/congressmen-cohen-and-burchett-introduce-tva-increase-rate [https://perma.cc/P7L4-XS8H].

202. *See* Shober & Jacob, *supra* note 199.

203. Tenn. Valley Auth. Bd. of Dirs., *Minutes of Meeting* 1, 14–16 (Nov. 10, 2021), https://tva-azr-eastus-cdn-ep-tvawcm-prd.azureedge.net/cdn-tvawcma/docs/default-source/about-tva/board-of-directors/november-10-2021/2021-111021-board-meeting-minutes-signedc8e0c54a-232e-454f-b4e5-10db25b739c4.pdf [https://perma.cc/D3DL-S9BQ]; Josh Keefe & Anila Yoganathan, *TVA Finalizes Plan to Transition Cumberland Coal Plant to Natural Gas*, KNOX NEWS (Jan. 10, 2023, 4:08 PM), https://www.knoxnews.com/story/news/environment/2023/01/10/tennessee-valley-authority-to-replace-cumberland-coal-plant/69795832007 [https://perma.cc/GZ27-P9JG]; Tenn. Valley Auth. Bd. of Dirs., *Minutes of Meeting* 12 (Aug. 24, 2023), https://tva-azr-eastus-cdn-ep-tvaw

instances—coupled with TVA's vague resource planning processes—amount to Board "abdication of decision-making power."[204]

D. FAVORING INDUSTRIAL CUSTOMERS

Another set of complaints about TVA stems from the prices it charges residential customers. These complaints emerged most notably in the lawsuit *Holbrook v. TVA*, in which a residential consumer alleged that TVA violated the terms of its statute through its recent electricity pricing patterns. The TVA Act establishes a "policy" that the agency's electricity generation "shall be considered primarily as for the benefit of . . . domestic and rural consumers."[205] Industrial use is sanctioned as "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."[206]

In 2010, TVA put into place a plan that redistributed costs from industrial to residential customers, in an effort "to achieve fairness in pricing and increase competitiveness by charging customers based on their proportion of total cost of service."[207] According to plaintiff Holbrook, the changes "shifted nearly half a billion dollars in costs from industry to consumers" in its first several years, and this gap has since increased.[208] TVA celebrates these changes as helping to drive industrial development in the Valley by attracting companies and jobs,[209] even as residential customers suggest they violate the plain language and spirit of the Act.

The Fourth Circuit held in *Holbrook* that TVA's ratemaking decisions are unreviewable by the courts, as there is no "clear guidance or instruction" provided by the TVA Act for court review.[210] Nevertheless, a core policy dispute persists as to whether TVA is striking the right balance. Indeed, TVA provides *more* competitive industrial rates than many IOU comparators that lack a mandate to prioritize residential consumers, even as residential rates have climbed within the territory.[211] At the same time, other analyses show that low-income households in TVA's service territory face an average twelve-

cm-prd.azureedge.net/cdn-tvawcma/docs/default-source/about-tva/board-of-directors/august-24-2023/august-24-2023-board-meeting-minutes-final-signed.pdf [https://perma.cc/U3A8-W8FY].

204. Press Release, S. Env't L. Ctr., TVA Ignores Warnings from Federal Agencies, Moves Forward with Proposed Kingston Gas Plant (Apr. 2, 2024), https://www.southernenvironment.org/press-release/tva-ignores-warnings-from-federal-agencies-moves-forward-with-proposed-kingston-gas-plant [https://perma.cc/6UVG-SBWR].

205. 16 U.S.C. § 831j.

206. *Id.*

207. Holbrook v. Tenn. Valley Auth., 48 F.4th 282, 286 (4th Cir. 2022).

208. *Id.*

209. Letter from Jeffrey J. Lyash to Frank Pallone, Jr., et al., *supra* note 118, at 4.

210. *Holbrook*, 48 F.4th at 293.

211. *See* LAZARD, *supra* note 112, at 34.

percent energy burden, with some households spending up to twenty percent of their income on energy.[212]

Those entities mounting efforts to challenge the incentives provided to industrial customers also struggle to access information.[213] TVA has refused to provide information on industrial rates offered as part of investment incentives for new businesses in the Valley, asserting that disclosing this "confidential information . . . would put the government at a competitive disadvantage."[214]

Compounding this industrial-residential rift, TVA has also recently eliminated its programs to support rooftop solar ownership, even as it provides special renewable energy programs "to the Googles and Metas of the world in order to attract them to the region."[215] These lopsided incentives amount, in the eyes of some, "to a 'massive energy injustice.'"[216]

E. THE COAL ASH DISASTER

No exploration of TVA's modern challenges would be complete without including the nation's largest coal ash disaster, which occurred when an earthen dike failed at TVA's Kingston facility in 2008.[217] The spill released more than one billion gallons of toxic coal ash sludge into the Emory River, resulting in the need for a massive, billion-dollar-plus cleanup operation.[218] That operation turned into a disaster of its own: The contractor that TVA engaged to do the cleanup failed to protect its nine-hundred workers adequately, refusing to even allow them to wear dust masks.[219] TVA reportedly was told of these practices and helped cover them up.[220] A lawsuit brought by

212. Comment of S. All. for Clean Energy at 9–10, Athens Utils. Bd. v. Tenn. Valley Auth., 177 FERC ¶ 61,021 (2021), https://cleanenergy.org/wp-content/uploads/2021-02-22_SACE_Comment.pdf [https://perma.cc/LF44-KUDE] (discussing energy burdens).

213. Daniel Dassow, *University of Tennessee Professor Sues TVA for Records of Incentives to Bitcoin Miners*, KNOX NEWS (Oct. 29, 2024, 5:01 AM), https://www.knoxnews.com/story/news/local/2024/10/29/university-of-tennessee-professor-sues-tva-for-cryptocurrency-records-bitcoin-bitdeer/72778459007 [https://perma.cc/C9X2-KQ85].

214. *TVA Keeps Its Economic Development Subsidies Secret*, KNOX NEWS (Sept. 17, 2017, 11:07 AM), https://www.knoxnews.com/story/money/2017/09/17/tva-keeps-its-economic-development-subsidies-secret/529543001 [https://perma.cc/8QJN-VL69] (quoting a TVA official).

215. Spector, *supra* note 9.

216. *Id.* (quoting Center for Biological Diversity's Gabriela Sarri-Tobar).

217. *See* Amanda P. Demmerle, Note, *Pain in the Ash: How Coal-Fired Power Plants Are Polluting Our Nation's Waters Without Consequences*, 122 W. VA. L. REV. 289, 290 (2019).

218. *Id.*

219. *Id.* at 296; Austyn Gaffney, *Hundreds of Workers Who Cleaned Up the Country's Worst Coal Ash Spill Are Now Sick and Dying*, NRDC (Dec. 17, 2018), https://www.nrdc.org/stories/hundreds-workers-who-cleaned-countrys-worst-coal-ash-spill-are-now-sick-and-dying [https://perma.cc/84RQ-EHXY]; *see also* Travis Loller, *Contractor Says It Has Settled Lawsuit with Sick and Dying Coal Ash Workers*, ASSOCIATED PRESS (May 23, 2023, 3:49 PM), https://apnews.com/article/coal-ash-workers-jacobs-engineering-lawsuit-tennessee-68b7809219a0c61d86825b934ca77edd [https://perma.cc/X5YH-4BS7].

220. Jamie Satterfield, *Workers Forced to Clean Up TVA Coal Ash Spill Without Personal Protection Settle with Company*, KY. LANTERN (May 23, 2023, 6:44 PM), https://kentuckylantern.com/2023/

two hundred workers against the contractor finally settled in 2023, after a jury found in the worker's favor.[221] By this time, nearly sixty workers had already died from related diseases, including brain cancer, lung cancer, and leukemia.[222]

In 2015, environmental groups filed a separate lawsuit alleging that TVA's handling of its coal ash at its Gallatin Fossil Plant outside of Nashville violated the Clean Water Act by leaking through local groundwater into the Cumberland River.[223] The Sixth Circuit disagreed, interpreting the Clean Water Act not to cover such scenarios.[224] New EPA regulations in 2024 may finally force TVA to remediate several coal ash sites long worrying to local residents and environmental groups, if they remain in place.[225] Either way, its coal ash legacy has cast a pall on the agency, given TVA's failure to live up to its statutory charge as an environmental steward and its disregard for the fate of Valley workers in its contracting decisions.[226]

III. A MUDDLED THEORY OF ACCOUNTABILITY

The criticisms documented in the previous Part often converge into a metacritique that TVA suffers from an "accountability" problem.[227] But this convergence belies a puzzle regarding what the theory of accountability *is* for the modern TVA. Some see TVA's larger mission as an anachronism and want it to function akin to an IOU in a competitive energy market. Others wish for TVA to embrace and revive a more capacious agenda that carves space both for grassroots democracy and clean energy innovation. The core problem facing TVA today is that its modern accountability structure works for *neither* of these camps.

05/23/workers-forced-to-clean-up-tva-coal-ash-spill-without-personal-protection-settle-with-company [https://perma.cc/6QEY-M4GG] (describing TVA investigation at the behest of the Occupational Health and Safety Administration).

221. *Id.*

222. *Id.*; Demmerle, *supra* note 217, at 296; *see also* Ella Wales, *Roane County Remembers Kingston Fossil Plant Ash Spill Workers 15 Years Later*, 6 NEWS (Dec. 22, 2023, 4:39 PM), https://www.wate.com/news/roane-county-news/roane-county-remembers-kingston-fossil-plant-ash-spill-workers-15-years-later [https://perma.cc/QLA9-WLLK].

223. Tenn. Clean Water Network v. Tenn. Valley Auth., 905 F.3d 436, 441 (6th Cir. 2018).

224. *See id.* at 444.

225. Anita Wadhwani, *Environmental Groups Welcome Federal Rules Requiring TVA to Clean Up Old Coal Ash Dumps*, TENN. LOOKOUT (May 8, 2024, 5:03 AM), https://tennesseelookout.com/2024/05/08/environmental-groups-welcome-federal-rules-requiring-tva-to-clean-up-old-coal-ash-dumps [https://perma.cc/PCV5-UNXC].

226. *See* Adkisson v. Jacobs Eng'g Grp., 36 F.4th 686, 690 (6th Cir. 2022) (describing worker safety practices in the context of a claim against TVA's contractor for the cleanup); Austyn Gaffney, *'They Deserve to be Heard': Sick and Dying Coal Ash Cleanup Workers Fight for Their Lives*, GUARDIAN (Aug 17, 2020, 4:00 AM), https://www.theguardian.com/us-news/2020/aug/17/coal-spill-workers-sick-dying-tva [https://perma.cc/4KAZ-8YQN].

227. *See, e.g.*, *TVA Consumer Protection Act Hearing*, *supra* note 56, at 24–25 (bemoaning "unaccountability of TVA"); HARGROVE, *supra* note 40, at 271.

Despite superficially resembling IOU governance in its CEO-plus-board structure, TVA lacks the traditional accountability mechanisms of corporate law. Most significantly, it lacks shareholders to discipline its leadership. In an IOU, shareholders buy shares in the corporation, betting that it will perform well enough to provide them a healthy return on their investment.[228] The IOU board's job is to monitor the utility's leadership to ensure that it makes decisions that maximize shareholders' value.[229]

In contrast, the TVA has no shareholders. Instead, the risk of bad investment decisions falls on the LPCs and large industrial customers via electricity rates. But the board has no particular charge to represent these entities as the primary "investors" in TVA's infrastructure; instead, it has significant leeway to make decisions that do not put costs first—a fact reflected in its resistance to purchasing cheap renewables. Moreover, whereas shareholders can sell their stakes in an underperforming company,[230] TVA LPCs cannot easily exit because the "fence" constrains their ability to turn elsewhere for electricity.[231] Compounding these differences, TVA ratepayers and LPCs also lack shareholders' ability to turn to the courts to vindicate violations of fiduciary duty.[232] Consequently, most TVA customers lack any substantial leverage in the agency's decision-making. Notably, TVA has built solar generation at the demand of powerful industrial customers like Google, and has even extended the same options to less mobile customers like Vanderbilt University and the city of Nashville.[233] But it has mostly pursued renewables via one-off

228. *See* Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 YALE J. ON REGUL. 569, 577 (2023) (describing typical shareholders as the "residual claimants" of any earnings left over after the company settles its obligations).

229. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 327 (1976). For general pushback on this theory, see generally LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); Kovvali & Macey, *supra* note 228, at 574 (arguing that these incentives break down in the context of rate regulation, where shareholders' upside and downside is limited by regulatory intervention).

230. *See* Kovvali & Macey, *supra* note 228, at 580.

231. Cox & Flynn, *supra* note 7, at 5.

232. *See* Kovvali & Macey, *supra* note 228, at 579–81.

233. Press Release, Tennessee Valley Auth., TVA, Origis Energy to Power Google Data Centers with 100% Renewable Energy (Nov. 9, 2020), https://www.tva.com/newsroom/press-releases/tva-origis-energy-to-power-google-data-centers-with-100-renewable-energy [https://perma.cc/U9K4-PTUM]; Brandon Vigliarolo, *Massive Solar Project in Tennessee is All About Google*, REGISTER (July 27, 2022, 6:15 PM), https://www.theregister.com/2022/07/27/solar_tennessee_google [https://perma.cc/2Q55-PLH7]; Press Release, Power, University, Silicon Ranch, NES, and TVA Flip the Switch on the Vanderbilt I Solar Farm (Apr. 11, 2023), https://www.powermag.com/press-releases/vanderbilt-university-silicon-ranch-nes-and-tva-flip-the-switch-on-the-vanderbilt-i-solar-farm [https://perma.cc/4YG3-4AGA]; *see also* Vandenbergh, Rossi & Faucher *supra* note 18, at 39 ("Customer pressure is particularly salient when it comes from corporate customers.").

arrangements with sophisticated and powerful partners, rather than through its general integrated resource planning to benefit all customers.[234]

In sum, corporate governance theory is based on the presumption that corporate leadership will prioritize the interests of the shareholders, or else shareholders and the market will hold them accountable.[235] But TVA remains a government corporation, with no shareholders, no board fiduciary duty, and a broad mission. Efforts to impose a corporate leadership structure to discipline this entity without appreciation of its governance mismatch are behind many of the loudest complaints about the modern TVA, from its pricing and contract decisions to its lack of transparency.

For those who want TVA to function more in the vein of the "radical" New Deal era of old, the modern structure also presents problems. As Dibley has traced, state-owned enterprises have great potential to act as innovators, but only under conditions where there is both strong innovation pressure from their host government and a structure in place to allow such pressure to translate into action.[236]

At TVA's inception, there was what can be described as a trifecta of accountability: presidential and congressional oversight from above, and democratic choice and mobilization from LPCs below. Under the modern regime, each of these means of political accountability is diminished. Severing TVA from reliance on congressional appropriations ended the political interference that disrupted TVA's development in the 1950s, but it also disconnected TVA from political accountability to Congress.[237] The only congressional oversight hearing of TVA that has occurred in the twenty-first century is one following the Kingston coal ash spill.[238] Although certain Congresspeople engage sporadically with the agency,[239] getting the full Congress to pay attention to TVA's performance has proven challenging in the post-appropriations era.

Presidential control would, on the face of things, appear to remain more plausible. But modern presidents have struggled to use their board appointment powers to steer TVA for several reasons. First, the board appointment process

234. *See* Neuburger, *supra* note 23, at 285 (explaining that larger LPCs "may have individual bargaining power over TVA that their smaller peers do not"); *see also* Vandenbergh, Rossi & Faucher, *supra* note 18, at 6, 18. Vandenbergh, Rossi, and Faucher offer an intriguing suggestion that TVA's bondholders—many of whom are large institutional investors—could exert pressure on the agency to decarbonize, *id.* at 34–35, although this pressure has not yet materialized.

235. *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2574–75 (2021).

236. Dibley, *supra* note 22, at 197.

237. *Cf. id.* at 151 (observing that "internal rules . . . which give government influence over the firm through financing" create effective control).

238. *See Oversight Hearing on the Tennessee Valley Authority and the Recent Major Coal Ash Spill: Hearing Before the S. Comm. on Env't & Pub. Works*, 111th Cong. 1, 8 (2009), https://www.congress.gov/111/chrg/CHRG-111shrg93852/CHRG-111shrg93852.pdf [https://perma.cc/4W8Z-FCYW].

239. *See, e.g.*, Letter from Frank Pallone, Jr., et al. to Jeffrey J. Lyash, *supra* note 153, at 1–2.

itself does not guarantee alignment between executive goals and board appointees, given the modern politics of presidential appointment.[240] The difficulties of getting preferred candidates through Congress checks the board's accountability to presidential directives, even as it ensures fealty to a wider array of regional political actors. Indeed, the appointments process appears to be the one place where at least a sliver of Congress is active in monitoring TVA—that sliver with the most direct interests in the region.[241] But the preferences of regional Senators at times diverge considerably from those of the president when it comes to innovating at TVA, requiring presidents to compromise considerably in TVA board nominations.[242]

Those board appointees that make it through the Senate gauntlet also face significant structural hurdles on the job. The 2005 switch to make the board part time limits its expertise and oversight capabilities.[243] Compounding these changes, TVA's board receives essentially all of its relevant information from TVA staff, who serve under TVA's CEO, which severely limits the board's independent analytical capacities.[244] In some instances, it appears that the CEO may not even pass along relevant information for Board consideration.[245]

This structure makes the Board's selection of CEO central to TVA's success. In fact, recent scholarship has posited that the role of entrepreneurial leaders within public enterprises may be *the* driving factor behind innovation in these institutions.[246] In the case of TVA, since creating the CEO role in 2005, *all* of its leaders have come from major southern IOUs save its most recent 2025 hire, who came from inside the TVA after decades at private utilities.[247] They thus come from cultures (a) focused on the bottom line

240. *See, e.g.*, Chris Piper, *The Broken Senate Confirmation Process Is Eating Up Precious Floor Time*, P'SHIP FOR PUB. SERV. (Sept. 19, 2023), https://ourpublicservice.org/blog/the-broken-senate-confirmation-process [https://perma.cc/4SKF-XZMJ]; Zane Bataineh, *What's the Hold Up on Senate Nominees?*, BIPARTISAN POL'Y CTR. (Aug. 29, 2023), https://bipartisanpolicy.org/blog/whats-the-hold-up-on-senate-nominees [https://perma.cc/9ZKT-GQHN].

241. *See* Vandenbergh, Rossi & Faucher, *supra* note 18, at 21 (observing the importance of "members of Congress from the TVA service area" in TVA's "opaque[]" political control).

242. *See* Kristi E. Swartz, *As Senate Sits on TVA Nominees, Biden's Climate Goals Wither*, E&E NEWS (June 1, 2022), https://www.eenews.net/articles/as-senate-sits-on-tva-nominees-bidens-climate-goals-wither [https://perma.cc/S2HW-VPDG] (describing the difficulty and delay of getting Biden TVA nominees through Congress).

243. *See supra* notes 108–11 and accompanying text.

244. *See* Zullo, *supra* note 138.

245. RUSSELL GOLD, SUPERPOWER: ONE MAN'S QUEST TO TRANSFORM AMERICAN ENERGY 232–33 (2019) (documenting TVA CEO's failure to bring offer for low-cost imported wind power to the Board).

246. Luc Bernier, *Public Enterprises as Policy Instruments: The Importance of Public Entrepreneurship*, 17 J. ECON. POL'Y REFORM 253, 253, 261 (2014).

247. Tom Killgore, CEO from 2006 to 2012, was hired from Progress Energy, which merged with Duke Energy in July 2012. *TVA Board Appoints Tom Kilgore as CEO*, CHATTANOOGAN.COM (Oct. 13, 2006), https://www.chattanoogan.com/2006/10/13/94632/TVA-Board-Appoints-Tom-Kilgore-As-CEO.aspx [https://perma.cc/LW27-L8VD]; Press Release, Duke Energy, Duke Energy, Progress Energy Complete Merger (July 2, 2012), https://news.duke-energy.com/releas

rather than a broader mission-driven perspective; and (b) resistant to sectoral changes that might threaten their territorial dominance (including renewable energy and competition).[248] The pattern of CEOs that TVA's board selects is thus unlikely to yield an entrepreneur that might lead the agency in new directions.

Board removal powers provide *somewhat* of a presidential check on selection of the CEO, but in clunky and disruptive ways. In one rare instance of top-down political accountability, in 2020 President Trump removed two TVA board members, including the Chair whom he had appointed, after TVA announced its plan to outsource 120 information technology jobs.[249] Taking sight of the CEO's salary—at the time over eight-million-dollars, making him the highest paid of any government employee—Trump called on the board to fire him, replace him with a CEO paid half a million dollars, and pass the savings on in the form of reduced energy costs.[250]

In response, the board swiftly rehired laid off employees and cancelled outsourcing plans but did not fire the CEO, whose salary had grown to $10.5

es/duke-energy-progress-energy-complete-merger [https://perma.cc/PH8X-86BK]. William D. "Bill" Johnson, CEO from 2012 to 2018, was hired from Progress Energy, its last CEO before merging with Duke Energy. Dave Flessner & Pam Sohn, *New CEO Tapped for TVA*, CHATTANOOGA TIMES FREE PRESS (Nov. 5, 2012, 1:00 AM), https://www.timesfreepress.com/news/2012/nov/05/new-ceo-tapped-for-tva-tennessee-valley-authority [https://perma.cc/K64Y-RNFA]; Brittany Crocker & Jim Gaines, *TVA President Bill Johnson Announces Plans to Retire; Board Member Eric Satz Leaving*, KNOX NEWS (Nov. 14, 2018, 5:50 PM), https://www.knoxnews.com/story/news/2018/11/14/tva-president-bill-johnson-announces-plans-retire/1999586002 [https://perma.cc/SQN9-HYJF]. TVA hired its most recent ex-CEO, Jeffrey Lyash, from Ontario Power Generation, Inc., though Lyash formerly worked as Executive Vice President of Energy Supply for Duke Energy and CEO of Progress Energy Florida. Jim Gaines, *TVA Names President of Canadian Utility as New CEO to Replace Outgoing Bill Johnson*, KNOX NEWS (Feb. 14, 2019, 5:36 PM), https://www.knoxnews.com/story/money/business/2019/02/14/tva-picks-new-ceo-jeffrey-lyash-president-of-ontario-power-generation/2868482002 [https://perma.cc/KVC8-3SB9]; *Ex-Progress Energy Florida CEO Jeff Lyash Exits Duke with $7.3 Million*, TAMPA BAY TIMES (Mar. 23, 2013), https://www.tampabay.com/news/business/energy/ex-progess-energy-florida-ceo-jeff-lyash-exits-duke-with-73-million/2110738 [https://perma.cc/62PW-YKK9]. TVA's CEO as of April 2025, Doug Moul, was hired internally from the TVA but previously had a long career in private IOUs. *See* Press Release, Tennessee Valley Auth., Don Moul Selected to Serve as TVA CEO (Mar. 31, 2025), https://www.tva.com/news-media/releases/don-moul-selected-to-serve-as-tva-ceo [https://perma.cc/5LWW-DY8F].

248. *See* Harrison & Welton, *"Why Change?" Monopoly and Competition in the Southeastern U.S. Electricity System*, *supra* note 101, at 1403–04; Harrison & Welton, *The States that Opted Out: Politics, Power, and Exceptionalism in the Quest for Electricity Deregulation in the United States South*, *supra* note 101, at 7–8.

249. Michael D. Shear, *Trump Dismisses 2 T.V.A. Board Members After Outsourcing Dispute*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/us/politics/trump-tennessee-valley-authority.html (on file with the *Iowa Law Review*).

250. President Donald J. Trump, Remarks in a Meeting with U.S. Tech Workers and Signing of an Executive Order on Hiring American (Aug. 3, 2020), https://web.archive.org/web/20210618124024/https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-meeting-u-s-tech-workers-signing-executive-order-hiring-american [https://perma.cc/WZB3-KS4N]

million by 2023.[251] Although removal authority thus worked to steer TVA policy in this instance, it is a draconian method of control that disrupts TVA board's ability to coherently direct the agency. And even a dramatic board replacement did nothing to change the key person at the helm of the modern TVA: the CEO.

Whether Trump's efforts to reshape the TVA board in his second term will be more efficacious than those in his first—and to what ends—remains to be seen. The Trump Administration has given no reasons for its 2025 firings of two board members, although others have observed that the dismissed board members were both Biden nominees.[252] That said, and as noted above, the recent board firings do follow on the heels of a call from Tennessee Senators Marsha and Bill Hagerty for TVA to further prioritize and accelerate the development of SMRs.[253] It will be interesting to see whether their vision is supported by the Trump Administration's eventual TVA board nominees—and whether the board can more aggressively steer TVA leadership than in the past.

As theories of presidential control have faltered, theories of local democracy—long muddled when it comes to TVA—have also struggled mightily in the case of TVA's modern structure. The core accountability mechanism for most public power entities operating at more local levels is democratic power to elect those in charge, which should check decision-making.[254] TVA lacks this direct democratic responsiveness because it answers to a presidentially appointed TVA board, which serves at the pleasure of a President elected by the entire U.S. population, for which TVA has limited salience. In the early days of TVA, LPCs had some choice as to whether to accept power on TVA's terms or look elsewhere. Today, however, they are largely locked into TVA service via extreme contract terms and no ability to exit.

The dearth of built-in administrative tools for participation compounds these dynamics. Whether consequential decisions happen through TVA's circumscribed IRP processes, or outside of them, LPCs and other stakeholders have limited voice at TVA. Board members are insulated from democratic input on viable future directions for the agency, largely taking their cues from internal TVA recommendations. The board's proclivity to devolve important

251. JT Neal & Gaby Sarri-Tobar, *For $10 Million a Year, Tennessee Valley Deserves Better than TVA CEO Jeff Lyash*, TENN. LOOKOUT (Apr. 30, 2024), https://tennesseelookout.com/2024/04/30/for-10-million-a-year-tennessee-valley-deserves-better-than-tva-ceo-jeff-lyash [https://perma.cc/R87P-8WE9]; Tyler Whetstone, *TVA Reverses Outsourcing Decision After Trump's Scolding, Executive Order*, KNOX NEWS (Aug. 6, 2020, 11:04 PM), https://www.knoxnews.com/story/news/local/tennessee/2020/08/06/tva-reverses-outsourcing-decision-trump-pressure/3311514001 [https://perma.cc/5WKZ-NEFT]; The Associated Press, *TVA Board Backs CEO Under Trump's Fire for Pay*, 6 NEWS (Apr. 10, 2020, 2:52 PM), https://www.wate.com/news/tennessee/tva-board-backs-ceo-under-trumps-fire-for-pay [https://perma.cc/9E9N-342C].

252. *See* Dassow, *supra* note 25; Dassow, *supra* note 27.

253. *See* Blackburn & Hagerty, *supra* note 28.

254. *See* Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 338–40 (2017).

decisions to the CEO both underscores the challenges facing a part-time board and further restricts either the President's or local partners' ability to shape these decisions.[255]

For these reasons, the modern TVA structure offers imperfect mechanisms of political control, even as its structure also fails to promote anything analogous to shareholder control. In fact, by fashioning the modern TVA as a messy compromise of these two alternative theories of control, Congress inadvertently weakened the potential of each. If TVA is to move in new substantive directions, new modes of accountability will be necessary.

IV. DESIGNING A TWENTY-FIRST CENTURY TVA

In the current political climate, TVA is likely to continue muddling along as is. But at some point—be it renewed federal interest in decarbonization or less optimistically, a regional natural disaster or electricity blackout—federal attention to the agency will renew. There are two divergent directions that TVA reforms might take. For those who desire to perfect the corporatization of TVA to bring it more fully into modern electricity markets, governance reforms that make LPCs more like customers or shareholders offer the best path forward. In contrast, those who believe that TVA's public power status accords it a vital role in the twenty-first century electric utility sector should look to enhance tools of political accountability.

A. CORPORATIZATION WITH TEETH

One option for TVA reform is to abandon its public power status. Such a move has been recently contemplated at the highest levels. Reflecting the widespread discontent that has dogged the modern TVA, the Obama Administration in 2014 proposed a "strategic review" of the agency, arguing "that [it] has achieved its original objectives, and thus no longer requires federal participation."[256] However, an ensuing Congressional Research Service ("CRS") investigation found two major problems with privatizing TVA: First, privatization would threaten TVA's mission of "minimization of flood damage and stewardship of water resources and navigation" because a private entity would not necessarily manage dams in a way that elevated these missions over profit.[257] Second, CRS found that TVA's public nature remained wildly popular: "[T]he opinion of most TVA stakeholders seems to be in favor of keeping TVA as a federal government corporation . . . ."[258] For these reasons, the privatization movement never gathered real steam in 2014.[259]

255. *See supra* Section II.C.

256. *See* CONG. RSCH. SERV., R43172, PRIVATIZING THE TENNESSEE VALLEY AUTHORITY: OPTIONS AND ISSUES 2 (2013).

257. *Id.* at 2.

258. *Id.* at 16.

259. YUDKEN, *supra* note 107, at 3 (noting "broad-based" opposition to divestiture).

However, if discontent continues to mount, one could imagine a renewed push for a privatized TVA—a possibility perhaps augured by President Trump's recent renewed interest in the agency's management.[260] The precise shape privatization might take remains an open question and its details are beyond the scope of this paper. Nevertheless, to give a broad sense: One option would be for Congress to pass legislation transforming TVA into a regional grid operator under FERC oversight, divesting it of its generation resources and requiring it to meet open access requirements. TVA could also be maintained as public power entity but made to function more like an IOU under conditions of competition. Key to these changes would be giving LPCs real ability to exit TVA service by ending TVA's "fence" and allowing LPCs to buy power from outside entities,[261] and subjecting TVA to FERC oversight of its rates and practices.[262] For these changes to be meaningful to LPCs, Congress would also have to release the ninety-six percent of LPCs currently bound by TVA's twenty-year contracts. And it should make explicit that antitrust laws apply to TVA and prohibit it from engaging in the kind of anticompetitive behavior it subjected Bristol, Virginia to in the 1990s.[263]

Changes to open TVA to competition would give LPCs real exit power, roughly akin to shareholders' ability to sell shares. The ability of LPCs to exit would, in turn, likely give them more "voice" within TVA, which would have to meet its LPCs' demands to retain them as customers.[264] Perhaps this pressure might induce internal reforms that LPCs and other stakeholders have long pressed for.

This model, however, comes with significant downsides. Open access might essentially cannibalize TVA from the inside out, eroding the agency that most in the Valley proclaim they want to remain a public power entity. If numerous LPCs exit TVA electricity supply, TVA might struggle to fund and fulfill its mission as a regional resource manager, as it would have to draw funding for this charge from an ever-smaller customer base.[265] It also would likely struggle to maintain its superior labor practices, if forced to compete against supply options with no such standards.[266]

260. *See supra* notes 25–29 and accompanying text.

261. *See* Comment of S. All. for Clean Energy, *supra* note 212, at 24.

262. Tennessee Congressman Steve Cohen introduced federal legislation in 2022 that would have eliminated TVA's anti-cherry-picking exemption and subjected it to FERC control, although it did not get traction. *See* TVA Reform and Consumer Protection Act, H.R. 9042, 117th Cong. (2022).

263. The current status of TVA's antitrust immunity is somewhat unclear in the wake of recent Supreme Court precedent. *See* BEN SPERRY, GEOFFREY A. MANNE & KRISTIAN STOUT, THE ROLE OF ANTITRUST AND POLE-ATTACHMENT OVERSIGHT IN TVA BROADBAND DEPLOYMENT 11–12 (2023).

264. *Cf.* Eleonora Broccardo, Oliver Hart & Luigi Zingales, *Exit Versus Voice*, 130 J. POL. ECON. 3101, 3102 (2022); ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30–43 (1970).

265. *Cf.* Athens Utils. Bd., *supra* note 7, at 46 (reciting TVA's argument along these lines).

266. *See* Huber & Stafford, *supra* note 125 (observing organized labors' opposition to deregulatory policies).

Less tangibly, something more is lost if the TVA's mission is allowed to erode through attrition: the latent, dormant possibility that it might be revived in the spirit of its earlier heyday—that it might serve again (and hopefully, better) as an economic and ecological experiment in how to manage a rivershed for its people, its place, and its time. There is no other agency like TVA in existence today, and to carve it up gives away its potential without a guarantee of addressing its pitfalls.

Perhaps these feel like worthwhile tradeoffs for those long disappointed with TVA's service and performance. But it bears keeping in mind the limits of what changes can be accomplished through an open-access TVA. Access to cheap renewables outside TVA's territory would likely drive rates somewhat downward and renewable energy penetration upward. However, under this model the upper limit on wind and solar resource penetration would be determined by individual LPC demand, based on local clean energy preferences and resource economics. LPCs that want to drive a clean energy future would be more empowered to do so—but others would continue to lag. Given well-known challenges in the governance of cooperative and municipal utilities[267]—as well as the profit imperatives facing private renewable energy developers—a bet on competition and market forces to drive a rapid energy transition in the Valley may be a losing one.[268]

B. THE ELECTRIC VALLEY FOR THE TWENTY-FIRST CENTURY

In the documentary *The Electric Valley*, David Lilienthal spoke of the power of electricity to serve as "the charge that makes for social change."[269] This sentiment has resonance today: The central way to ameliorate climate change is to "electrify everything," while transforming the electricity sector to run on carbon-free sources.[270]

Given this imperative, there is a second vision for TVA reform that revivifies the agency as a clean energy laboratory and yardstick.[271] In the short term, there is little prospect for such reforms, but articulating the vision might inform a longer-term national decarbonization strategy.

267. *See* Jim Cooper, *Electric Cooperatives: From New Deal to Bad Deal?*, 45 HARV. J. ON LEGIS. 335, 362–70 (2008); Debra C. Jeter, Randall S. Thomas & Harwell Wells, *Democracy and Dysfunction: Rural Electric Cooperatives and the Surprising Persistence of the Separation of Ownership and Control*, 70 ALA. L. REV. 361, 384–85 (2018).

268. *See generally* BRETT CHRISTOPHERS, THE PRICE IS WRONG: WHY CAPITALISM WON'T SAVE THE PLANET (2024) (observing that under competition, profitability (not price) of renewables drives development).

269. THE ELECTRIC VALLEY (James Agee Film Project 1984), *quoted in* CREESE, *supra* note 41, at 67.

270. *See* Jesse D. Jenkins, Max Luke & Samuel Thernstrom, Commentary, *Getting to Zero Carbon Emissions in the Electric Power Sector*, 2 JOULE 2498, 2498 (2018) (identifying electric power as "the linchpin of efforts" to limit greenhouse-gas emissions).

271. *See* HARGROVE, *supra* note 40, at 201 (quoting Freeman as envisioning TVA as "a living laboratory . . . where national energy policy becomes a reality").

If and when national politics again prioritize decarbonization, significant benefit might come out of elevating TVA reform in the political agenda. IOUs are frequently identified as laggards in the U.S. clean energy transition.[272] These utilities often decry renewable energy as unreliable and unaffordable, even as its economics have shifted and new technologies like battery storage have emerged to bolster its reliability.[273] A public power exemplar of how to transition affordably, reliably, and sustainably to an energy mix devoid of fossil fuels would be a powerful proof of concept and disciplining yardstick for the clean energy transition. Similarly, TVA might serve as an ideal proving ground for certain technologies that the private sector struggles to launch but that have strong support in the region, such as small modular nuclear reactors and long-duration storage technologies.[274] And it might also prove an ideal place to test models of how to induce or assist households in electrifying their energy systems, in a rekindling of early agency efforts to induce electricity consumption to lower rates.

But as Freeman's experience in the 1970s foretells—and recent Biden Administration frustrations confirm—transforming TVA into this kind of laboratory for the energy transition requires more than just a few sympathetic board nominees. Instead, a successful revival and reorientation of TVA would require three things: (1) enhanced political accountability; (2) increased transparency; and (3) a clear mission backed by sustained regional buy-in.

Enhanced political accountability would require transformation of TVA's leadership structure away from a strong-CEO, weak-board model, toward a more robust form of board oversight.[275] Two changes are paramount: First, the board must have more incentive for engaged policymaking. Such incentives might come from return to a full-time management board, with longer terms and deeper engagement. Second, the board must have more capacity to make good decisions. Providing board members with independent staff to assist them in evaluating recommendations emerging out of TVA's bureaucracy could significantly improve their ability to govern effectively.[276]

272. Especially in the Southeast. *See* CARA FOGLER & NOAH VER BEEK, SIERRA CLUB, THE DIRTY TRUTH ABOUT UTILITY CLIMATE PLEDGES 4, 13 (2023), https://coal.sierraclub.org/sites/nat-coal/files/dirty_truth_report_2023.pdf [https://perma.cc/42UP-FUCE].

273. THOMAS BOWEN, ILYA CHERNYAKHOVSKIY & PAUL DENHOLM, NAT'L RENEWABLE ENERGY LAB'Y, U.S. AGENCY FOR INT'L DEV., GRID-SCALE BATTERY STORAGE: FREQUENTLY ASKED QUESTIONS 2 (2019), https://www.nrel.gov/docs/fy19osti/74426.pdf [https://perma.cc/WLL3-AFFF].

274. *See, e.g.*, Chris O'Brien, *Governor Lee, Commissioner McWhorter Announce New Funding for Nuclear Education*, TENN. DEP'T ECON. & CMTY. DEV. (Oct. 15, 2024), https://tnecd.com/news/governor-lee-commissioner-mcwhorter-announce-new-funding-for-nuclear-education-2 [https://perma.cc/MAK4-RQHL] (describing Tennessee governor's support for nuclear power).

275. *Cf.* Dibley, *supra* note 22, at 141 (observing that innovation in public entities "occurred when the legal arrangements . . . gave the government power to influence management's technology decision-making").

276. *Cf.* HARGROVE, *supra* note 40, at 76 (tracing similar recommendations made as early as the 1940s); Zullo, *supra* note 138 (recommending more capacity for board members).

It would also align TVA with the oversight capabilities of state public utilities commissions, which typically have their own staff that evaluates utilities' filings.[277] This independent staff would enhance the TVA board's expertise and democratic legitimacy, as it would empower the board to absorb and analyze information from a wider variety of entities.

Increased transparency and participatory governance are also key to a stronger TVA. As an organization with a mission, TVA understandably does not want to saddle itself with procedures that slow or cabin its decision-making capabilities.[278] But the agency has fallen behind the times of the bare minimum for high-quality decision-making. As states do across the country, TVA should open its consequential IRP processes for public scrutiny and contestation, allowing the board to hear a wide range of perspectives on the benefits and risks of various long-term scenarios.[279] It might also make sense to require TVA's board to engage in more reasoned explanation of the agency's decisions.[280] TVA or Congress should also consider the benefits of allowing its board members to meet with outside stakeholder groups more regularly to establish more informal channels of input into agency decision-making.[281] And to enhance TVA's "grass roots" legitimacy, Congress might revisit the advisability of twenty-year rolling contracts and explicitly raise or eliminate five-percent self-generation caps to provide LPCs more leverage in their discussions with TVA. Similarly, Congress might consider mandating direct LPC representation on TVA's board, to give those with the most stake in the Board's decisions more say in them.

Finally, and most importantly, transforming TVA into a clean energy laboratory would require a clear mission backed by sustained regional buy-in. TVA's capacious mission allows it to pursue clean energy goals but certainly does not require it to do so. More concrete congressional directives instructing TVA to assume clean energy leadership might help in this regard. However, TVA is at the end of the day a regional institution.[282] Many of TVA's

277. *See* JIM LAZAR, ELECTRICITY REGULATION IN THE US: A GUIDE 25 (2d ed. 2016), https://www.raponline.org/wp-content/uploads/2023/09/rap-lazar-electricity-regulation-US-june-2016.pdf [https://perma.cc/D45Q-9G5C].

278. Nicholas Bagley ably highlights the risks of procedure to agency mission. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 352, 360–61, 396 (2019).

279. *See* Peluso, *supra* note 186, at 13–14.

280. *See supra* note 210 and accompanying text (revealing extreme judicial deference to TVA).

281. *Cf.* Sierra Club v. Costle, 657 F.2d 298, 400–01 (D.C. Cir. 1981) ("[T]he very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives . . . .").

282. *See* HARGROVE, *supra* note 40, at 193 (describing how the shift to self-financing made TVA "a solely regional institution without pretention to a national mission").

regional partners remain understandably focused on affordability, as electricity prices continue to rise even faster than inflation.[283]

Many (especially outside the Valley) suggest that TVA can and should lead on clean energy because as a public power entity, it can take long-term risks that IOUs cannot because it has no shareholders to answer to.[284] As one reporter observes, the TVA was "launched to invest in power infrastructure the market deemed too risky," and could play this role again with emerging clean energy technologies such as small modular reactors and new pumped hydropower.[285] Indeed, one version of this vision is precisely what Senators Blackburn and Hagerty advanced in spring 2025 with respect to SMRs. Far from treating TVA like a typical utility, they call on President Trump to reshape to TVA to allow "for the nation's largest public utility to command a lead in the provision of energy for the country's technological innovations that will ensure American leadership throughout this century and beyond."[286] Although not the same vision for TVA espoused by many advocates of renewable energy, the senators' call highlights the uniqueness of TVA as a public laboratory that has the potential to deploy first-of-a-kind technologies.

The notion of TVA as this kind of public laboratory strikes us as theoretically sound but deeply unjust, when it comes to a regional institution like the TVA being asked to assume a national role in clean energy leadership. The risk that shareholders avoid at the TVA is shunted onto a group with distinctly less ability to absorb cost overruns: TVA ratepayers.[287] What's more, TVA's initial investments that proved too risky for private companies were funded by *Congress*, not by asking Valley residents to assume risks that no ordinary investor would.[288]

Here we offer a perhaps controversial suggestion: If the country at some point wants TVA to serve as a national experiment in the clean energy transition, it should fund it to do so. Congressional funding should not be necessary for some cost-saving investments, such as solar energy and energy efficiency investments.[289] However, if a pivot to solar and energy efficiency

283. *See* Robert Walton, *US Electricity Prices Outpace Annual Inflation*, UTIL. DIVE (Mar. 13, 2024), https://www.utilitydive.com/news/us-electricity-prices-rise-customer-eia-outlook/710113 [https://perma.cc/RVN3-NWYJ].

284. *See* Spector, *supra* note 9; Kaufman, *supra* note 163.

285. Kaufman, *supra* note 163.

286. *See* Blackburn & Hagerty, *supra* note 28.

287. *Cf.* HARGROVE, *supra* note 40, at 221, 232 (describing regional resistance to Freeman's efforts to "use the rate payers money to benefit the world").

288. *See supra* Part I.

289. FOREST BRADLEY-WRIGHT, S. ALL. FOR CLEAN ENERGY, ENERGY EFFICIENCY IN THE SOUTHEAST: FIFTH ANNUAL REPORT 7–8 (Maggie Shober ed., 2023), https://cleanenergy.org/wp-content/uploads/Energy-Efficiency-in-the-Southeast-Fifth-Annual-Report.pdf [https://perma.cc/E5SN-5B7U]; RACHEL WILSON, IAIN ADDLETON & JON TABERNERO, SYNAPSE ENERGY ECON., INC, CLEAN PORTFOLIO REPLACEMENT AT TENNESSEE VALLEY AUTHORITY: ECONOMIC AND EMISSIONS

might put good jobs in the Valley at risk, Congress might fund TVA as a national experiment in a just energy transition that does not sacrifice workers at the altar of renewable energy.[290] Similarly, TVA ratepayers might be legislatively relieved of some of the risk of being national first-deployers of new clean energy technologies. Congress could guarantee a generous federal share of cost overruns related to advanced nuclear, pumped hydropower, long duration storage, or other promising new technologies that private utilities deem too risky to pursue.[291] At the same time, it should also encourage proven clean energy solutions at scale by requiring TVA to maximize solar deployment and demand-side management toward the ultimate goal of demonstrating a 24/7 net-zero grid.[292]

Reintroducing appropriations to guide TVA's clean energy future would likely come with enhanced congressional engagement to monitor TVA's spending decisions. Given that many see TVA's twentieth-century nuclear follies as resulting from an overly disinvested Congress,[293] a return to some level of congressional scrutiny might be prudent in the face of an expanded and revivified TVA.

Pragmatically, relying on legislation as an avenue for change in today's political climate is close to mining for fool's gold. Recognizing this reality, we want to highlight that TVA could undertake many of these changes on its own, including enhancing board capacity, improving transparency, more fully embracing cost-saving renewable energy technologies, and freeing its LPCs to do more local procurement and innovation. Doing so could improve both its bottom line and its regional legitimacy, offering a path to redemption that avoids the fate of either privatization or slow obsolescence. Conversely, if changes are not made, it will lend force to the arguments of those in favor of deconstructing the agency as a historical relic that no longer serves a public purpose.

CONCLUSION

When pressed to explain his vision for TVA, Roosevelt explained, "I'll tell them it's neither fish nor fowl . . . . But whatever it is, it will taste awfully good to the people of the Tennessee Valley."[294] TVA is today an even stranger

BENEFITS FOR TVA CUSTOMERS 2 (2022), https://www.synapse-energy.com/sites/default/files/TVA_Clean_Portfolio_Modeling_21-097_0.pdf [https://perma.cc/82BV-W74R].

290. Huber & Stafford, *supra* note 125.

291. *See* Shelley Welton & Conor Harrison, *Lessons in Climate Derisking: The United States' Failed Nuclear Renaissance*, 173 U. PA. L. REV. 705, 712 (2025).

292. ERIC O'SHAUGHNESSY & MONISHA SHAH, NAT'L RENEWABLE ENERGY LAB'Y, THE DEMAND-SIDE OPPORTUNITY: THE ROLES OF DISTRIBUTED SOLAR AND BUILDING ENERGY SYSTEMS IN A DECARBONIZED GRID, at vi (2021), https://www.nrel.gov/docs/fy21osti/80527.pdf [https://perma.cc/UUX9-RYDR] (finding that demand-side management can accomplish 20% of necessary grid decarbonization).

293. *See* HARGROVE, *supra* note 40, at 266.

294. *The Enduring Legacy*, TENN. VALLEY AUTH., https://www.tva.com/about-tva/our-history/tva-heritage/the-enduring-legacy [https://perma.cc/HRH4-6NDF].

protein than Roosevelt imagined. It is regional and national, ignored and critiqued, a business and an agency, corporatized and in the public interest, a set of embodied hopes and accreted disappointments. What should those contemplating public power as a clean energy strategy today take from its unique tale?

It is hardly fair to hold TVA up as an example of why public power *as a theory or practice* won't work for the energy transition. Our hope is that untangling the contradictions of the modern TVA highlights many legal and structural reasons for its current challenges. At the same time, understanding TVA as a creature of its institutional context offers three broader lessons for those who hope public power can play a more robust role in the energy transition.

First, the purpose of a public agency is to serve the public interest. This must go beyond doing the same thing as a private corporation. In the case of the energy transition, public power agencies should be given clear goals and priorities in terms of climate, environment, labor, affordability, and beyond. When tradeoffs must be made among these goals—as will inevitably be required, beyond the easiest investments that IOUs themselves will make—there should be public, democratic direction to guide these decisions.

Second, administrative capacity to make enlightened decisions in the public interest is critical to public power's success. Boards should be well-staffed and free to make broad inquiries and gather information. Strategies to recruit, train, and maintain talented, committed staff—especially in the face of stiff private-sector competition for their skills—are also vital to long-term success.

And third, public power agencies must create a strong basis for building and maintaining democratic legitimacy. This requires baking in tools of transparency and accountability, not simply relying on grassroots aspirations and a "public power" label to manifest democracy. Open, deliberative decision-making processes—where information is thoroughly shared and vetted—are critical to empowering decision-makers and maintaining legitimacy over time.[295]

We end where Roosevelt began, with the yard-sticking potential of public power. Roosevelt intended public options to serve as a check primarily on price. Today, rapid decarbonization imperatives give the yardstick concept far more potency: Someone must quickly show us a way to deliver electricity affordably, reliably, and completely carbon-free. Whether public power can do so depends on what we ask of it, and how we equip it to accomplish these pressing societal objectives.

295. *See* K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 3 (2016).