UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Plaintiffs, v. TENNESSEE VALLEY AUTHORITY, Defendant	No. 21-cv-00319-TAV-HBG

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In opposing Plaintiffs' motion for summary judgment, the Tennessee Valley Authority ("TVA") continues to mischaracterize Plaintiffs' suit, and the limited relief it seeks, all to avoid a simple task: providing a meaningful response to Petitioners' 2020 Rulemaking Petition. *See* TVA Opposition to Plaintiffs' Motion for Summary Judgment (Doc. 27) ("TVA Summ. Jud. Opp."). Indeed, while suggesting myriad reasons why the agency may ignore its basic obligations under the Administrative Procedure Act ("APA"), 5 U.S.C. § 500, *et seq.*, TVA never reveals why it is so reluctant to definitively either grant or deny the APA Petition's request for a new rule that would simply bar TVA funding to third party organizations, including industry trade associations, engaged in controversial political influence activities.

In any event, cutting through TVA's obfuscations, this case can be resolved based on just a few legal and factual propositions. As to the law:

- Whether TVA possesses the authority, under the TVA Act, to issue a rule governing whether it will spend funds on third-party organizations engaged in lobbying and related influence advocacy;
- Whether the APA authorizes any citizen—or group, on behalf of its members—to submit a rulemaking petition for an agency to issue a rule within the scope of its statutory authority; and
- Whether the APA mandates that an agency provide a legally sufficient response to such a rulemaking petition within a reasonable time.

And as regards the facts:

- Whether it is disputed that in February 2020, several Plaintiffs submitted to TVA an APA Petition seeking a new rule governing TVA spending on certain third-party advocacy organizations;
- Whether it is disputed that TVA's response to the Petition neither granted nor denied the Petition, nor addressed the bases for the new rule set out in the Petition; and
- Whether it is disputed that TVA has not sent a further response to the Petition.

As Plaintiffs explained in their summary judgment memorandum and further address here, the answers to these straightforward legal and factual questions dictate that Plaintiffs are entitled to summary judgment and a Court order directing TVA to meaningfully respond to the 2020 APA Petition in a timely manner.

ARGUMENT

A. BECAUSE TVA DOES NOT DISPUTE THAT ITS MAY 2020 LETTER WAS NOT A FINAL RESPONSE TO PLAINTIFFS' APA PETITION, THE COURT NEED NOT RESOLVE PLAINTIFFS' CLAIM ONE.

In briefing their motion to dismiss, TVA appeared to argue that its May 21, 2020 letter was a legally sufficient response under the APA, because Plaintiffs are not entitled to "specific language" or a definitive response granting or denying the Petition. *See* TVA Reply in Support of Motion to Dismiss (Doc. 23) at 12–13. However, in opposing Plaintiffs' motion for summary judgment, TVA has disavowed that position, unequivocally asserting that its May 2020 letter "*was not a final decision on any matter*," and thus making it clear that Plaintiffs' APA Petition remains pending before the agency, two years after it was submitted. TVA Summ. Jud. Opp. at 7–8.

Accordingly, as Plaintiffs explained in moving for summary judgment, the Court need not resolve Plaintiffs' alternative Claim One, which Plaintiffs included in the event TVA argued that its May 2020 letter responding to the 2020 Rulemaking Petition was a legally sufficient response, and nothing further is required under the APA for that reason. *See* Plaintiffs' Summary Judgment Memorandum ("Pl. Summ. Jud. Mem.") at 22–23 (Doc. 22). In short, since the parties now agree that the letter was "not a final decision on any matter," TVA Summ. Jud. Opp. at 7–8, Claim One is essentially moot.

In any event, the parties also agree that the appropriate remedy for Claim One would be the same as for Claim Two: directing TVA to meaningfully respond to the APA Petition. *See id.* at 9, n.10. Thus, to the extent the Court considers the sufficiency of the TVA's May 2020 letter, it should conclude that the agency failed to engage with the issues raised in the Petition, as required in this Circuit, and direct TVA to provide a legally adequate response. *See* Pl. Summ. Jud. Mem. at 22 (citing *Cmty. Serv. Inc. v. United States*, 418 F.2d 709, 711 (6th Cir. 1969)).[1]

B. TVA IS NOT FREE TO IGNORE THE APA PETITION.

Having conceded that TVA's May 2020 letter was not a final response to the Petition, TVA is left with its position that the agency is free to ignore the APA Petition altogether. While TVA presents several arguments in support of this restrictive view of its legal obligations, none has any merit.

First, TVA claims an agency need only respond to a rulemaking petition for an action an agency is required to take, and thus, in the absence of a "discrete mandatory duty to act," an agency may simply ignore such a petition. TVA Summ. Jud. Opp. at 9–10. But that is precisely the argument the D.C. Circuit rejected in *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418–19 (D.C. Cir. 2004).

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[1] TVA's argument that it is not required to explicitly grant or deny the Petition also flies in the face of another district court's recent admonition that allowing an agency to provide "no definitive answer" to a rulemaking petition would be incompatible with the APA. *Whale & Dolphin Conservation v. Nat'l Marine Fisheries Serv.*, No. 21-112, 2021 U.S. Dist. LEXIS 217216, *9 (D.D.C. Nov. 10, 2021).

Similarly, TVA's alternative argument that the Court could not grant summary judgment on Claim One because TVA has not produced an Administrative Record, *see* TVA Summ. Jud. Opp. at 6–7, is impossible to square with TVA's claim that its May 2020 letter was a "purely informational" letter that did not represent any kind of decision-making by the agency. *Id.* at 8–9. And in any event, TVA does not claim the Court needs such a Record to resolve Claim Two, as unreasonable delay claims do not turn on a particular agency record, but rather on the agency's defenses for its delay. *See* Pl. Summ. Jud. Mem. at 7 (Doc. 22).

In that case, the Federal Energy Regulatory Commission ("FERC") argued it was "not obligated to address [a rulemaking] petition at all," because the petition at issue did not seek an action FERC was required to take under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq. In re Am. Rivers,* 372 F.3d at 418. Noting that it is irrelevant whether FERC is required by another statute to grant the petition, the Court explained that "FERC is obligated *under the APA* to respond to the 1997 petition." *In re Am. Rivers.* 372 F.3d at 419.

So too here. Contrary to TVA's argument, TVA Summ. Jud. Opp. at 9–10, the agency's broad discretion under the TVA Act is irrelevant. What is relevant is that TVA—like FERC—is obligated *under the APA* to provide a coherent response to the Petition. [2]

TVA's obligation, under the APA, to respond to the Rulemaking Petition also addresses the agency's confusing argument that Plaintiffs cannot prevail here because they have not invoked a statutory violation other than the APA. TVA Summ. Jud. Opp. at 3–6. Once again, *In re Am. Rivers* did not turn on whether the agency had violated a separate obligation under the ESA, but rather on whether it had complied with its APA obligation to explain how it intended to exercise its authority under that statute. 372 F.3d at 418–20.

So too here. The parties do not dispute that TVA has the *authority*, under the TVA Act, 16 U.S.C. § 831, *et. seq.*, to issue the rule Plaintiffs have requested constraining the agency's

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[2] Nor does it matter whether TVA has its own complementary regulation governing rulemaking petitions, as do other agencies like FERC. TVA certainly cites no authority for the startling proposition that an agency can free itself from its APA obligations by not separately codifying them in its own regulatory scheme. To the contrary, courts require agencies to respond to APA rulemaking petitions regardless of whether the agency itself has a separate petitioning regulation or pending rulemaking. *See, e.g., Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 539–40 (S.D.N.Y. 2009) (requiring response to rulemaking petition irrespective of agency's internal procedures); *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065, 1074–75 (7th Cir. 2020) (Hamilton, J., concurring) (emphasizing the distinction between agency action required by statute and an agency's duty to respond to a rulemaking petition); *see also Wis. Elec. Power Co. v. Costle*, 715 F.2d 323, 328 (7th Cir. 1983) (explaining an agency need not have its own procedures for APA Petitions to be subject to the Act's requirements).

costs incurred supporting third-party advocacy organizations. *See, e.g.,* TVA Mot. to Dismiss (Doc. 15) at 7–8 (emphasizing TVA's broad discretion); *see also*, *e.g.*, 16 U.S.C. § 831 (broadly authorizing TVA to take the steps necessary to achieve the Act's objectives). Accordingly, TVA must cogently respond to the 2020 APA Petition, irrespective of its discretion under the TVA Act in how it might address the issues presented.[3]

Second, TVA claims that the APA Petition does not request an action that may be requested of TVA under the APA. TVA Summ. Jud. Opp. at 11–18. Plaintiffs have already largely addressed these issues, *See* Pl. Summ. Jud. Mem. at 7–11, but address TVA's further points in opposing Plaintiffs' motion for summary judgment here.[4]

TVA's principal new argument is that because the agency's *Membership in External Organizations* Policy is a non-binding statement of policy, it cannot be the subject of a rulemaking petition. TVA Summ. Jud. Opp. at 12–18. But that obfuscation deliberately mischaracterizes the Rulemaking Petition at issue in this case, which does not request an amendment to TVA's non-binding policy document, as TVA asserts.

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[3] None of TVA's citations to cases concerning so-called "free-standing" APA claims concern an agency's duty to simply respond to a rulemaking petition seeking a rule within the agency's relevant statutory authority. TVA Summ. Jud. Opp. at 3–6.

[4] TVA also asserts that Plaintiffs have improperly relied on APA Section 553(e) in addressing TVA's arguments. TVA Summ. Jud. Opp. at 2, 10. However, Plaintiffs' Complaint expressly relies on Section 553(e), Complaint ¶ 24 (Doc. 1), and asks the Court to grant "any other relief" necessary to resolve Plaintiffs' claims. *Id.* at 20. Moreover, Plaintiffs have relied on Section 553(e) principally to rebut TVA's arguments that *other subsections* of Section 553 free TVA from any obligation to respond to the APA Petition. *See, e.g.,* TVA Summ. Jud. Opp. at 11–18. This is entirely appropriate, as it is well-established that "[a] complaint need not anticipate every defense and accordingly need not plead every response to a potential defense." *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 902 (6th Cir. 2004). In any event, consistent with Plaintiffs' complaint, reviewing courts consistently explain that an agency's duty to respond to a rulemaking petition arises from APA Sections 555 and 706. *See, e.g., Napolitano*, 628 F. Supp. 2d at 539–40.

Rather, the Petition asks TVA to impose a new rule that, if granted, would for the first time impose "substantive requirements," *id.* at 13, on whether TVA could incur costs for outside advocacy groups. Thus, to resolve whether TVA must respond to the APA Petition, the Court should not look to TVA's *Membership in External Organizations* Policy, as TVA suggests, but to the specific regulation *proposed in the APA Petition*, which, again, is as follows:

> (f) No TVA funds may be:
> ***
> (ii) paid to a third party organization that either:
> (A) engages in litigation related to agency regulations or other governmental activities; or
> (B) influences or attempts to influence legislative or executive action, including policy research to support such efforts; or
> (C) makes political contributions.

Feb. 2020 Petition for Rulemaking, Attachment 2 (*see* Galvin Decl., Ex. 1 (Doc. 20-1, at .pdf page 67)). In short, because the rule set forth in the Rulemaking Petition would unambiguously impose legal obligations restricting TVA from funding third-party political groups, the Petition plainly seeks an agency rule within the meaning of the APA.

The court's discussion in *Center for Biological Diversity v. Bernhardt*, 509 F. Supp. 3d 1256 (D. Mont. 2020)—relied on by TVA itself, *see* TVA Summ. Jud. Opp. at 11–12—is instructive. In that case, the court found that the requested agency action, a species recovery plan under the ESA, was not a rule—and thus could not be requested in a rulemaking petition—because, if issued, it would "not bind [the] agency into any single course of action." 509 F. Supp. 3d at 1267. Rather, the court explained, a species recovery plan, which sets forth conservation pathways to protect a species, is simply a "statement of intent, that may be followed at times and disregarded at others." *Id.*

Here, by contrast, the rule requested in the Rulemaking Petition, if imposed, would unambiguously bind TVA by precluding the agency from incurring costs for certain third-party advocacy organizations. Indeed, the fact that TVA's existing *Membership in External Organizations* policy is, as TVA emphasizes, "non-binding," TVA Summ. Jud. Opp. at 14, only serves to show that the binding rule sought in the APA Petition would bring about an important, substantive change to how TVA handles these costs.

Finally, TVA continues to argue that a rulemaking petition may only be submitted for rules subject to notice and comment rulemaking. TVA Summ. Jud. Opp. at 12. As Plaintiffs have already explained, however, nothing in the APA limits the right to submit a rulemaking petition in this manner. Pl. Summ. Jud. Mem. at 8-10.[5]

In any event, however, even assuming *arguendo* that APA Section 553(e) had such a limitation, it would not apply here because, in fact, Plaintiffs' APA Petition proposes a substantive rule that *would be subject to notice and comment rulemaking in any event*. To be sure, the precise line between a substantive and an interpretive rule can be difficult to define. *See, e.g., Perez v. Mortg. Bankers Assn*, 575 U.S. 92, 96 (2015) ("The term 'interpretative rule,' . . . is not further defined by the APA, and its precise meaning is the source of much scholarly and judicial debate.")

Nonetheless, as TVA itself emphasizes, one of the key hallmarks of a *substantive* rule is "whether an agency intends to bind itself to a particular legal policy position." TVA Summ. Jud. Opp. at 18; *see also, e.g.*, *Dyer v. Sec'y of Health & Hum. Servs.*, 889 F.2d 682, 685 (6th Cir. 1989) (explaining a substantive rule is one which "narrowly circumscribes administrative

[5] TVA entirely ignores Plaintiffs' reliance on the Federal Circuit's admonition that the APA right to petition "'encompasses, as the APA itself states, more than legislative rules.'" *Id.* at 9 (quoting *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1351 (Fed. Cir. 2011) (emphasis added)).

discretion in all future cases"). Here, as noted, *see supra* at 6, that is precisely what the rule proposed in the 2020 Rulemaking Petition does: it binds TVA to no longer incur costs for third-party organizations engaged in advocacy activities. And, again, the fact that TVA's existing approach to these matters is contained in a non-binding policy manual is simply irrelevant.

Indeed, in this regard the rule at issue here is on all fours with the rule the D.C. Circuit found to be a substantive rule in *Croplife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003). In that case, the agency had issued a press release, without notice and comment, announcing that it would not consider certain data in its decision-making. *Id.* When challenged, EPA claimed the release was merely a statement of policy or interpretation exempt from APA Section 553 procedures. *Id.* at 881–84.

Rejecting these arguments, the D.C. Circuit explained that the rule was substantive because it represented "an obvious change in established agency practice [that] creates a 'binding norm'" for the agency. *Id.* at 881.

Similarly here, the rule set out in Plaintiffs' APA Petition would, if adopted, be an obvious change to TVA's prior, non-binding approach toward funding these outside organizations, and would create a "binding norm" prohibiting such funding. *Id.* Accordingly, TVA must respond to the APA Petition even if the Court were to conclude that this obligation only applies to petitions for legislative rules. *See also, e.g., Dyer v. Sec'y of Health & Hum. Servs.*, 889 F.2d 682, 685 (6th Cir. 1989) ("A statement is also likely to be considered binding if it narrowly circumscribes administrative discretion in all future cases, and if it finally and conclusively determines the issues to which it relates"); *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011) ("The question raised by the policy exception [to

notice and comment] is whether a statement is . . . of present binding effect; if it is, then the APA calls for notice and comment.").[6]

C. PLAINTIFFS HAVE STANDING TO OBTAIN RELIEF FROM THIS COURT.

Plaintiffs' summary judgment memorandum demonstrated that Plaintiffs have Article III standing to obtain a response to the APA Petition, both in light of their statutory right to information, and because their members have concrete interests in whether they are forced to subsidize outside groups engaged in political activities contrary to their interests and values. Pl. Summ. Jud. Mem. at 15–21. None of TVA's responses undermine these bases for Plaintiffs' standing here. TVA Summ. Jud. Opp. at 19–24.

First, as to Plaintiffs' arguments for standing based on the concrete impacts the rule sought in the APA Petition would have on their members, TVA's only rejoinder is to assert that this constitutes a "generalized grievance" that may not form the basis for Article III standing. TVA Summ. Jud. Opp. at 22–23. But this is wrong both legally and factually.

Legally, it is well-established that the fact that certain interests may be "shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972). To the contrary, rather than having to demonstrate that they are the *only* people impacted by an agency action, a plaintiff need only show they are "*among* the injured." *Id.* at 735 (emphasis added). That is why organizations with impacted members may bring a suit concerning air pollution, despite the fact

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[6] While the binding impact on TVA itself is alone sufficient to make the rule in the APA Petition a substantive rule, it also bears noting that, by prohibiting TVA from costs on outside advocacy organizations, the rule would also impact TVA ratepayers, freeing them from coerced subsidy of these advocacy activities in arguable contravention of their constitutional rights. *See, e.g., Cahill v. N.Y. Public Serv. Comm'n,* 556 N.E.2d 133 (N.Y. 1990) (discussing First Amendment implications of utilities using ratepayer funds for groups engaged in advocacy work).

that everyone breathes the same air. *See, e.g., Nat'l Parks Conservation Ass'n v. TVA*, No. 01-71, 2010 U.S. Dist. LEXIS 31682 (E.D. Tenn. Mar. 31, 2010).

Factually, as TVA notes, Plaintiffs' declarations establish that Plaintiffs' members object to having their TVA funds used to support groups engaged in political influence activities, TVA Summ. Jud. Opp. at 22 (quoting Plaintiff declaration)—which distinguishes them from other TVA ratepayers in any event.

Moreover, TVA's assertion that recognizing this straightforward economic injury would somehow open the door to "virtually endless" claims from TVA ratepayers ignores the strict constraints that separately exist on claims against TVA. In particular, courts do not generally permit ratepayers to directly challenge TVA rate decisions. *See, e.g., Holbrook v. TVA*, 527 F. Supp. 3d 853, 856 (W.D. Va. 2021). Thus, Plaintiffs' right to obtain a basic response to their APA Petition in light of their members' concrete economic and constitutional interests does not implicate TVA's potential exposure to more far-reaching claims.[7]

Second, in responding to Plaintiffs' argument that they also have Article III standing in light of their statutory right to information, TVA conflates informational injury with a separate form of injury to organizations: resource injury. TVA Summ. Jud. Mem. at 19–20. Thus, TVA relies on cases concerning whether the organization has legitimately spent financial resources that could be preserved if the plaintiff prevails in the suit. For example, in *PETA v. U.S. Department of Agriculture*, on which TVA relies, TVA Summ. Jud. Mem. at 19, the D.C. Circuit found the plaintiff had standing because they had demonstrated that, without the action sought in

[7] TVA also ignores Plaintiffs' argument that, as the Supreme Court recently recognized, even nominal economic impacts can be sufficient for standing where First Amendment rights are at stake. Pl. Summ. Jud. Mem. at 19. Again, as courts have recognized, compelled funding for advocacy activities through utility rates raises important First Amendment concerns. *Id.* at 20–21.

the suit, they have "expended resources" cognizable as an Article III injury. *PETA v. U.S. Dep't of Agric.*,797 F.3d 1087, 1093–94 (D.C. Cir. 2015).

This is not the basis for Plaintiffs' injury here. Rather, as Plaintiffs have explained, Pl. Summ. Jud. Mem. at 16–17, their informational injury is much more straightforward: the APA requires TVA to respond the Plaintiffs' Rulemaking Petition, and Plaintiffs are therefore injured by TVA's failure to comply with this statutory right to information. *See, e.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d at 419 (the agency "is obligated under the APA to respond to the 1997 petition.").

The Court of Appeals' recent ruling in *Ohio v. Raimondo*, 848 F. App'x 187 (6th Cir. 2021), fully supports this proposition. Indeed, in issuing its ruling, the Court of Appeals reversed the district court, which had incorrectly concluded that—as TVA argues here—the plaintiff lacked Article III standing because it had failed to demonstrate a concrete harm *beyond* its interest in the statutorily required information. *See Ohio v. Raimondo,* 528 F. Supp. 3d 783, 792 (S.D. Ohio 2021). In short, Plaintiffs have Article III standing to obtain a response to their APA Petition because of their statutory right to information, and legitimate interest in these matters. *See*, *e.g*, Galvin Decl. ¶¶ 3–6 (Doc. 20-1).[8]

Similarly unavailing is TVA's claim that Plaintiffs cannot establish Article III redressability because they cannot prove that, should they prevail, TVA will move forward with the rule Plaintiffs have presented. TVA Summ. Jud. Opp. at 20. This is not how Article III standing is evaluated in this kind of case.

[8] Tellingly, while TVA cites irrelevant cases concerning Article III standing to challenge a completed *response* to an APA Petition, TVA Summ. Jud. Opp. at 20 n.17, TVA has failed to identify a single case where a court found a plaintiff lacked Article III standing to pursue an unreasonable delay claim for an agency's *failure to respond* to an APA Petition at all.

Rather, where plaintiffs are presenting an APA injury, "the normal standards for redressability and immediacy" do not apply, and a plaintiff who demonstrates Article III injury has standing so long as "there is *some possibility* that the requested relief will prompt the injury causing party" to provide the requested relief. *Protect Our Aquifer v. TVA*, No. 2:20-cv-02615, 2021 U.S. Dist. LEXIS 151923, *37 (W.D. Tenn. Aug. 12, 2021) (quoting *Klein v. U.S. Dep't of Energy*, 753 F.3d 576, 579 (6th Cir. 2014)) (emphasis added); *see also, e.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 26 (1998) (explaining a plaintiff has Article III standing "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason").

Finally, TVA's argument that Plaintiffs fail the "zone of interest" test for standing, TVA Summ. Jud. Opp. at 23, also has no merit. As a threshold matter, Plaintiffs' procedural right to a response to the Rulemaking Petition under the APA (Claim Two) is no different from a party's APA procedural right to notice and comment rulemaking, and the Court of Appeals has explained that, under those circumstances, any party affected by the agency's failure to comply with such a procedural obligation falls within the requisite zone of interests. *See Dismas Charities v. U.S. Dep't of Just.*, 401 F.3d 6, 27–29 (6th Cir. 2005) (distinguishing between the zone-of-interest test under the APA's procedural requirements and other statutes).

Moreover, even were the Court to resolve Plaintiffs' substantive Claim One, concerning whether TVA's May 2020 response to the Rulemaking Petition was arbitrary and capricious under the TVA Act, Plaintiffs' members are certainly within the zone-of-interest of that Act. Congress directed TVA to conduct its operations for "for the benefit of the people" in its service area. 16 U.S.C. § 831(j). Here, Plaintiffs' members are precisely such people, as they obtain their electricity from TVA. *See* Pl. Summ. Jud. Mem. at 3, n.1 (citing member declarations).

The Ninth Circuit's ruling in *Oregon Natural Resources Council v. Thomas*, 92 F.3d 792 (9th Cir. 1996), relied on by TVA (TVA Summ. Jud. Opp. at 24) does not suggest otherwise. In that case, Congress had—through a separate Rescission Act—expressly given the agency unreviewable discretion in its decision-making. 92 F.3d at 795–96. Here, by contrast, TVA points to no statutory provision freeing the agency from its basic APA obligation to provide a coherent response to a Rulemaking Petition. *See, e.g., Milbrand v. U.S. Dep't of Labor*, No. 17-3451, 2018 U.S. App. Lexis 3025 (6th Cir. Feb. 7, 2018); *Cmty. Serv. Inc. v. United States*, 418 F.2d 709, 711 (6th Cir. 1969). Indeed, as the Court of Appeals recently explained, even where an agency has great discretion in its decision-making, it must consider the relevant factors and may be compelled to do so. *Garcia v. U.S. Dep't of Homeland Sec.*, 14 F.4th 462, 478–479 (6th Cir. 2021); *see also Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 371–372 (2018) (discussing reviewability of agency action, despite statutory language conferring broad discretion). Accordingly, there is also no basis for the Court to find that Plaintiffs lack standing here because they are not within the zone-of-interests of the TVA Act or the APA.

D. THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

In light of the foregoing, the answers to the limited set of legal and factual matters presented in this case are clear. *See supra* at 1–2. *First*, as to the law: TVA plainly has the power, under its broad TVA Act authority, to issue the requested rule; the APA plainly authorizes Plaintiffs to submit a Petition requesting such a new rule; and the APA mandates that TVA must meaningfully respond to such a Petition within a reasonable time.

Second, as to the facts: it is undisputed that, two years ago, several Plaintiffs submitted a Rulemaking Petition to TVA seeking a new rule on TVA spending for certain third-party organizations; it is undisputed that, while TVA sent a letter back to Plaintiffs, that letter neither

granted nor denied the Petition, nor addressed the Petition's bases for the new rule; and it is undisputed that TVA has provided no further response to the Petition.

Given these legal propositions and undisputed facts, Plaintiffs are entitled to summary judgment, and an order directing TVA to respond to the Rulemaking Petition in a timely manner.

As Plaintiffs have noted, this case would be resolved if TVA would simply provide a straightforward and definitive response to the Rulemaking Petition, which—in addition to the option of granting the Petition—could take the form of a petition denial that explains why TVA maintains that its funding for outside advocacy organizations is consistent with the TVA Act and the First Amendment. *See* Pl. Summ. Jud. Mem. at 15. The fact that TVA has now devoted more than sixty pages of briefing to avoiding that simple task suggests that something more is at issue here. Indeed, it could prove difficult for TVA to reconcile its ongoing costs for these politically controversial advocacy organizations—including, for example, paying invoices that include work on "influencing legislation"—with its Congressional mandates, or ratepayers' First Amendment rights. *See* 2020 APA Petition, Attachment 13, at 3 (invoice for 2017 EWAC dues) (Galvin Decl., Ex. 1 (Doc. 20-1, at .pdf page 171) (noting portion of payments for "influencing legislation")).[9]

[9] Recent developments at the Federal Energy Regulatory Commission ("FERC") demonstrate that issues concerning whether ratepayers should be compelled to fund influence activities is of growing concern. In December, 2021, FERC launched a Notice of Inquiry ("NOI") concerning ratepayer funding for industry associations engaged in advocacy work. 86 Fed. Reg. 72,958 (Dec. 23, 2021). Noting the long-standing principle that, as a general rule, ratepayers should not be funding "lobbying, civic engagement, public information campaigns and the like," the NOI asks whether utilities may be inappropriately charging ratepayers for these activities through payments to utility trade associations. *Id.* at 72,961.

However, while TVA may not want to respond to the APA Petition, TVA is a federal agency, and must follow the APA. Accordingly, Plaintiffs urge the Court to grant Plaintiffs' motion for summary judgment, and direct TVA to finally respond to Plaintiffs' Rulemaking Petition, submitted two years ago.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully urge the Court to grant their motion for summary judgment.

Respectfully submitted,

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