

Exhibit 12

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

TENNESSEE VALLEY AUTHORITY,
ET AL.,
PLAINTIFFS,

v.

CIVIL ACTION
NO. 79-0009-P

ENERGY REGULATORY COMMISSION
OF KENTUCKY (FORMERLY
PUBLIC SERVICE COMMISSION
OF KENTUCKY),
DEFENDANTS.

SUMMARY JUDGMENT

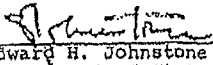
For the reasons stated in the Memorandum Opinion
this day entered,

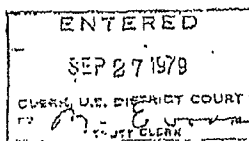
IT IS ORDERED AND ADJUDGED that the plaintiffs'
motion for Summary Judgment be, and hereby is, SUSTAINED.

This is a final and appealable judgment and there is
no just cause for delay.

IT IS FURTHER ORDERED that enforcement of plaintiffs'
injunction be STAYED during the time in which any notice
of appeal may be filed.

DATED: September 25, 1979.


Edward H. Johnstone
Judge, United States District Court



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MEMORANDUM OPINION

Plaintiffs, Tennessee Valley Authority (TVA) and various distributors of TVA electric power in Kentucky brought suit under 28 U.S.C. §§1331, 1337, 1345 and 2201-2202 asking for declaratory and injunctive relief preventing the Energy Regulatory Commission of Kentucky (ERC) from exercising any authority over the rates charged by the TVA distributors. Plaintiffs have moved for summary judgment. The Court is of the opinion that this motion should be granted.

The TVA, a United States Government corporation, was created by the Tennessee Valley Authority Act of 1933. The act authorizes the TVA to generate and sell electric power under contracts for terms of up to twenty years. In 1935 Section 10 of the Tennessee Valley Authority Act was amended to provide that:

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

49 Stat. 1076 (1935), 16 U.S.C. §831f (1976).

Pursuant to this congressional grant of authority, the TVA contracted to sell electrical power to plaintiff TVA distributors. These distributors then resell the power to consumers in Kentucky.

One purpose of Congress in creating the TVA was to establish a "yardstick" with which to measure utility rates around the country. That is, by charging TVA with the duty to supply electrical power at the lowest possible cost, a national standard of fairness was established with regard to utility rates. In describing the TVA yardstick, the 1938-1939 Joint Congressional Committee report placed special emphasis on the retail rates charged by TVA distributors:

(B) The Yardstick

The resolution in subsection (g) directs the committee to investigate "Whether by accounting methods and cost charges applicable to private industry, the electric rates of the Authority provide a legitimate, honest 'yardstick' of equitable rates of private industry.

Regardless of the numerous and conflicting descriptions of the yardstick, it can be defined as follows: The yardstick is not in the Authority's wholesale rates, but in the retail rates of the various municipalities and other local organizations that have purchased Authority power and distributed it at unusually low rates. If their operations are shown to be of a kind that may be substantially duplicated in other parts of the country, their rates may be considered a nationwide yardstick, or measure of results to be expected.

Report of the Joint Comm. on the Investigation of the Tennessee Valley Authority, S. Doc. No. 56, 76th Cong., 1st Sess., pt. 1, at 179, 190, 197-98 (1939).

On the other hand, four of the plaintiff distributors are Kentucky rural electric cooperatives. These four cooperatives were created pursuant to the provisions of an Act of the General Assembly of Kentucky incorporated into K.R.S. Chapter 279. The other named plaintiff distributors

are a Tennessee rural electric cooperative and a Tennessee municipality that sell electric power in Kentucky. The same legislative act enables these non-resident entities to distribute power to a distance of not more than three miles from the state boundary.

The Kentucky laws, in addition to providing for the creation of these resident cooperatives, also impose limitations and obligations with regard to their operations. Specifically the state law provides that these and all other distributors so created or doing business under the Act are subject to the general supervision of the Public Service Commission (now ERC).¹

For the purpose of this action the intention of the Kentucky General Assembly was twofold: (1) To permit the creation or operation of the plaintiff distributors or their like; and (2) to subject those distributors to ERC supervision.

¹ K.R.S. 279.210 provides in part:

(1) Every corporation formed under KRS 279.010 to 279.220 shall be subject to the general supervision of the Public Service Commission, and shall be subject to all the provisions of KRS 278.010 to 278.450 inclusive, and KRS 278.990.

K.R.S. 279.220 provides in part:

(1) Any rural electric cooperative corporation organized under a law of any state contiguous to this state, which law is substantially similar to the law under which such corporations may be organized in this state, may extend its operations into this state for a distance not exceeding three miles from the boundary between that state and this state, . . .

(2) The operations of such corporation within this state shall be subject to the supervision of the Public Service Commission, and the commission may take the necessary action to require the corporation to furnish adequate service at reasonable rates. If the corporation fails to comply with the regulations and requirements of the commission it shall forfeit the privilege granted by this section.

The TVA and the ERC have each sought to fulfill their legislative mandates. On the federal side, TVA, in exercising the power delegated to it by Congress, has set resale rates to be followed by its distributors by including the following language in the TVA and distributors contracts:

5. Resale Rates. In order to assure a wide and ample distribution of electric energy in the area served by [the TVA distributor], the parties agree as follows:

(a) [The TVA distributor] agrees that the power purchased hereunder shall be sold and distributed to the ultimate consumer without discrimination among consumers of the same class, and that no discriminatory rate, rebate, or other special concession will be made or given to any consumer, directly or indirectly.

(b) [The TVA distributor] agrees to serve consumers . . . at and in accordance with the rates, charges, and provisions set forth . . . and not to depart therefrom. . . .

The contracts with the TVA distributors contain provisions which allow resale rates to increase as the cost of fuel used by the distributors increases.

Over on the state side, the ERC, in responding to the obligation delegated to it by the General Assembly of Kentucky, ordered the named TVA distributors to set retail rates by reference to fuel escalation schedules differing from the fuel escalation provisions imposed by the TVA contract.

ERC argues that no actual conflict exists between the regulation undertaken by it and the fuel escalation provisions in the contracts between TVA and the TVA distributors. The ERC points out that the statutory mandate imposed on it by the Kentucky Revised Statutes -- to see that utility rates are fair, just, and reasonable -- does not conflict with TVA's mission to make low-cost power available to domestic and rural consumers.

This contention ignores the fact that it is impossible for the TVA distributors to comply with the ERC regulation without breaching contracts with the TVA. This Court finds direct conflict exists between an exercise of federal authority granted TVA by Congress and an exercise of state authority granted ERC by the General Assembly of Kentucky.

When compliance with the legitimate directions of a state government is impossible without violating the legitimate directions of the federal government, Article IV §2 of the United States Constitution, the Supremacy Clause, demands that the exercise of federal authority supersede the exercise of state authority. Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), United States v. Georgia Public Service Commission, 371 U.S. 285 (1963), McDermott v. Wisconsin, 228 U.S. 115 (1912).

The United States Congress and the General Assembly of Kentucky each have the ultimate power over the entities they create. Congress can curtail the authority of TVA¹ The General Assembly can alter the authority of electrical cooperatives established under its acts.

¹ Mr. Justice Burger observed in Tennessee Valley v. Hill, 437 U.S. 153, 98 S.Ct. 2279 (1978),

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . .

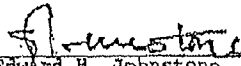
. . . in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'commonsense and the public weal'.

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But so long as plaintiff cooperatives distribute power purchased from TVA they must comply with the legitimate conditions imposed upon them by TVA.

An appropriate order is this day entered.

DATED: September 25, 1979.


Edward H. Johnston
Judge, United States District Court

