THE TENNESSEE VALLEY AUTHORITY ACT BEFORE THE COURTS

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In compliance with Section 124 of the National Defense Act of 1916, 39 Stat 215 (50 U.S.C.A. Sec. 79), the United States Government acquired certain properties in the vicinity of Muscle Shoals, Alabama, for the purpose of producing nitrates and other war materials. Nitrate plants were constructed, and in 1926 the properties were unified by the completion of a large dam on the Tennessee River, called Wilson Dam. Until the passage of the Tennessee Valley Authority Act of 1933, 48 Stat 58 (16 U.S.C.A. Sec. 831 et seq.), these Muscle Shoals properties stood idle except for the operation of the dam to improve navigation on the Tennessee River and the generation of limited quantities of electric energy and the sale thereof to the Alabama Power Company.

The continued idleness of the Muscle Shoals properties as a whole and the annual waste of vast quantities of unused power at Wilson Dam had become a problem of grave concern to Congress. Several bills for public operation met with serious objection, and no offer for private operation had met with Congressional favor. To prevent the continued partial idleness and waste of power at Wilson Dam, Congress created by Act, a corporation designated the Tennessee Valley Authority (hereinafter called TVA), as a governmental agency for the purposes and with the powers, "to improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defence by the creation of a corporation for the operation of government properties at and near Muscle Shoals in the State of Alabama, and for other purposes."

Among the powers conferred upon TVA by the Act was the power, to produce, distribute and sell electric power. TVA Act, Sec. 5(l). Congress specifically authorized its agency to convert the water power into electric energy and to sell and transmit it to the various types of purchasers in the surrounding territory. TVA Act, Sec. 10 and 12. It empowered the Authority to make such contracts, as to effectively execute the other provisions. TVA Act, Sec. 4(d).

In the execution of the provisions of the Act, TVA had concluded contracts with various corporate persons, giving preference, in accordance with a policy declared in the Statute, to municipalities and rural co-operatives. To perform these obligations it was necessary to contract with the Alabama Power Company, a corporation engaged in the production, transmission and distribution of electricity. Since this company owned all transmission lines extending from Wilson Dam, TVA in order to avoid the duplication of existing transmission facilities concluded such a contract January 4, 1934.

The major provisions of the contract, after the recital of mutual benefits were: (1) An agreement by the Alabama Power Company to sell to the TVA certain transmission lines extending from the Government owned Wilson Dam to the surrounding territory in Northwestern Alabama, together with certain real property in the area known as the Joe Wheeler Dam Site. The respective properties to be delivered upon request of the TVA, which agreed to pay the purchase price, aggregating $1,150,000 upon delivery. (2) The TVA agreed not to extend their operations of the direct sale of power beyond the limits of nine counties in the State of Mississippi; five and one-half counties in the State of Alabama; and four and one-half counties in the State of Tennessee. (3) The Alabama Power Company further agreed that it would offer its distribution systems within the territory above named for sale to the respective municipalities in which such systems are located, at prices which it was willing to accept. (4) The TVA after waiting three

months for the negotiation and consummation of sales of the urban distribution systems, was to have the right to furnish electric power to any and all such systems, regardless of whether the Alabama Power Company had sold them to the municipalities.

On September 13, 1934, George Ashwander *et al*, minority of the preferred stockholders of the Alabama Power Company, brought suit to enjoin performance of the above-mentioned contract, after they had formally but unsuccessfully demanded that the Company itself institute suit to rescind the contract. An action was commenced in Circuit Court of Limestone County, Alabama, and was later removed to the District Court, N.D. Alabama, upon petition of the TVA.

The District Judge made the following, among other findings of fact: It is not the purpose of TVA to limit the production of electric power to that needed by the Government in manufacturing war materials and providing for navigation, but its declared policy is to utilize to the fullest extent possible all the electric enegry which the Wilson and other dams are capable of producing; by producing first, governmental needs and then by selling the surplus to users of electricity, in competition with public utility corporations engaged in the manufacture, transmission, and distribution of electricity. In disposing of surplus power the TVA intends to obtain revenue, but at the same time to undersell its private competitors in order to establish a "power yardstick," and to demonstrate the advantages of public over private ownership of electric light plants.

Upon these findings (which the Circuit Court of Appeals assumed to be correct since none of them were challenged), the District Court concluded as a matter of law, that Congress had no Constitutional power to confer upon the TVA, or any federal agency, the right to enter into such a contract, and since void as to the TVA, it was void also to the Alabama Power Company. It was the view of the District Judge that the TVA, while it had the implied right to dispose of any surplus power unintentionally created in the exercise of a bona fide effort to

make such power only as was needed for the manufacture of war materials and for serving the necessities of navigation, had and could have no constitutional authority intentionally to create and sell any additional surplus. The Court therefore enjoined further performance of the contract of January 4, 1934, *Ashwander, et al.* v. *Tennessee Valley Authority et al.*, 9 Fed. Supp. 965 (1935).

It was the contention of the TVA, in an appeal to the Circuit Court of Appeals, 5th Circuit, that as an agency of the United States it had the constitutional right and statutory authority to dispose of all electric power, in excess of such of it as may be needed from time to time for the production of war materials and for purposes of navigation, that the Wilson Dam operated to its full capacity could be made to produce.

The arguments and citations in support of such contention are as follows:

I. The statutory authority of the TVA to acquire transmission lines, to produce, distribute and sell electric power, is express and clear. Particularly, Sections 10, 11, and 12, of the TVA Act, supra, were conceived and adopted for the purpose of a larger utilization and operation of the Muscle Shoals properties.

II. The authorization of the TVA, by Congress, to acquire transmission lines to facilitate the sale of electric energy available at Wilson Dam is constitutional under the commerce clause of the Constitution. The Federal Government is authorized to conserve, protect, and improve navigable waters of the United States. Ever since the historic decision in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), the Supreme Court has consistently given a liberal interpretation to the commerce power in order to maintain the navigable waters of the United States. *United States* v. *Rio Grande*, 174 U.S. 690 (1899); *Scranton v. Wheeler*, 179 U.S. 141 (1900); *Wisconsin* v. *Duluth*, 96 U.S. 379 (1877). In the course of this power, it became apparent that the protection and improvement of navigation is physically, functionally and economically related to other phases of water use and con-

trol; such as flood control, *Jackson* v. *U.S.*, 230 U.S. 1 (1913); watershed protection, *U.S.* v. *Griffin*, 58 F.(2d) 674 (W.D.Va. 1932); irrigation, *Arizona* v. *California*, 283 U.S. 423 (1931). As each of these problems has arisen, the federal commerce power has been invoked to act affirmatively in certain of these fields in aid of navigation.

The generation, transmission and sale of electric energy made available by the construction and operation of a navigation dam is a reasonable incident of the exercise of the power of the Federal Government over navigable waters. *Green Bay* and *Mississippi Canal Company* v. *Patten Paper Company*, 172 U.S. 58 (1898). The right to dispose of the incidental power was confirmed in *United States* v. *Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913).

III. The generation, transmission and sale of surplus electric energy created at Wilson Dam is authorized under the "war powers" of Congress (Article I, Sec. 8, sub-sec. 1, 11, 12, 13, 14, 15 and 16, of the Constitution of the United States). *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), in upholding the constitutionality of national banks. *United States* v. *Gettysburg Electric R. R. Co.*, 160 U.S. 668 (1896), it was not required that the measure be indispensable in order to place it within the "necessary and proper" category.

IV. The generation, transmission and sale of surplus electric energy at Wilson Dam is within the powers conferred upon the Congress by clause 2 of Sec. 3 of Article 4 of the Constitution, which provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; * * *." This provision contains no limitations in terms, and the decisions of the Supreme Court establish: *first*, that Congress has unlimited authority to dispose of the public property. In *United States* v. *Gratiot*, 14 Pet. 526 (1840), the Court rejected the contention that the power to dispose included only the power to sell the fee, but not the power to lease the use, of public lands. See also *Utah Power and Light Co.* v. *United States*, 243 U.S. 389,

at 404 (1917); *Ruddy* v. *Rossi*, 248 U.S. 104, at 106 (1918); *Camfield* v. *United States*, 167 U.S. 518 (1897); *Light* v. *United States*, 220 U.S. 523 (1911). *Second*, the cases demonstrate that Congress may adopt all reasonable means to promote its chosen policy relating to Government property, *Ruddy* v. *Rossi*, *supra*; *Camfield* v. *United States*, *supra*; *McKelvey* v. *United States*, 260 U.S. 353 (1922); *United States* v. *Alford*, 274 U.S. 264 (1927). It is plain that the water power necessarily created as a by-product, by the construction of a navigation dam is the property of the *United States*. In *Kaukauna Water Power Co.* v. *Green Bay* and *Mississippi Canal Co.*, 142 U.S. 254 (1891), it was held that water power created by construction of a government dam belongs to the government. *Green Bay* and *Mississippi Canal Co.* v. *Patten Paper Co.*, *supra*. And the conversion of water power into electric energy and the transmission of such energy to the market for sale are reasonable means of disposing of Government-owned power. *Ruddy* v. *Rossi*, *supra*; *Camfield* v. *United States*, *supra*; *Van Lear* v. *Eisele*, 126 Fed. 823 (1903). It may dispose of the power in order to avoid waste, or to liquidate the cost of the dam, or to make a widespread distribution of the benefits of the power.

V. The contention that the TVA is engaged in a "proprietary business" beyond the power of the National Government, was answered by the citation of the following cases. There is nothing express in the Constitution about the National Government engaging in a proprietary business, any more than there is about creating corporations to conduct a banking business, *McCulloch* v. *Maryland*, *supra*; *First National Bank* v. *Fellows ex rel. Union Trust Co.*, 244 U.S. 416 (1917); *Smith* v. *Kansas City Trust Co.*, 255 U.S. 180 (1921). In *United States* v. *Gratiot*, *supra*, it was held over objections on the ground of its being a proprietary business, that the Government could lease lead mines. In *King County* v. *United States Shipping-Board Emergency Fleet Corp.*, 282 Fed. 950 (C.C.A. 9th, 1922), and *Sloan Ship Yards* v. *United States*, 272 Fed. 132 (1921), the

constitutionality of the establishment, ownership and operation of merchant ships was upheld. In *New Brunswick* v. *United States*, 276 U.S. 547 (1928), the constitutionality of the United States Housing Corporation was assumed. By Act of August 24, 1912, 37 Stat. 557, the Parcel Post was established and its validity has been unchallenged. The mere fact that one of the incidental results of the exercise of such a constitutional power is a governmental activity in a field more commonly occupied by private corporations is not a reason for denying the existence of the power; *a fortiori* when the field is frequently occupied by other public agencies. The conduct of business in competition with the private interests may, of course, be for a public purpose. *Standard Oil Co.* v. *City of Illinois*, 114 Neb. 243, 207 N.W. 172, 275 U.S. 504 (1927). Mr. Justice Brandeis in *Emergency Fleet Corp.* v. *Western Union*, 275 U.S. 415 (1928), said, "It is no constitutional objection to its existence or to its exercise that the property or contracts of individuals may be incidentally affected." *Juilliard* v. *Greenman*, 110 U.S. 421 (1884).

VI. The TVA contended that there is no unconstitutional delegation of legislative power in the sections of the Act relating to, the construction and operation of dams, the generation and sale of electric energy, and the acquisition of transmission lines. The TVA declared, that the case at bar is unlike the cases of *Panama Refining Co.* v. *Ryan*, 55 Sup. Ct. 241 (1935) and *United States* v. *Schecter*, 55 Sup. Ct. 837 (1935). The Supreme Court held in both cases that the delegation provisions were unconstitutional because standards and policies laid down by Congress for the guidance of the administration agencies were not definite and clear, and permitted such agencies to determine their own policies and standards for the laying down of rules. By the TVA Act, Congress has not attempted to authorize the TVA to lay down any rules of conduct for persons. The Act conferred no power upon the Board of Directors to make any laws or rules. It simply authorized the TVA to do certain acts "in execution of the Act of Congress." *Union Bridge Co.* v. *United*

States, 204 U.S. 364 (1907); *Ryan* v. *Chicago, B. & Q. Railroad Co.*, 59 F(2d) 137 (C.C.A. 7th, 1932); *Louisville Bridge Co.* v. *United States*, 204 U.S. 364 (1907).

The Circuit Court of Appeals, taking cognizance of the contentions of the TVA concluded as a whole that the decree of the District Court was erroneous. The Court held, that the United States by virtue of lawful ownership of Wilson Dam, owns also the water power inevitably created by the dam. National Defence Act of 1916, *supra*. Under the constitutional power to dispose of property belonging to the United States, Congress may dispose of surplus water power created at Wilson Dam, and the right of disposal is not limited to that part of the power accidentally produced in excess of the amount strictly necessary for national defence or navigation purposes, and the proceeds may be applied toward reimbursement of the cost of the dam. It is held, not beyond the power of Congress or of the TVA as not being reasonably or substantially related to war and commerce powers conferred on Congress. It may adopt any reasonable means, whether of lease, or sale for disposition of surplus power produced at Wilson Dam, owned by the United States. The Federal Government, although it may not engage at will in private business, may sell property it owns even if in so doing it competes with other public or private property owners.

The contract by the TVA to purchase private power company transmission lines to convey surplus electrical energy is not invalid or ultra vires the Authority, as not unreasonably related to the exercise of war and commerce powers, * * * since the Government has the right to dispose of all excess power and use of transmission lines to facilitate sales was not unreasonable or inappropriate to that end. The TVA generation, transmission and sale of electric energy is therefore held within the statutory and constitutional power of the Authority. *Tennessee Valley Authority, et al.* v. *Ashwander*, 78 F.(2d) 578 (1935).

The issue is raised. The statutory and constitutional power of the Tennessee Valley Authority to execute the contract en-

joined now rests upon the construction and interpretation by the Supreme Court of the United States.

The court, in its opinion, may take one of several positions. It may deal specifically with the contract and declare it negatory as ultra vires the Authority. It may hold that Congress has no right to delegate such specific powers in the Act, and therefore, the latter is unconstitutional as to those sections involved. *United States* v. *Schecter, supra.* The court may declare the Act unconstitutional on the ground that the creating and selling of power far beyond the necessities of inter-state commerce or war could not be justified as a legitimate exercise of these powers, or of the power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States; that it was in reality not an exercise of these powers, but an unwarranted invasion of a field of legislation reserved to the States.

Or the Supreme Court may affirm the decision of the Circuit Court of Appeals: that there has been no unconstitutional delegation of power; that the Tennessee Valley Authority has not exceeded its statutory authority; and that the creation and selling of power is a power legitimately derived from the granted powers named above.