

Case No. 01-1240

ORAL ARGUMENT SCHEDULED FOR MAY 7, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITIZEN POWER INC., ET AL.,
Petitioners

v.

CASE NO. 01-1240

FEDERAL ENERGY REGULATORY
COMMISSION, Respondent.

**INITIAL BRIEF OF PETITIONERS
CITIZEN POWER AND
AMERICAN PUBLIC POWER ASSOCIATION**

**On Review of an Order of the
Federal Energy Regulatory Commission**

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October 31, 2001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to CIR. R. 28 (a)(1), Petitioners Citizen Power, Inc., and American Public Power Association provide this Certificate as to parties, rulings, and related cases.

Parties and Amici. In the agency proceedings below, Federal Energy Regulatory Commission (“FERC”) Docket Nos. EL99-39, EL99-40, and EL00-94, the following parties appeared and are listed on FERC’s official docket sheet:

- Petitioners Citizen Power, Inc., and American Public Power Association;
- FirstEnergy (FirstEnergy Operating Companies, FirstEnergy System, and FirstEnergy Corporation), as Respondent in Docket No. EL00-94.
- Duquesne Light Company, as Respondent in Docket No. EL99-39 and as intervenor in Docket No. EL99-40.
- The following additional parties appeared only as intervenors, in Docket No. EL99-40 only unless otherwise marked.

Pennsylvania Public Utilities Commission (Docket No. EL99-39 only)
National Rural Electric Cooperative Association
Enron Power Marketing, Inc.
Southern Company Services, Inc.
Edison Electric Institute
Electric Power Supply Association
Southern California Edison Company
Tucson Electric Power Company
Electric Clearinghouse, Inc. (now known as Dynegy, Inc.)
Arizona Public Service Company

Rulings Under Review. Two FERC rulings are under review:

1. Order Disclaiming Jurisdiction Over Certain Dispositions, 94 F.E.R.C. ¶ 61,104, issued February 7, 2001; and
2. Notice of Denial of Rehearing, 95 F.E.R.C. ¶ 61,023, issued April 6, 2001.

Related Cases. Counsel is not aware of any cases pending before this Court or any other court involving similar issues. For completeness, counsel notes that a different issue involving the Federal Power Act's jurisdictional provisions is pending before the United States Supreme Court on certiorari from this Court. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *cert. granted sub nom. New York v. FERC*, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001) (No. 00-568).

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rules 26.1 and 15(c)(1), Citizen Power, Inc. and the American Public Power Association provide the following disclosure statement.

Citizen Power, Inc. is a non profit, research, education and advocacy organization that seeks to advance the interests of utility consumers in Pennsylvania and Ohio through participation in state and national regulatory proceedings. It has no parent companies, and no publicly-held company has a 10% or greater ownership interest in it.

APPA is the national service organization representing the interests of the nation's approximately 2000 locally owned, locally controlled, not-for-profit electric utility entities of government — municipalities, counties, public utility districts, and an occasional state government throughout the United States. Approximately 1,870 of these systems are currently owned by cities and municipal governments that control their day-to-day operations. Collectively, public power delivers 15 percent of all kilowatt-hour sales to ultimate customers in the United States. Some of these electric utility entities and some of the governments have issued debt securities held by the general public. The association has no shareholders. The association is the sole shareholder of a for-profit subsidiary, Public Power Inc., which is the one hundred per cent

owner of Hometown Connections International, LLC. Neither Public Power Inc. nor Hometown Connections International, LLC have issued publicly held debt or equity. Hometown Connections International, LLC holds a 37.5 per cent interest in a joint venture, UtilityFrontier.com, LLC, which has no publicly owned equity or debt.

Respectfully submitted,

David E. Pomper

ATTORNEY FOR CITIZEN POWER, INC
AND THE AMERICAN PUBLIC POWER
ASSOCIATION

October 31, 2001

GLOSSARY

APPA:	American Public Power Association
“But” Clause:	The italicized language from Section 201(b)(1) of the Federal Power Act, which provides in relevant part that “[t]he Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, <i>but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy....</i> ”
“Except” Clause	The underlined language from Section 201(b)(1) quoted above; part of the “But” Clause
FERC:	Federal Energy Regulatory Commission
FPA:	Federal Power Act
Generation Exemption:	The term used in the order under review to describe the “But” Clause
Interstate Wholesale Generating Facilities:	Generation facilities used to produce electricity sold at wholesale in interstate commerce
PUHCA:	Public Utility Holding Company Act

JURISDICTIONAL STATEMENT

Petitioners seek review of two orders. The first rejected their request for a declaratory order and dismissed Citizen Power’s complaints against Duquesne Light Company and FirstEnergy Corporation. The second gave notice that rehearing would not be entertained.

Basis for agency jurisdiction: The Federal Energy Regulatory Commission (“FERC”) had jurisdiction over the Petition for Declaratory Order in Docket No. EL99-40 under sections 201, 203 and 309 of the Federal Power Act (“FPA”), 16 U.S.C. §§ 824, 824b and 825h (1998), and Rule 207 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.207 (1998). FERC had jurisdiction over the complaints filed in Docket Nos. EL99-39 and EL00-94 under sections 201, 203, 306 and 307 of the FPA, 16 U.S.C. §§ 824, 824b, 825e, and 825f (1998), and Rule 206 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.206 (1998), because the respondents in those proceedings intended to dispose or had disposed of jurisdictional generation facilities (among other jurisdictional facilities), valued in excess of \$50,000, without prior FERC approval for the generation disposition.

Basis for appellate jurisdiction: The order denying petitioners’ request for a declaratory order and Citizen Power’s complaints was issued February 7,

2001. *American Public Power Ass'n*, 94 F.E.R.C. ¶ 61,104 (2001) (“Order”).

Petitioners timely sought rehearing on March 9, 2001. FERC issued a Notice of Denial of Rehearing on April 6, 2001. *American Public Power Ass'n*, 95 F.E.R.C. ¶ 61,023 (2001). These orders were final orders disposing of Petitioners’ claims, and Petitioners filed a timely Petition for Review on May 30, 2001. This Court has jurisdiction and venue pursuant to 16 U.S.C. § 825l(b).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether FERC erred in concluding that it lacked jurisdiction to review, under Federal Power Act Section 203, proposed dispositions of generating facilities valued above \$50,000 that are used to produce electric energy sold at wholesale in interstate commerce;
2. Whether FERC’s blanket assertion that “Section 201(b)(1) expressly exempts from the Commission’s jurisdiction ‘facilities used for the generation of electric energy’” is contradicted by the statutory text and legislative history;
3. Whether Congress’s intent in enacting Section 203 is violated by FERC’s current practice of paying close attention to generation concentration issues in reviewing generation dispositions that happen to include \$50,000 worth of transmission facilities, but ignoring dispositions that concentrate generation by disposing of generation assets alone;
4. Whether FERC’s interpretation of its authority under Sections 201 and 203 is unreasonable because it departs without explanation from FERC precedent and is contradicted by authoritative interpretations in appellate case law;
5. Whether the requirement of reasoned decisionmaking required FERC to do more than rely on previous conclusory disclaimers of jurisdiction that lacked significant analysis and themselves departed without reasoned explanation from earlier precedent; and

6. Whether the decisions under review were otherwise arbitrary, capricious and not the product of reasoned decisionmaking.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum at the end of this brief.

STATEMENT OF THE CASE

On February 11, 1999, Citizen Power and APPA filed a Petition for Declaratory Order asking FERC to confirm that it has jurisdiction to review, under Section 203(a) of the Federal Power Act, 16 U.S.C. § 824b(a), public utility dispositions of generating facilities valued above \$50,000 that are used to generate power for wholesale sales in interstate commerce. On the same day, Citizen Power filed a complaint against Duquesne Light Company alleging that Duquesne intended to dispose of such jurisdictional generating facilities (among other jurisdictional facilities) without obtaining prior FERC approval. Similarly, on July 26, 2000, Citizen Power filed a complaint against FirstEnergy and FirstEnergy Operating Companies, alleging that they had failed to seek FERC approval under Section 203 to transfer jurisdictional generating facilities to FirstEnergy's marketing affiliate.

All three pleadings rested on the same premise: that the disposition of \$50,000 in generation facilities used to produce electricity sold at wholesale in interstate commerce requires prior FERC approval under FPA Section 203.

In a single short order, issued February 7, 2001, FERC rejected the request for a declaratory order and dismissed the complaints. FERC argued (wrongfully as shown below) that “[f]or Section 203 purposes, the term, jurisdictional facilities, has never been read to include generation facilities.” 94 F.E.R.C. at 61,423. FERC also contended that “there is no precedent, legislative history, or case law which would support [Petitioners’] conclusion” (*id.*) but did not discuss any of the precedent, legislative history, or case law that Petitioners cited. FERC also asserted that by looking to the entire second sentence of FPA § 201(b)(1) rather than omitting the clause “except as provided in this Part and the Part next following,” Petitioners were seeking to “muddy the waters.” *Id.*

Citizen Power and APPA timely sought rehearing, and on April 6, 2001 FERC issued a one-paragraph order indicating that “the Commission has decided to take no action on the request.” 95 F.E.R.C. at 61,023. This appeal followed.

STATEMENT OF FACTS

The FirstEnergy Companies are investor-owned public utilities providing electric service principally in northern Ohio and western Pennsylvania. The Duquesne Light Company is an investor-owned public utility providing electric service principally in the Pittsburgh area. During 1999-2001, these utilities and many others engaged in dispositions of substantial generating assets. *See, e.g.*, R.1, Attachment 2, Appendix A, pp.22-24; R.10 at 2 n.2 and 24; *see also* R.19, appended tables. As recited above, Citizen Power and APPA filed complaints and a declaratory petition that sought to obtain FERC review of these dispositions under FPA § 203. All were dismissed by FERC in the orders under review.

The orders under review do not rest upon — or even contain — any factual findings. Notably, the orders do not deny that the generating facilities at issue in the complaint proceedings are facilities valued above \$50,000 that produce power sold at wholesale in interstate commerce. Rather, the orders rest entirely on FERC's erroneous reading of the statute. This appeal thus presents a purely legal question: whether FERC has jurisdiction to review under FPA Section 203 proposed dispositions of generating facilities used to produce power sold at wholesale in interstate commerce.

That legal question has profound policy implications. The largest electric industry reorganization since the 1930s is underway. Pursuant to federal policy, the industry's traditional vertically integrated structure is being replaced with one that places generation and transmission facilities in separate hands.¹ The machines that create bulk power sold at wholesale in interstate commerce are being merged, auctioned, divested, consolidated, swapped, spun off, and otherwise disposed of to new owners through a wide array of transaction structures. In the past, generation dispositions were often accompanied by transmission dispositions, and FERC leveraged its review of the latter into a basis to review the former.² But that approach has holes, and the radical restructuring now underway will leave it in shreds. Thus, this case will determine whether the federal agency with the principal economic regulatory authority and expertise to regulate bulk electricity commerce can timely ensure that the rising flood of generator dispositions is consistent with the national public interest.

¹ See *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 810 at 813, 815-17 (Jan. 6, 2000), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), *appeal docketed sub nom. Pub. Util. Dist. 1 v. FERC*, No. 00-1174 (D.C. Cir. Apr. 24, 2000).

² See, e.g., *Minnesota Power & Light Co.*, 43 F.E.R.C. ¶ 61,103 (1988).

SUMMARY OF ARGUMENT

FERC's interpretation of FPA Sections 201 and 203 conflicts with the statutory text and Congress's clear intent. Traditional tools of statutory interpretation reveal that Congress spoke directly to the question at issue and that it intended FERC to review dispositions of generation facilities that produce electricity sold at wholesale in interstate commerce. Accordingly, under step one of the *Chevron* framework, FERC's Order must be vacated and reversed. FPA Section 203(a) prohibits public utilities from disposing of "facilities subject to the jurisdiction of the Commission ... value[d] in excess of \$50,000" without prior FERC approval. FPA Section 201(b) provides initially that FERC shall have jurisdiction over all facilities used for sales of electricity at wholesale in interstate commerce. Generation facilities that produce power sold at wholesale in interstate commerce are facilities "used for" such sales. To this point, then, FERC's jurisdiction is unquestioned.

FPA Section 201(b) next provides that FERC shall not have jurisdiction over generation facilities "except as specifically provided in this Part and the Part next following." Congress inserted this "except" clause for the express purpose of removing doubt about FERC's jurisdiction over generation. For the same reason and at the same time, it inserted language in Section 201(a) declaring "Federal regulation of matters relating to generation to the extent

provided in this Part and the Part next following” to be in the public interest. These insertions clearly indicate that Congress intended to grant FERC some jurisdiction over generation facilities used to produce power sold at wholesale in interstate commerce. That jurisdiction makes these facilities ones “subject to the jurisdiction of the Commission,” and thus makes their disposition subject to Section 203. Indeed, FERC’s contrary view effectively deletes from the statute the “except” clause that Congress added to clarify that FERC did have substantial jurisdiction over interstate wholesale generating facilities. FERC has never explained how its position that Section 203 does not reach generation facilities can be squared with the “except” clause. Instead, its jurisdictional decisions have frequently replaced that clause with ellipses.

FERC acknowledges that Congress granted it jurisdiction over generation facilities for purposes of exercising the regulatory powers contained in FPA Sections 205 and 206, and it has also held that ownership of such facilities makes its owner a “public utility” subject to FERC regulation. *Hartford Electric Light Co.*, 2 F.P.C. 359, 366-67 (1941), *aff’d*, *Hartford Elec. Light Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942); *Middle South Energy*, 32 F.E.R.C. ¶ 61,425, at 61,948 (1985), *aff’d sub nom. Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir.), *vacated in other part*, 822 F.2d 1104 (D.C. Cir.), *cert. denied sub nom. Arkansas Pub. Serv. Comm’n v. FERC*, 484 U.S. 985 (1987).

FERC fails to explain why the jurisdiction it acknowledges for these purposes does not satisfy Section 203's jurisdiction requirement. Nor does FERC explain why the interpretation of FPA Section 201(b) that results in a finding of jurisdiction for purposes of Sections 205 and 206 does not also establish FERC's jurisdiction for purposes of Section 203.

Congress's intent that FERC review interstate wholesale generator dispositions also is demonstrated by Section 203's context and the illogical results of FERC's interpretation. Under FERC's interpretation, Section 203 attaches when public utilities merge, or otherwise engage in a transaction that transfers even a minimal amount of marginally "transmission" facilities. In such cases, FERC rightly places front and center the question whether changing generation ownership will affect the public interest in competition. Yet if the very same change in generation ownership occurs by itself, FERC disclaims jurisdiction. FERC's approach elevates form over substance, and allows public utilities to evade federal review of generation market power structural issues by simply delaying or excising the transmission components of their asset transfers or otherwise artfully structuring their deals.

For all of these reasons, the Court should find FERC's Order contrary to Congress's clearly expressed intent under step one of the *Chevron* framework. However, even if the Court finds the FPA ambiguous and proceeds to step two,

deference to FERC’s interpretation would still be inappropriate. First, FERC’s interpretation is unreasonable for the reasons set out above. Second, FERC’s discretion to interpret the FPA is circumscribed by its own previous interpretations and the interpretations set forth authoritatively in binding appellate decisions. FERC has neither reconciled its Order with those interpretations nor attempted to provide a reasoned explanation for its decision to depart from them. Instead, FERC simply cites a few other cases in which it has previously disclaimed jurisdiction — in equally conclusory fashion — and ignores the cases that support a finding of jurisdiction. That is not reasoned decisionmaking.

ARGUMENT

The question presented in this appeal is whether Congress, when it provided for Federal review of proposed dispositions of jurisdictional facilities, left beyond FERC’s reach what this Court has characterized as the “archetypal” jurisdictional facilities, and what FERC itself has called “traditional[]” jurisdictional facilities — namely, the generators that produce power sold for resale in interstate commerce.³ FERC’s claim that Congress carved these core

³ See *Automated Power Exchange, Inc.*, 82 F.E.R.C. ¶ 61,287 at 62,106 (1998) (jurisdictional facilities are defined in FPA §§ 201(a) and 201(b)(1), and “traditionally such facilities have [included] ... physical facilities such as generation plants”), *reh’g denied*, 84 F.E.R.C. ¶ 61,020 at 61,085-86 (1998),

facilities out from federal jurisdiction is facially implausible and inconsistent with the text, structure, and legislative history of the FPA. It is also contradicted by interpretations of the instant FPA provisions (and analogous provisions) contained in prior FERC decisions, as well as opinions of this Court, the Second Circuit, and the Supreme Court. *See* Sections I through IV below.

Petitioners acknowledge, as they have from the outset, that this is not the first time FERC has disclaimed jurisdiction over generating facilities for purposes of FPA § 203. In recent years, FERC has developed a line of conclusory disclaimers traceable to a 1964 case that lacked any analysis and may not even stand for the proposition at issue. FERC was arbitrary and capricious when it blindly adhered to this line of cases, even though it is inconsistent with the statute and departs without explanation from FERC precedent — including recent, well-reasoned decisions asserting that FERC does have jurisdiction over interstate wholesale generation facilities. *See* Section V.

aff'd, 204 F.3d 1144, 1147 (D.C. Cir. 2000) (Rogers, J.) (“FERC acknowledged that the archetypal ‘facilities’ under the Act are power generating plants and transmission lines....”).

I. FERC’S ORDER DOES NOT SURVIVE REVIEW UNDER EITHER OF *CHEVRON*’S STEPS

This Court reviews FERC’s statutory interpretation under the framework announced in *Chevron USA v. NRDC*, 467 U.S. 837 (1984). Under *Chevron*’s first step, the Court “must first exhaust the ‘traditional tools of statutory construction’ to determine whether Congress has spoken to the precise question at issue.” *NRDC v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995). If Congress has spoken directly, “that is the end of the matter.” *U.S. v. Haggard Apparel Co.*, 526 U.S. 380, 392 (1999). “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” *Chevron* at 843 n.9. *Chevron*’s second step comes into play only if the Court determines that Congress has not spoken to the issue at hand. *Southern Cal. Edison Co. v. FERC*, 195 F.3d 17, 23 (D.C. Cir. 1999).

The question presented here — whether Congress excluded from FERC’s disposition review power the “archetypal” facilities used for jurisdictional sales — is so fundamental that one cannot reasonably conclude that Congress failed to address it.⁴ This is a central issue, not an interstitial matter that

⁴ As Justice Breyer has explained, “A court may ... ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.” Breyer, *Judicial*

Congress would leave for FERC to fill in through its daily administration of the Act. In fact, as discussed in Sections II and III below, Congress *has* addressed the question and has granted FERC the necessary jurisdiction. The court should therefore decide this case at step one of the *Chevron* framework and declare FERC's interpretation inconsistent with Congress's clearly-expressed intent.

However, even if the Court finds the FPA ambiguous and proceeds to step two, it should reject FERC's interpretation. In step two, courts defer to agency interpretations — but only if they are reasonable. To be considered reasonable, an interpretation must be permissible in light of the statutory text and legislative history,⁵ and of the provision's context in the overall statutory scheme.⁶ In this case, for the reasons stated in Sections II and III, FERC's interpretation cannot be considered reasonable because it nullifies statutory language, is inconsistent with legislative history, and imputes to Congress illogical distinctions in defining which transactions should be reviewed.

Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986), cited in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“our inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented”).

⁵ *Building Owners & Mgrs. Ass'n Int'l v. FCC*, 254 F.3d 89, 94 (D.C. Cir. 2001).

⁶ *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1178 (D.C. Cir. 2000) (Sentelle, J., dissenting).

Deference would also be inappropriate because FERC's present interpretation is inconsistent with prior FERC decisions and binding judicial precedent. FERC is not writing here on a blank slate. As discussed in Section IV, FERC interpreted the FPA until at least 1964 as providing jurisdiction for it to review dispositions of generating facilities; and it continues to interpret FPA Section 201 (the provision at issue here) as granting jurisdiction over generating facilities for other aspects of FERC's economic regulatory authority (*i.e.*, Sections 205 and 206). FERC has never adequately explained its departure from those precedents, making deference inappropriate. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation ... which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."); *Automated Power Exchange, Inc. v. FERC*, 204 F.3d at 1151 ("Even if FERC's statutory interpretation might otherwise be reasonable..., FERC must also interpret the Act consistently with its own precedent or explain its reasons for departure therefrom.").

Nor is FERC free to depart, under shelter of *Chevron* deference, from authoritative judicial interpretations. *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an

agency’s later interpretation of the statute against our prior determination of the statute’s meaning.”). As explained in Section IV, this Court, the Second Circuit, and the Supreme Court have endorsed the statutory interpretation Petitioners advanced below, and FERC is not free to abandon it.

II. CONGRESS SPOKE TO THE QUESTION PRESENTED AND FERC’S ORDER CONTRADICTS CONGRESS’S INTENT

The question here is whether FERC’s authority to review proposed dispositions of jurisdictional facilities extends to generating facilities used to produce power sold for resale in interstate commerce.⁷ Congress has answered the question affirmatively.

A. The FPA’s Text Shows that Congress Intended to Grant Jurisdiction for FERC to Review Dispositions of Interstate Wholesale Generating Facilities

FPA Section 203, 16 U.S.C. §824b(a), prohibits public utilities from disposing of “facilities subject to the jurisdiction of the Commission ... value[d] in excess of \$50,000” without prior FERC approval. As discussed below, FERC has held elsewhere that Section 203 must be read broadly in order to fulfill Congress’s purposes, which includes ensuring that “corporate realignments do not adversely affect the maintenance of adequate service or

⁷ R.1 at 1, 25. Petitioners hereafter refer to facilities producing power sold at wholesale in interstate commerce as “interstate wholesale generating facilities.”

coordination in the public interest of jurisdictional facilities.” *Enova Corp.*, 79 F.E.R.C. ¶ 61,107 at 61,488 (1997).

FPA § 203 applies to all dispositions of jurisdictional facilities exceeding the \$50,000 threshold. Determining whether facilities are “subject to the jurisdiction of the Commission” requires reference to Section 201(b)(1), 16 U.S.C. §824(b)(1), which provides that:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce.... The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, *but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy....*^[8]

This jurisdictional grant is broad,⁹ and clearly gives FERC jurisdiction over interstate wholesale generating facilities for purposes of exercising the

⁸ Hereafter, Petitioners will refer to the entire italicized phrase as the “but clause,” which the Order calls the “Generation Exemption,” and to the underlined language as the “except clause.”

⁹ *Automated Power Exch.*, 204 F.3d at 1153 (“Congress chose broad language to describe FERC’s jurisdiction.”); *cf. Brown & Williamson Tobacco Corp.*, 529 U.S. at 165-66 (Breyer, dissenting) (“That Congress would grant the FDA such broad jurisdictional authority should surprise no one. In 1938, the President and much of Congress believed that federal administrative agencies needed broad authority and would exercise that authority wisely — a view embodied in much Second New Deal legislation.”).

regulatory powers specifically provided later in the statute, including those contained in Section 203.

There is no doubt that interstate wholesale generating facilities are “facilities” for purposes of the FPA or that they are “used for” jurisdictional sales. In *Middle South Energy, Inc.*, for example, FERC found that “there is no question that the Grand Gulf I generation facilities are used as facilities for interstate wholesale sales, since sales made by MSE from those facilities involve sales of electric energy at wholesale in interstate commerce.” 32 F.E.R.C. ¶ 61,425, at 61,948 (1985), *aff’d sub nom. Mississippi Indus. v. FERC*, 808 F.2d 1525 (D.C. Cir.), *vacated in other part*, 822 F.2d 1104 (D.C. Cir.), *cert. denied sub nom. Arkansas Pub. Serv. Comm’n v. FERC*, 484 U.S. 985 (1987). As discussed below, both FERC and this Court went on to conclude that the Grand Gulf generating facilities were jurisdictional and that FERC could regulate them as provided in FPA Sections 205 and 206. *See also Hartford Elec. Light Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942). To this point in reading Section 201, then, FERC unquestionably has jurisdiction.

Thus, whether FERC ultimately has jurisdiction turns on the next part of the sentence, providing that FERC shall not have jurisdiction over generating facilities “except as specifically provided.” There FERC goes awry. FERC simply makes a blanket assertion that “Section 201(b)(1) expressly exempts

from the Commission’s jurisdiction ‘facilities used for the generation of electric energy’ (Generation Exemption).” 94 F.E.R.C. at 61,423. Indeed, FERC goes so far as to criticize Petitioners for reading the rest of the sentence, chastising them for “seek[ing] to muddy the waters by citing” the “except” clause. *Id.*

However, Section 201(b) cannot reasonably be read to say that FERC lacks all jurisdiction over generating facilities. The very existence of the “except” clause suggests that FERC must possess *some* such jurisdiction. Indeed, the FPA’s legislative history reveals that the Conference Committee added the “except” clause, together with language in Section 201(a) declaring “Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following” to be in the public interest, specifically to “remove any doubt” whether FERC possessed jurisdiction over generating facilities. H. Rep. No. 1903, 74th Cong., 1st Sess., 74 (1935); *Mississippi Indus.*, 808 F.2d at 1543. As discussed in Section II.B below, a deeper examination of the legislative history only reinforces the conclusion that Congress intended to confer jurisdiction.

Likewise, other FPA language indicates clearly that Section 201(b)(1) confers some jurisdiction over generating facilities. For example, the same Congress that drafted Section 201(b)(1) also drafted Section 206(d), 16 U.S.C. §824e(d), which refers expressly to “production ... of electric energy by means

of facilities under the jurisdiction of the Commission,” and authorizes FERC to determine the cost of such jurisdictional facilities “in cases where the Commission has no authority to establish a rate governing the sale of such energy.” This language illustrates two important points: *first*, that Congress understood there to be production or generation facilities “under the jurisdiction of the Commission” and, *second*, that the Commission’s jurisdiction over such facilities is not simply incident to or coextensive with its rate-setting authority. Similarly, FPA Sections 202(c) and 207, 16 U.S.C. §§ 824a(c) and 824f, create authority in appropriate circumstances to compel the operation of generating facilities. *See Hartford Elec. Light Co.*, 2 F.P.C. at 367 (discussing Section 207).

The plain meaning of the FPA’s text therefore indicates (a) that Congress intended to grant FERC at least some jurisdiction over interstate wholesale generating facilities and (b) that Section 203 applies to dispositions of all jurisdictional facilities valued above the threshold level. Thus, Section 203 applies to dispositions of interstate wholesale generating facilities.

B. The FPA’s Legislative History Shows that Congress Intended to Grant FERC Jurisdiction Over Interstate Wholesale Generating Facilities

The legislative history of Section 201’s but-and-except clauses reinforces the conclusion that they operate together to give the Commission authority to

exercise the powers set forth in FPA Sections 202 *et seq.* with respect to interstate wholesale generating facilities. The original bill drafted by the Federal Power Commission stated that it applied to “the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, but shall not apply to the retail sale of energy in local distribution.”¹⁰ That bill also indicated that the Commission would have “jurisdiction over all facilities for such transmission, sale, and/or production . . . except facilities for the retail distribution of electric energy, or for the production or transmission of energy solely for the use of the producer or transmitter or the use of his tenants on property owned or controlled by him and not for resale.”¹¹

The Senate Commerce Committee reported out a substitute bill, which simplified the jurisdictional exclusion to “facilities used only for the production or transmission of electric energy in intrastate commerce or in local distribution or for the use of the producer or transmitter.” S.2796, 74th Cong., Part II, §201(b). This jurisdictional exclusion — the progenitor of the “but” clause — came directly from comments of the National Association of Railroad and Utilities Commissioners, which nevertheless expressly supported federal

¹⁰ S.1725, 74th Cong., Part II, § 201(a).

¹¹ *Id.*

jurisdiction over “all facilities for such [interstate wholesale] transmission, sale, and/or production.”¹²

Similarly, FPC Solicitor DeVane explained that federal jurisdiction over generation divestitures was an essential tool for promoting the regionalized efficiency sought by the FPA. In testimony before the House Commerce Committee during its mark-up, he testified that the FPA’s second principal objective, beyond filling a regulatory gap as to ratemaking, was to promote “regional coordination,” *i.e.* “creation of regional integrated systems so as to secure the best service to the public.” *Federal Water Power Act, 1935: Hearings on H. R. 5423 Before the House Interstate & Foreign Commerce Comm., 74th Cong. 549-550* (statement of FPC Solicitor DeVane). The disposition-review provision (now numbered Section 203, then 205) was included as part of the Commission’s “jurisdiction over production facilities connected with the interstate transmission facilities,” principally in order “to carry out the regional coordination plan that is provided in section 202 and section 203 [numbered sections 202(a)-(b) as enacted].” *Id.* at 550, 560. Indeed, Solicitor DeVane insisted that such jurisdiction was “absolutely

¹² See *Public Utility Holding Company Act, 1935: Hearings Before the Senate Interstate Commerce Comm., 74th Cong. 748* (statement of H. Lester Hooker, NARUC Legislative Committee Chairman). The Supreme Court has noted that

necessary to effectively carry out regional planning and coordination.” *Id.* at 560.

Concerned that federal jurisdiction over generating facilities might be unconstitutional and aware that almost all electric energy was then consumed in the state where produced, the House of Representatives passed a version that would have foreclosed federal jurisdiction over generating facilities altogether.¹³ However, the House-Senate Conference Committee significantly altered the House’s language — adding the “except” clause and the declaration that Federal regulation of matters relating to generation to the extent provided is in the public interest — to preserve the Senate’s intent to assert federal jurisdiction, for specified purposes, over generating facilities that were in fact used for interstate wholesale sales.¹⁴

C. Faced With the FPA’s Text and Legislative History, FERC’s Order Offers Only Evasions

FERC’s attempt to overcome the text and legislative history discussed above fails two basic tests of statutory interpretation: to be sustainable, an interpretation must construe the statute so that it makes sense as a whole, and

NARUC’s comments influenced the delineation of federal jurisdiction. *Jersey Central Power & Light Co. v. FPC*, 319 U.S. 61, 77 n.23 (1943).

¹³ See 79 Cong. Rec. H10377-78 (1935); 79 Cong. Rec. S1960 (1935).

¹⁴ H. Rep. No. 1903, 74th Cong., 1st Sess., 74 (1935); *Mississippi Indus.*, 808 F.2d at 1543.

must give meaning to every clause.¹⁵ FERC’s Order does neither. First, the Order *acknowledges* FERC’s “jurisdiction over generation facilities for ratemaking purposes,”¹⁶ while simultaneously denying that the same generating facilities are jurisdictional for purposes of Section 203(a). FERC never explains why its acknowledged jurisdiction over generating facilities for ratemaking purposes does not *make them* “facilities subject to the jurisdiction of the Commission,” and thus subject to Section 203(a). Nor does it explain why the interpretation that renders such facilities jurisdictional for ratemaking purposes does not also make them jurisdictional for purposes of Section 203(a). To find that interstate wholesale generating facilities are jurisdictional for purposes of one legislated power (Section 205-206 ratemaking), but not another (Section 203 disposition review), is to read into the statute a distinction that is not there.

Second, the statutory interpretation underlying the denial of jurisdiction for purposes of Section 203(a) is flawed. The Order fails to set out any intelligible interpretation of the “but” and “except” clauses taken together; and, to the extent there is an interpretation implicit in FERC’s Order, it is one that deprives the “except” clause of any meaning. As mentioned, Congress inserted

¹⁵ See, e.g., *United States v. Menasche*, 348 U.S. 528, 538-39 (1955);

¹⁶ Order at 61,423 n.12 (citing *Mississippi Indus.*, 808 F.2d 1525).

the “except” clause specifically to remove any doubt about FERC’s jurisdiction over interstate wholesale generating facilities; yet FERC’s Order fails to identify a single circumstance under which its interpretation of the “but” and “except” clauses produces a finding of jurisdiction. Instead, FERC treats the “but” clause — which it calls the Generation Exemption — as all-encompassing, and inexplicably dismisses Petitioners’ reliance on the “except” clause as an attempt to “muddy the waters,” Order at 61,423.

FERC’s analysis appears to misunderstand both Petitioners’ contentions and the FPA. For example FERC seems to claim that Petitioners “seize[d] on” Section 201(b)(1)’s grant of jurisdiction over “all facilities” used for transmission or jurisdictional sales as an example of jurisdiction “specifically provided.” FERC then explains that Section 201(b)(1)’s general grant of jurisdiction does not count as specifically providing jurisdiction for purposes of Section 203, because “[t]here is no necessary nexus between the interstate transmission or sale of electric energy, on the one hand, (the triggering events giving rise to our jurisdiction) and the disposition of a generation facility by itself.” *Id.* In fact, there is such a nexus because Petitioners limited their petition to dispositions of interstate wholesale generating facilities, which by definition are used for jurisdictional sales (*see* R.8 at 19-21; R.22 at 24-25).

More fundamentally, however, the Order misconstrues the relationship between Sections 201 and 203 and interprets Section 201(b)(1)'s "except" clause in a way that renders it meaningless. The triggering event for FERC's authority under Section 203 is the proposed disposition of a jurisdictional *facility* — not the transmission or sale of electric energy. Determining whether a facility is jurisdictional is a function of Section 201, the FPA's only jurisdictional section. That section grants FERC jurisdiction over all facilities used for jurisdictional transactions, including interstate wholesale generating facilities, but limits FERC's jurisdiction over generation to that "specifically provided."

FERC's Order appears to interpret the "except as specifically provided" clause as requiring identification of a supplemental, express grant of jurisdiction. However, that interpretation renders the clause meaningless: the FPA contains no other express grants of jurisdiction. If FERC's present interpretation were applied consistently (which it is not, as discussed below), it would prevent FERC from exercising jurisdiction over interstate wholesale generating facilities for any purpose — negating the "except" clause entirely.

To avoid nullifying Congress's language, one must interpret the "except as specifically provided" language as referring not to an express grant of jurisdiction but, rather, to the grant of jurisdiction implicit in Congress's

delineation of the powers it intended FERC to exercise. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 383 (1988) (Scalia, concurring) (“[I]t is reasonable to regard FERC’s §824e(a) authority to set wholesale rates as precisely an example of jurisdiction ‘specifically provided.’”).

Stated differently, Section 201(b)(1) grants FERC jurisdiction over interstate wholesale generating facilities but limits such jurisdiction to that which is necessary for FERC to carry out the specific regulatory duties set out in FPA Parts II and III, including Section 203. As discussed in Section IV, this interpretation — the only permissible one — is exactly the reading adopted by this Circuit, by the Second Circuit, and by the Commission shortly after its founding, and is exactly the reading that produces FERC’s unquestioned jurisdiction over interstate wholesale generating facilities for purposes of Sections 205 and 206. FERC has offered no statutory basis for departing from it here.

III. FERC’S ORDER VIOLATES CONGRESS’S INTENT BY DRAWING ILLOGICAL DISTINCTIONS THAT ELEVATE FORM OVER SUBSTANCE

In determining whether Congress has spoken to an issue or whether FERC’s construction of a provision is reasonable, courts must examine the provision “in ... context and with a view to [its] place in the statutory scheme.”

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000). Here, examining Section 203(a)'s reference to jurisdictional facilities in context reveals that Congress intended FERC to review dispositions of interstate wholesale generating facilities. FERC's contrary interpretation makes the agency's jurisdiction turn on the marginalia of a transaction, not its substance, and introduces a disconnect between the aspect of a transaction that triggers FERC review and the nature of the review once undertaken.

Under FERC's present interpretation, FERC reviews the public interest consequences of a generation transfer only if it happens to be associated with a contemporaneous transfer of other facilities — *e.g.*, a \$50,000 “step-up” transformer that raises the generator's output voltage to transmission voltage. Such transformers are now treated as part of the generation function for ratemaking purposes, but as “transmission” for purposes of establishing jurisdiction to perform Section 203 review. *Kentucky Utils. Co.*, Opinion No. 432, 85 F.E.R.C. ¶ 61,274 at 62,112 & n.37 (1998). When it deems a transfer of generating facilities to be part of the same transaction, FERC's practice is to review the competition effects of the entire transaction.¹⁷ And in that review,

¹⁷ See, *e.g.*, *Vt. Yankee Nuclear Power Corp.*, 91 F.E.R.C. ¶ 61,325 at 62,121-23 & n.4 (2000) (reviewing a proposed nuclear plant sale under Section 203 because it included a contemporaneous sale (to a different purchaser) of “switchyard facilities and transmission lines located at the Plant”); *Delmarva*

FERC's principal focus concerns whether the disposition will result in generation market power.

FERC recognizes that “[a] concentration of generation assets that allows a company to dominate a market will dampen or preclude the benefits of competition.” *Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act; Policy Statement*, 61 Fed. Reg. 68,595, 68,599 (Dec. 30, 1996). FERC therefore views Section 203’s public interest test as requiring it to “pay close attention to the possible effect of a merger on competitive bulk power markets and the consequent effects on ratepayers.” *Id.* at 68,596. Yet FERC turns a blind eye to generation-only asset dispositions that can produce the same anticompetitive consequences.¹⁸

Hinging jurisdiction on such artificial distinctions frustrates Congress’s intent. While it is well known that one of the FPA’s purposes was to plug a gap in ratemaking authority, that was not Congress’s only purpose. Another

Power & Light Co., 71 F.E.R.C. ¶ 61,160 at 61,610 n.25 (1995) (acknowledging jurisdiction to review public utility mergers in which either of the merging entities controls \$50,000 worth of transmission assets).

¹⁸ There is also a second way in which disclaiming jurisdiction over generation dispositions risks exalting form over substance. If wholesales of electric generator output are subject to review, but sales of unit ownership are not, generation owners may escape federal review of their sales terms by selling ownership interests rather than output. *Compare* PUHCA §32(a)(2)(B), 15 U.S.C. §79z-5a(a)(2)(B) (treating leases of an eligible Exempt Wholesale

important purpose of the FPA (reinforced by the contemporaneous Public Utilities Holding Company Act (“PUHCA”)) was to establish federal supervision over the ownership of the facilities underlying interstate commerce in electricity. The first task for which this authority was designed was to supervise the replacement of far-flung holding companies with utilities operating integrated systems. The FPA was designed to give FERC authority to ensure that this reorganization was effected economically:

[A] prime purpose of the [FPA] in general and Section 203(a) in particular was “to protect the public against an uneconomic realignment [sic]” of utility companies expected to occur in the wake of the “unscrambling of the holding company properties” as a result of [PUHCA].

Duke Power Co. v. FPC, 401 F.2d 930, 942 (D.C. Cir. 1968) (quoting Hearings Before the House Interstate and Foreign Commerce Committee on H.R. 5423, at 560 (1935); *see also Enova Corp.*, 79 F.E.R.C. ¶ 61,107, at 61,488-89 (1997) (Section 203 “reflects Congress’ intent that the Commission be able to ensure that corporate realignments do not adversely affect the maintenance of adequate service or coordination in the public interest of jurisdictional facilities” and that

Generator as a “sale of electric energy at wholesale for purposes of sections 205 and 206 of the Federal Power Act”).

it be able to “prevent[] transfers of control over those facilities that would be detrimental to consumers and/or investors”).¹⁹

In the wake of state and federal restructuring initiatives, the industry now is undergoing another realignment, as utilities around the country abandon their traditional vertical integration and attempt to transform themselves into either power suppliers or wires companies. The need to “protect the public against an uneconomic realignment” is thus more pressing than ever. However, the Order’s interpretation of Sections 201 and 203 makes FERC’s ability to review the substance of those transactions turn on the incidental and manipulable happenstance of whether they are associated with a contemporaneous disposition of facilities that are deemed to constitute transmission for this purpose.

FERC’s interpretation is therefore inconsistent not only with the FPA’s text, for the reasons described in Section II, but also with the stated purpose of Section 203 and with a “common sense” reading of Section 203 as a whole (*Brown & Williamson*, 529 U.S. at 133). Congress has recognized, in the context of the Clayton Act’s analogous merger-review provisions, that allowing

¹⁹ Indeed, Section 203(b), 16 U.S.C. §824b(b), allows FERC to condition its approval of proposed dispositions to secure “the coordination in the public interest of facilities subject to the jurisdiction of the Commission.” In FPA

the applicability of federal review to turn on the way a transaction is structured rather than its substance renders such review “ineffective.”²⁰ Likewise, the Commission itself has recognized that the substance of a transaction, not its form, is what matters. *See Enova*, 79 F.E.R.C. at 61,494 (noting that Section 203’s broad language “reflect[s] an intent to cast a broad net over various types of transactions so that public utilities and their affiliates cannot use form over substance to avoid regulatory oversight of corporate realignments affecting jurisdictional facilities, paper or otherwise”).

In short, the FPA text and legislative history compel a finding, not dispelled by anything in FERC’s Order, that Congress has spoken directly to the jurisdictional question presented here. Because “traditional tools of statutory construction” reveal Congress’s intent to grant jurisdiction over interstate wholesale generating facilities such that their disposition triggers Section 203 review, the Court is obliged to effectuate that intent and reverse FERC’s interpretation at step one of the *Chevron* analysis.²¹

parlance, “coordination” refers principally to coordinated dispatch of generation. See page 21 above.

²⁰ *See Brown Shoe Co. v. United States*, 370 U.S. 294, 311 (1962). In 1950 Congress therefore “plug[ged] the loophole” in the original Clayton Act by expanding antitrust review to encompass asset acquisitions as well as mergers. *Id.* at 314, 316.

²¹ *Chevron*, 467 U.S. at 843 n.9; *NRDC v. Browner*, 57 F.3d 1122 at 1125.

IV. THE COURT SHOULD NOT DEFER TO FERC'S ORDER BECAUSE IT IS UNREASONABLE AND INCONSISTENT WITH BOTH PRIOR FERC INTERPRETATIONS AND BINDING JUDICIAL PRECEDENT

Even if the Court were to find that Congress has not spoken directly to the issue at hand, deference to FERC's position would be inappropriate in this case. First, FERC's interpretation is unreasonable because as set forth above it does not jibe with the FPA's text, purpose, and legislative history. Second, deference is inappropriate because FERC has neither reconciled its interpretation with prior Commission pronouncements and binding judicial precedent nor explained its reasons for departing from them.

As noted above, "An agency interpretation ... which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view," *Cardoza-Fonseca*, 480 U.S. at 446 n.30; and the requirement of reasoned decisionmaking compels FERC to explain its departures from prior decisions. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). Likewise, FERC is obliged to follow authoritative judicial interpretations of relevant statutory language. *Maislin Indus.*, 497 U.S. at 131. Here, however, FERC's Order does not even acknowledge its previous decisions finding interstate wholesale generation facilities to be subject to its jurisdiction and reviewing their disposition under Section 203, or attempt to reconcile its decision here with its acknowledgment

of jurisdiction over such facilities for Sections 205 and 206. Indeed, FERC's order here simply denies the existence of those prior decisions. 94 F.E.R.C. at 61,423. Nor can FERC's decision here be reconciled with the interpretation of Section 201(b)(1) adopted by this Circuit, the Second Circuit, and the Supreme Court.

As Petitioners explained in their Petition for Rehearing, they did not invent their analysis of Section 201(b)(1) and the Commission's jurisdiction. As early as 1938, the Commission found that a disposition parcel "consist[ing] of a steam generating plant and appurtenances," but which did not include the transmission lines connected to the plant, constituted jurisdictional facilities whose disposition required Section 203 review. *Baton Rouge Electric Company*, 1 F.P.C. 740, 740-41, 743 (1938) (finding that Louisiana Steam's facilities were jurisdictional). Shortly thereafter, the Commission set forth its clear analysis supporting such jurisdiction. This 1941 analysis was authored by a unanimous Commission that (in the words of Justice Douglas) included "men intimately familiar with the background and history of the Act — Leland Olds, Basil Manly, Claude L. Draper, and Clyde L. Seavey."²²

²² *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 689 (1954) (Douglas, J., dissenting) (discussing a different jurisdictional decision by the same set of early Commissioners).

In *Hartford Electric Light Co.*, 2 F.P.C. 359 (1941), Hartford contended that it was not a public utility, and was therefore exempt from FERC jurisdiction, because the only facilities it owned were generation or local distribution. FERC rejected that contention and set out the statutory interpretation Petitioners follow here:

Hartford's contention is wrong in its analysis of Section 201(b) of the Act.... The first clause in the second sentence defines our jurisdiction over facilities. It is an all-inclusive provision to the effect that our jurisdiction shall extend over all facilities for transmission or sale of electric energy in interstate commerce. The second clause of the second sentence indicates the types of facilities which are without the ambit of our regulatory power, but this is not an all-inclusive provision. This exception to our jurisdiction is itself subject to a further exception, to wit: "except as specifically provided in this Part and the Part next following." In other words, section 201(b), after defining the scope of our regulatory power and jurisdiction, provides that, in respect of certain types of facilities, we shall not exercise our regulatory powers, except as provided in Parts II and III of the Act.

The object of this provision was to limit the extent of regulation we may exercise in respect of generation or local distribution facilities; but there are some forms of regulation which we are given specific authority to exercise in respect of generation and local distribution facilities, subject only to limitations found in the Act itself.

2 F.P.C. at 366-67. The Second Circuit affirmed FERC's decision on two independent grounds. First, it found that "petitioner's corporate organization,

contracts, accounts, memoranda, papers and other records, in so far as they are utilized in connection with such sales” are jurisdictional facilities. *Hartford Elec. Light Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942). Second, “[a] majority of the court [held] that ... generation facilities, where used as aids to such sales, are within the Commission’s jurisdiction under § 201(b).” *Id.*

When the Second Circuit upheld FERC’s jurisdiction over interstate wholesale generating facilities, it had Section 203 explicitly in mind. The Second Circuit recognized that basing its decision solely on the first ground “would ... leave it undecided whether, as to such facilities, the Commission has authority, with respect to petitioner’s generating facilities, under § 203.” *Id.* at 963 n.20. This Second Circuit ruling by itself disproves the Order’s claim (at 61,423) that “[f]or Section 203 purposes, the term, jurisdictional facilities, has never been read to include generation facilities.”

One aspect of the Second Circuit’s decision *not* necessary to its finding of jurisdiction over interstate wholesale generating facilities soon proved problematic, however. In an attempt to give meaning to the “local distribution” reference within the “but” clause, the Second Circuit had interpreted the “but” clause not as limiting FERC’s jurisdiction but as extending it to reach even local facilities *not* used for interstate transmission or interstate wholesale sales. Shortly thereafter, *Connecticut Light & Power Co. v. FPC*, 141 F.2d 14, 18

(D.C. Cir. 1944), a case involving only local distribution facilities, followed the Second Circuit's misstep and held that Section 201(b)(1)'s "but" clause was "intended to make it clear that this jurisdiction extends even to local facilities." This Circuit affirmed FERC's jurisdiction over the accounting practices of a utility engaged only in local, intrastate, retail service and considered it irrelevant "whether or not the facilities by which petitioner distributes [interstate] energy ... should be classified as 'local.'" *Id.* at 18.

Less than two years after declining to review *Hartford's* holding regarding interstate wholesale generating facilities,²³ the Supreme Court stepped in to reject extension of that holding to local distribution facilities. In *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945), the Court repeatedly emphasized the facilities' local nature and the absence of any connection with wholesale transactions regulated by FERC. *Id.* at 518, 521. The Court explained that "[w]hat petitioner does or fails to do [with respect to local distribution facilities] is only after the incidence of federal regulation and can in no way frustrate it." *Id.* at 524. But the same cannot be said for generating facilities that produce power sold at wholesale in interstate commerce. Thus, while the Court criticized some of *Hartford's* reasoning and

²³ *Hartford* sought review of the Second Circuit's decision, and the Supreme Court denied *certiorari*. *Hartford Elec. Light Co. v. FPC*, 319 U.S. 741 (1943).

its extension to local distribution facilities, it expressly acknowledged — and left in place — the Second Circuit’s holding with respect to interstate wholesale generation. *Id.* at 528 n.6 (approving *Hartford* because it “recognize[d] [the] need for the further step of finding that the generating facilities were used as facilities for interstate wholesale sales, *and therefore were within section 201(b)*”) (emphasis added).²⁴

FERC’s own reliance on this aspect of *Hartford* in subsequent decisions, issued in 1957²⁵ and in 1985, shows that FERC considered *Hartford* good law even after *Connecticut Light & Power Co.*, and even after the 1964 Arizona case discussed at page 43 below. Particularly instructive are FERC’s 1985 decision in *Middle South Energy* and this Court’s affirmance, because they

²⁴ See also *Duke Power Co. v. FPC*, 401 F.2d 930 (D.C. Cir. 1968) (rejecting FERC jurisdiction over local distribution facilities on grounds that do not invalidate FERC’s jurisdiction over interstate wholesale generating facilities).

²⁵ In *Continental Oil Co.*, 18 F.P.C. 296, 299-300 (1957), the Commission asserted Natural Gas Act jurisdiction over facilities used to effectuate interstate wholesale sales, even though they were production facilities (roughly analogous to electricity generation facilities) that would be outside such jurisdiction if not so used. The Commission reached that decision even though the Natural Gas Act’s jurisdictional provisions lack language corresponding to the clauses inserted into the FPA by the conference committee to clarify FERC’s jurisdiction over generation. Compare 16 U.S.C. §824 with 15 U.S.C. §717. On appeal, the Fifth Circuit noted FERC’s holding with approval, *Continental Oil Co. v. FPC*, 266 F.2d 208, 210-11 (5th Cir. 1959), and even cited *Hartford* itself, *id.* at 211 n.4., but went on to affirm FERC on other grounds.

provide comparatively recent, thorough discussions of FERC’s jurisdiction over interstate wholesale generating facilities.

In that case, FERC considered jurisdictional challenges to its decision to reallocate among affiliated companies the capacity costs of nuclear generation facilities. The companies argued that FERC lacked jurisdiction to reallocate the costs because it could not exercise jurisdiction over generation facilities. 32 F.E.R.C. at 61,948. They *also* argued that FERC lacked jurisdiction over Middle South Energy (“MSE”) because it owned no facilities subject to FERC’s jurisdiction and therefore was not a public utility. *Id.* Relying on *Hartford*, and noting the Supreme Court’s reference to it in *Connecticut Light & Power*, FERC rejected *both* arguments:

In the instant case, there is no question that the Grand Gulf 1 generation facilities are used as facilities for interstate wholesale sales, since sales made by MSE from those facilities involve sales of electric energy at wholesale in interstate commerce. We thus reject the argument that we have no jurisdiction over the UPSA sales because Grand Gulf is a generating facility not subject to our jurisdiction, *or* that we have no jurisdiction over MSE because it does not own facilities subject to our jurisdiction.

Id. (emphasis added). In short, FERC made two holdings: (1) that Section 201(b)(1)’s “but” clause did not vitiate the regulatory powers granted in Sections 205 and 206; and (2) that the Grand Gulf generation facilities were jurisdictional facilities, ownership of which rendered MSE a public utility.

This Court easily affirmed both holdings. With respect to the second holding, the Court found that Grand Gulf’s ownership of facilities used to make interstate wholesales made it a “public utility” under Section 201. 808 F.2d at 1540. In affirming FERC’s other holding, this Court reviewed the statute, *Hartford*, and *Connecticut Light & Power*, and expressly noted the Supreme Court’s approval of *Hartford*. *Mississippi Indus.*, 808 F.2d at 1544-45 (“In this discussion, the Court accepts the proposition that FERC may lawfully assert jurisdiction over matters pertaining to generation where it is found that generation facilities are used as facilities for interstate wholesale sales.”). The D.C. Circuit agreed with FERC’s observation that “allocating cost does, to some extent, result in the ‘regulation of matters relating to generation,’” *id.* at 1543, but it noted that “under the clear terms of the statute, the Commission has been awarded jurisdiction over generating facilities ‘to the extent provided in other sections,’ including jurisdiction necessary to effectuate regulation of interstate wholesale rates,” *id.* at 1545 n.74.

Just last year, this Court cited *Mississippi Industries* approvingly and held that, because section 201(b) is modified by the “except” clause, “FERC may exercise jurisdiction over generation facilities to the extent necessary to regulate interstate transmission.” *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 718 (D.C. Cir. 2000), *cert. granted in other regards sub*

nom. New York v. FERC, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001) (No. 00-568).

Much as the Commission was found in that case to possess jurisdiction over generation facilities to the extent of its FPA § 205 transmission rate review power, it should be found in this case to have jurisdiction over generation facilities to the extent of its FPA § 203 disposition review power.

Similarly, FERC decisions more recent than *Middle South Energy* have articulated interpretations of its Section 201 and Section 203 authority that are difficult to square with the Order under review. In FERC's transmission open access rulemaking,²⁶ for example, environmentalists and northeastern states urged that open access be withheld from generators that emit high levels of air pollutants. Order No. 888 at 21,680. FERC rejected the request, explaining that Section 201 bars it from exercising "authority over the *operation* of generating facilities." *Id.* (emphasis added). It continued by drawing a distinction between the physical aspects of generation, over which FERC lacks jurisdiction, and the economic matters over which it possesses jurisdiction:

²⁶ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540, *modified*, Order No. 888-A, 62 Fed. Reg. 12,274, *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688, *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *cert. granted sub nom. New York v. FERC*, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001) (No. 00-568).

Parts II and III do not grant the Commission authority to regulate the environmental aspects of jurisdictional activities. Instead, they provide authority over certain interconnections; the rates, terms and conditions of wholesale sales of electric energy in interstate commerce and transmission in interstate commerce; *the disposition and merger of facilities used for such sales and transmission*; issuance of securities; accounting matters; and interlocking directorates. *Thus, the Commission's jurisdiction over generation extends only to matters directly related to the economic aspects of transactions resulting from such facilities.*

Id. (emphasis added, footnotes omitted).

Finally, in *Enova Corp.*, 79 F.E.R.C. at 61,489, FERC reviewed Congress's purposes in enacting Section 203 and noted that it did not believe the provision's key terms should be read narrowly. "To do so," FERC wrote, "would result in a jurisdictional void in which certain types of power sales facilities and corporate transactions could escape Commission oversight." *Id.* Accordingly, FERC announced that it would "interpret undefined terms in the statute to preserve its ability to protect consumers from corporate realignments that adversely affect jurisdictional facilities." *Id.* at 61,490.

Further, although FERC's jurisdiction over generation was not centrally relevant in *Enova*, its discussion of the term jurisdictional "facilities" (*id.* at 61,489 & n.17) tellingly cites not only *Hartford's* holding regarding "paper facilities," but also footnote 6 of *Connecticut Light & Power*, in which the

Supreme Court approved *Hartford*'s holding regarding interstate wholesale generating facilities. FERC also went on to caution that the mergers “of greatest potential concern” are mergers between vertically-integrated utilities that own “generation and/or transmission facilities,” *Enova* at 61,496, and that FERC’s concern with mergers involving power marketers may be heightened if the marketer owns generation facilities that are not geographically dispersed, *id.*

FERC has not even attempted to reconcile the Order under review with the agency’s own prior interpretations of Sections 201 and 203 or with the appellate courts’ authoritative opinions. Instead, FERC adopts without reasoned explanation an interpretation that conflicts with those decisions and that undermines FERC’s acknowledged “public interest responsibility to be vigilant with respect to the corporate realignment” that the industry is now undergoing, *Enova*, 79 F.E.R.C. at 61,495. These failures render inappropriate whatever deference the Court might otherwise accord to FERC’s Order if (but only if) it were to find the FPA ambiguous. *Automated Power Exch.*, 204 F.3d at 1151.

V. FERC CANNOT JUSTIFY ITS FAILURE TO GRAPPLE WITH STATUTORY TEXT, LEGISLATIVE HISTORY, AND PRECEDENT BY RELYING ON CONCLUSORY DISCLAIMERS

Instead of addressing Petitioners’ textual arguments or the precedent and legislative history they cited, FERC relied instead on the fact that it “has held

repeatedly that Section 203 does not apply to dispositions of only generation facilities.” Order at 61,423 & n.10. Of course, Petitioners have acknowledged from the outset that several decades after the FPA was enacted (and after living memory of its legislative history faded) a line of FERC decisions arose that denied FERC jurisdiction of generation dispositions. However, those cases suffer from the same flaws as the instant Order. They depart from FERC precedent and appellate case law without acknowledging that authority or offering reasoned explanations for the departure. FERC cannot justify its actions here — its failure to address the text, legislative history, and the precedent discussed above — by relying on such conclusory disclaimers.

Each of the cases cited in footnote 10 of the Order was acknowledged (along with other such cases) in Petitioners’ pleadings below, and each is devoid of any analysis of the relevant statutory language, its history, or its judicial construction. Those cases simply collect prior cases in which FERC announced the conclusion that it lacked jurisdiction over generating facilities.²⁷

Tracing the chain of conclusory citations back to its source leads to *Arizona*

²⁷ *United Illuminating Company*, 29 F.E.R.C. ¶ 61,270, at 61,558-59 & n.1 (1984), does cite *Hartford* but only for the proposition that “a lease may have characteristics similar to those of a jurisdictional unit sale of power.” Nowhere does it grapple with *Hartford*’s holding, 131 F.2d at 961, that “generation facilities, where used as aids to such [interstate wholesale] sales, are within the Commission’s jurisdiction under §201(b).”

Public Serv. Co., 32 F.P.C. 1525 (1964), which involved an early cogeneration facility located in McNary, Arizona that had produced steam for industrial uses, along with about 8 MW of electricity. Arizona Public Service sold the plant to a lumber company that until then had used the plant's steam and electric output. With the sale, the plant appears to have been retired from electric service. *Id.* at 1525 (“[T]he sale of facilities will eliminate the use of inefficient and outmoded plant”). No party intervened in or protested the utility's request for Section 203 approval or jurisdiction disclaimer. The one-page order cites no cases or legislative history.

Given its uncontested genesis and shallow analysis, *Arizona* would hardly be compelling authority even if it did stand clearly for the proposition that interstate wholesale generating facility dispositions are not subject to Section 203 review. However, it is not even clear that the 8 MW facility was viewed as generating power for interstate wholesale sale. There is no indication in the FPC's opinion that the plant's output ever was sold *for resale* in interstate commerce or that its output was expected to be sold for resale after the disposition.²⁸

²⁸ McNary is surrounded by the Sitgreaves National Forest and the Fort Apache Indian Reservation, and backs up against sparsely populated mountains (which presumably were the lumber company's source of trees). Petitioners note again, as they did before FERC, the indication in published records that the McNary

The rootless decision in *Arizona* lay dormant for almost twenty years (being cited only once, in a case that did not involve an interstate wholesale generation facility²⁹), until FERC used it in the early 1980s to anchor the chain of conclusory citations that led to the present case. The first of these 1980s-era cases was *Virginia Electric and Power Company*, 25 F.E.R.C. ¶ 61,261 (1983), another uncontested case. Beyond a conclusory cite to *Arizona*, it did not analyze the statutory text, legislative history, *Hartford*, or any relevant precedent. Numerous subsequent decisions followed the same pattern.

One link in the chain that followed was appealed to this Court, which repeated FERC's assertion that it lacked jurisdiction in the course of affirming on other grounds. But that does not make the chain any stronger. Indeed, we address that case only in the interest of full disclosure, as FERC did not even consider the point strong enough to warrant mention in the Order below.

area was at the very end of a radial pair of lines and not otherwise connected to the grid. R.8 at 18. The brief *Arizona* order contains no indication that the 8 MW facility was viewed as generating power that flowed beyond the lumber company and thence to sale at wholesale in interstate commerce. To the contrary, the disposition apparently freed the lumber company from purchasing the expensive electricity generated at the 8 MW facility, and substituted sales from the utility's "normal generation sources." 32 F.P.C. at 1525.

²⁹ In *Pacific Power & Light Company*, 55 F.P.C. 2165, 2167-68 (1976), the Commission found that a generating plant that was then still under construction, and thus was a "non-operational electric generating facilit[y]" not yet used for interstate wholesale transactions, was not a jurisdictional facility.

The subsequent link is *Consumers Power Company*, 52 F.E.R.C. ¶ 61,023, *reh'g denied*, 53 F.E.R.C. ¶ 61,382 (1990), *aff'd sub nom. Michigan Public Power Agency v. FERC*, 963 F.2d 1574, 1575 (D.C. Cir. 1992) (“*Michigan*”). In that case, FERC reviewed a proposed disposition of transmission facilities connected to the Palisades Nuclear Generating Plant but refused to set for hearing a panoply of allegations regarding “an elaborate anticompetitive scheme designed to increase its profits at the expense of [municipal customers],” 963 F.2d at 1575, of which scheme the transfer of the Palisades generating plant was allegedly part.

On rehearing, one of the reasons FERC advanced for not expanding the scope of its hearing was that it lacked jurisdiction to review the transfer of the generating plant under Section 203. 53 F.E.R.C. at 62,343 (citing what it termed FERC’s “long-standing determination that it does not have jurisdiction”). The order engaged in only cursory textual analysis and grappled with none of the cases discussed above. On appeal of that decision and two related orders, the appellate parties left unchallenged FERC’s jurisdictional determination, and the appeals were decided on a different ground: that FERC had discretion to decide that the “allegations were too unfounded, premature, and irrelevant to warrant full investigation at a hearing.” 963 F.2d at 1575.

None of the appellate briefs in *Michigan* even cited *Hartford* or *Mississippi Industries*. The only discussion of FERC’s jurisdiction over generation was limited to a single short paragraph in FERC’s brief. We quote it here in full, as we did below (at R.22 p.20, in a pleading that clarified the issues and therefore should have been considered):

As the Commission pointed out in its rehearing order regarding the transfer of transmission facilities, Section 201(b)(1) of the FPA states that “the Commission *** shall not have jurisdiction*** over facilities used for the generation of electric energy,” R2573-2574. See also *Entergy Services, Inc.*, 51 FERC ¶ 61,376 at 62,285-286, reh’g den. 52 FERC ¶ 61,317 (1990).

The ellipses deleting the “except” clause were in FERC’s original *Michigan* brief. The opinion that followed took it as given that the sale of the Palisades generating plant was “one over which FERC [did] not even have jurisdiction.” 963 F.2d at 1583. It bears no indication of an independent analysis to validate that there-undisputed conclusion.

In the present case, had FERC engaged in reasoned decisionmaking, it might have mentioned *Michigan* and weighed its sleight analysis against the more substantive and rigorous discussions contained in *Hartford*, *Mississippi Industries*, and *Connecticut Light & Power*. If it had, it would have been forced to conclude that the weight of authority rests with the conclusion that Section 201 grants FERC jurisdiction over interstate wholesale generating facilities for

purposes of Section 203. However, FERC did not engage in that analysis; it simply followed its own unanchored chain of conclusory citations. That does not constitute reasoned decision-making. FERC's Order is entitled to no deference.

CONCLUSION

FPA Section 203 obligates public utilities to obtain FERC approval before disposing of jurisdictional facilities, and generation facilities that produce power sold at wholesale in interstate commerce are made jurisdictional by FPA Section 201. The Order failed to intelligibly explain how FERC's interpretation of FPA Sections 201 and 203 squares with the statutory text, with Congress's clear intent, with the jurisdictional explication by the *Hartford* Commission composed of FPA framers, with the Second Circuit's *Hartford* affirmance, with FERC's more recent decision in *Middle South Energy*, with this Court's affirmance in *Mississippi Industries*, and with similar authority that Petitioners brought to FERC's attention. Indeed, the Order's contrary position effectively deletes from the statute the "except" clause that Congress added to clarify that FERC did have substantial jurisdiction over interstate wholesale generating facilities.

Although the question of FERC's jurisdiction is a matter of statutory interpretation, the Court also should note that the loophole created by FERC's refusal to review generation dispositions under Section 203 is vast. By the time

Petitioners filed their Petition, 32 of 91 investor-owned utilities surveyed by Edison Electric Institute had announced plans to divest either all or some of their generation assets; and in 1998 alone 52.9 gigawatts, or 13.3 percent of the total of investor-owned electric utility fossil and hydro generation capacity, had been made available for auction, a 46.3 percent increase over 1997 levels. *See* R.1 at 2 n.2 and 24; see also R.19, appended tables.

Moreover, the need for FERC review of generation dispositions will become more critical over time. Federal policy now all but mandates corporate separation of transmission assets from generation assets, through at least the transfer of control, and with an apparent preference for the transfer of ownership.³⁰ As industry restructuring progresses, generation ownership is likely to be concentrated in fewer hands, even fewer of which will also own significant transmission facilities. As the Commission found in a major recent restructuring order, between August 1997 and December 2000, “generating facilities representing approximately 50,000 MW of generating capacity,” *i.e.*,

³⁰ *See Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 810 (Jan. 6, 2000), *order on reh’g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), *appeal docketed sub nom. Pub. Util. Dist. 1 v. FERC*, No. 00-1174 (D.C. Cir. Apr. 24, 2000) (strongly encouraging transfer of ownership or control); *Int’l Transmission Co.*, 92 F.E.R.C. ¶ 61,276 at 61,917 (2000) (granting rate incentives to encourage transfer of ownership), *reh’g pending*.

“more than ten percent of U.S. generating capacity,” were sold, largely to “independent power producers with no required service territory.”³¹

Consequently, generation-only dispositions will become more prevalent and more competitively sensitive. The leveraging approach that FERC sometimes uses now — reviewing the competition effects of generation dispositions as an incident to reviewing the dispositions of associated transmission facilities — will not do. For example, a nuclear plant owner recently agreed to sell its generator to one purchaser, and its transmission switchyard to another. In reviewing the switchyard disposition under Section 203, FERC also reviewed competition effects of the generator disposition.³² But under that regimen, if the generator were subsequently resold, there would be no associated switchyard disposition to leverage into a basis for reviewing the generator resale.

³¹ *See, e.g.* Order No. 2000, 65 Fed. Reg. 810 at 813. *See also* R.19, appended “Asset Sales to Date” table (showing numerous generation asset transfers, valued in the billions of dollars, from vertically integrated traditional utilities to new, non-transmission-owning producers).

³² *Vt. Yankee Nuclear Power Corp.*, 91 F.E.R.C. ¶ 61,325 at 62,121-23 & n.4 (2000).

For the reasons set forth above, the Court should reverse FERC's Order and make clear that FERC does have jurisdiction to review proposed dispositions of interstate wholesale generating facilities under FPA Section 203.

Respectfully submitted,

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October 31, 2001

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type-volume limitation of 14,000 words for a principal brief. It was prepared using Microsoft Word '97, and the word count feature of that program counts 11,226 words in the brief. This count includes all of the matter that Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) directs be included (headings, footnotes, and quotations), and excludes the cover and the matter that Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) directs be excluded (the corporate disclosure statement, tables, certificates, and addendum).

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CERTIFICATE OF SERVICE

Pursuant to Rule 15 of the Federal Rules of Appellate Procedures, I hereby certify that I have this day served a copy of the foregoing Opening Brief of Petitioners by first-class mail, postage prepaid, upon each party in this proceeding as listed below.

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ADDENDUM OF STATUTES AND REGULATIONS

Included herein are

1. Federal Power Act Sections 201 through 207, 16 U.S.C.S. §§ 824-824f;
2. Federal Power Act Sections 306, 307, 309, and 313, 16 U.S.C.S. §§ 825e, 825f, 825h, and 825l;
3. Natural Gas Act Section 1, 15 U.S.C. § 717
4. 18 C.F.R. Part 33
5. 18 C.F.R. Part 385, Sections 206-207