

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

CITIZEN POWER, INC.,

Complainant,

v.

DUQUESNE LIGHT COMPANY,

Respondent.

Docket No. EL99-\_\_\_\_-000

**COMPLAINT**

**I. INTRODUCTION**

Citizen Power, Inc. is a non-profit organization dedicated to seeking safe, clean and affordable energy for all Pennsylvania citizens. Citizen Power files this complaint against Duquesne Light Company (“Duquesne”) under Section 306 of the Federal Power Act, 16 U.S.C. § 825e (1998), which permits “[a]ny person” to file a complaint against a public utility whose actions are “in contravention of the provisions of this Act.”

As explained below, Citizen Power alleges that Duquesne is planning to dispose of jurisdictional facilities in excess of \$50,000 without seeking all necessary Commission approvals under Section 203(a) of the Act, 16 U.S.C. § 824b(a) (1998). Specifically, Duquesne is planning to divest itself of all of its generating facilities — which facilities are used to supply power sold at wholesale in interstate commerce — as part of its plan to restructure its operations in light of Pennsylvania’s retail competition initiative. As discussed in Part IV.A below and Attachment A

hereto, the divestiture of such facilities is subject to Section 203 review.<sup>1</sup> Citizen Power submits that federal review of the proposed divestiture is necessary because the transaction is likely to significantly affect the public interest.

Citizen Power also alleges that the transactions anticipated by Duquesne will involve jurisdictional facilities besides the generating units themselves, such as generator step-up transformers and intangible facilities, such as contracts, books and records, over which the Commission has acknowledged its jurisdiction. These facilities may not be divested without Section 203 approval.

## **II. PARTIES**

Citizen Power is a non-profit organization, based in Pittsburgh, Pennsylvania, dedicated to seeking safe, clean and affordable energy to Pennsylvania consumers. Citizen Power has numerous members who reside within Duquesne's service territory and who are currently served, at least in part, by the facilities that Duquesne has proposed to divest. Communications directed to Citizen Power should be addressed to David Hughes, Executive Director, Citizen Power, P.O. Box 81766, Pittsburgh, Pennsylvania, 15217.

Duquesne is a public utility subject to the Commission's jurisdiction by reason of its ownership of facilities used to transmit electric energy in interstate commerce and of facilities used to sell electric energy at wholesale in interstate commerce.

## **III. JURISDICTION**

The Commission has jurisdiction over the instant complaint pursuant to Sections 306 and 307 of the Federal Power Act, 16 U.S.C. §§ 825e, 825f (1998). Section 306 authorizes

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<sup>1</sup> In addition to this Complaint, Citizen Power joins with the American Public Power Association in seeking a declaratory order that the Commission has jurisdiction to review proposed divestitures of generating facilities

complaints by “[a]ny person ... complaining of anything done or omitted to be done by any licensee or public utility in contravention of the provisions of this Act.”<sup>2</sup> Section 307(a) provides that “[t]he Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated *or is about to violate* any provision of this Act” (emphasis added).

As discussed below, the Commission has jurisdiction over the proposed disposition of assets in excess of \$50,000 pursuant to Sections 201 and 203 of the Act.

#### **IV. ALLEGED VIOLATION: DUQUESNE INTENDS TO DISPOSE OF JURISDICTIONAL FACILITIES WITHOUT ALL REQUIRED COMMISSION APPROVALS**

Section 203(a) of the Federal Power Act provides that “[n]o public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$50,000, ... without first having secured an order of the commission authorizing it to do so.” 16 U.S.C. § 824b(a) (1998). Duquesne has indicated that it intends to divest its generating resources as part of the Commonwealth of Pennsylvania’s retail competition restructuring program. *Duquesne Light Co.*, 84 F.E.R.C. ¶ 61,309 at 62,405-406 (1998). Subject to certain conditions, reporting requirements, and interstitial issues, the Pennsylvania PUC has recently approved Duquesne’s Generation Auction Plan. *In re Duquesne Light Co.*, Docket No. R-00974104 (Pa. PUC, entered Jan. 15, 1999) (affirming on reconsideration Opinion and Order entered December 18, 1998). The order granted Duquesne the right to immediately begin the auction process as proposed in Duquesne’s filed Generation Auction Plan. That Plan includes a timetable that anticipates moving through two rounds of bids

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valued above \$50,000, under Section 203. A copy of that Petition for Declaratory Order, filed today, is attached to the instant complaint as Attachment 1 and is incorporated herein by reference, as if retyped herein.

<sup>2</sup> As defined in section 3 of the Act, the term “person” includes corporations. 16 U.S.C. § 796(4) (1998).

to the signing of an asset purchase agreement as early as June 1999, just a few months hence. See Attachment 2 hereto at Appendix H.

Duquesne's Generation Auction Plan makes clear that Duquesne does not plan to seek Section 203 approval for its divestiture of generation. In addition, Duquesne may not plan to seek Section 203 approval to dispose of other facilities that are subject to the Commission's jurisdiction and slated for divestiture: the facilities used to deliver the output of the subject generation facilities to the high-voltage transmission grid, and "intangible" facilities (contracts, books, and records) associated with wholesale sales from the subject generators. Divesting facilities that are subject to the Commission's jurisdiction, and worth more than \$50,000, without first obtaining Section 203 approval would plainly violate the Federal Power Act.

For the reasons discussed below and in the accompanying Petition for Declaratory Order, filed together with APPA, Citizen Power submits that the anticipated divestiture transaction involves the disposition of facilities subject to the Commission's jurisdiction. First, contrary to the Commission's suggestion in *Duquesne Light Company*, the Commission has jurisdiction over the generating facilities to be divested by Duquesne because they are facilities used for the sale of electric energy at wholesale in interstate commerce. See Part IV.A below and the Attachment 1 Petition for Declaratory Order. Second, the assets divested by Duquesne will include facilities used to transmit electric energy in interstate commerce after it has been generated. See Part IV.B, below. Third, the assets to be divested by Duquesne include "intangible" facilities, such as wholesale contracts, that are subject to Commission jurisdiction. See Part IV.C, below.

***A. Section 203 Approval is Required Before Duquesne May Divest its Generating Facilities Used for Sales at Wholesale in Interstate Commerce***

Duquesne's official Generation Auction Plan, which is excerpted as Attachment 2 hereto, makes clear that Duquesne does not intend to seek Commission approval for its divestiture of generating facilities. In describing the regulatory approvals to be sought, the Plan states (at 37, emphasis added) that "The FERC has authority, pursuant to Federal Power Act ('FPA') section 203, 16 U.S.C. § 824b, to review the transfer of any transmission facilities or jurisdictional contracts." The plain, negative implication is that Duquesne will not submit its transfer of generation facilities for Section 203 review.

APPA and Citizen Power explain in detail, in their Petition for Declaratory Order, why the Commission has jurisdiction to review under Section 203 proposed divestitures of generating facilities used for sales at wholesale in interstate commerce. Rather than repeat that detailed explanation here, Citizen Power respectfully refers the Commission to that Petition (appended to this Complaint as Attachment 1), incorporates it by reference as if fully retyped herein, and summarizes the argument briefly below.

The first part of the second sentence of Section 201(b) grants the Commission jurisdiction over "all facilities" for interstate transmission *and* for the sale of electric energy at wholesale in interstate commerce. *See* 16 U.S.C. § 824(b); 18 C.F.R. § 33.2(d). That jurisdictional grant encompasses generation facilities that produce the electric energy sold at wholesale in interstate commerce. However, the second part of the second sentence limits Commission jurisdiction over generating facilities to that "specifically provided in this Part and the Part next following." 16 U.S.C. § 824(b).

In other words, Congress did not grant the Commission general, licensing-like jurisdiction over non-hydropower generating facilities used for the sale of electric energy at wholesale in interstate commerce, but it did grant limited jurisdiction over such facilities — jurisdiction sufficient to allow the Commission to exercise the powers and fulfill the duties specifically enumerated elsewhere in the Act. Thus, the Commission has explicitly recognized that Section 201 grants it sufficient jurisdiction over such generating facilities to allow it to fulfill its responsibilities under Sections 205 and 206 of the Act. *Middle South Energy, Inc.*, 32 F.E.R.C. ¶ 61,425 (1985).

For the reasons described in the Petition filed by Citizen Power and APPA, the Commission’s denial of jurisdiction over interstate wholesale generation facilities<sup>3</sup> for purposes of Section 203 cannot be squared with its acknowledgment of such jurisdiction for purposes of Sections 205 and 206. Specifically, its denial of jurisdiction for purposes of Section 203 is at odds with its decision in *Middle South Energy, Inc.*, with the D.C. Circuit opinion (*Mississippi Industries v. FERC*, 808 F.2d 1525, 1540 (D.C. Cir.), *vacated in other part*, 822 F.2d 1105 (D.C. Cir. 1987)), approving that Commission decision, and with the Second Circuit case (*Hartford Electric Light Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942)) on which the Commission relied. In short, the Commission was right when it stated in Order No. 888<sup>4</sup> that it does have “authority

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<sup>3</sup> We use the term “interstate wholesale generating facilities” as shorthand referring to generating facilities used for the sale of electric energy at wholesale in interstate commerce.

<sup>4</sup> *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 [1991-1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,036, at 31,980, *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274, III FERC Stat. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 62 Fed. Reg. 64,688, 81 F.E.R.C. ¶ 61,248 (1997), *petitions for review docketed sub nom. Transmission Access Policy Study Group v. FERC*, No. 97–1715 (D.C. Cir. Dec. 5, 1997), *order on reh’g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998).

over ... the disposition and merger of facilities used for such [interstate wholesale] sales.” Order No. 888 at 31,882-83.

In addition, there are strong policy considerations favoring the exercise of Commission jurisdiction to review proposed divestitures of interstate wholesale generating facilities. As the Commission has recognized in its merger policy statement, large-scale shifts in generation ownership may harm the public interest by concentrating ownership (and increasing market power) within limited geographic markets. *See Policy Statement Establishing Factors the Commission Will Consider in Evaluating Whether a Proposed Merger Is Consistent with the Public Interest*, Order No. 592, Docket No. RM96-6-000 (Dec. 18, 1996), *reprinted in* 61 Fed. Reg. 68,595, 68,599 (Dec. 30, 1996), *order on reconsideration*, Order No. 592-A, 79 F.E.R.C. ¶ 61,321, 62 Fed. Reg. 33,341 (1997). The Commission also recognized that such shifts in generation ownership may affect interstate transmission capability (*id.* at 68,608) and may, through its effect on transmission constraints, alter the size of geographic markets for generation (*id.* at 68,601). Large-scale divestitures of interstate wholesale generating facilities are just as likely as mergers to create such effects, to which the Commission must pay “close attention” (*id.* at 68,596) under Section 203(a).

From a policy perspective, the Commission’s observation about mergers is just as applicable to divestitures: “[A]s customer protection is increasingly dependent upon vibrant competition, it is *critically important* that mergers be evaluated on the basis of their effect on market structure and performance.” *Id.* at 68,599 (emphasis added).

Because the Commission has jurisdiction to review proposed divestitures of interstate wholesale generating facilities under Section 203, Duquesne’s divestiture of such facilities without seeking and receiving Commission approval for the divestiture of those facilities would

violate the Federal Power Act. It would also violate the Commission's implementing regulation, 18 C.F.R. Part 33.

***B. Section 203 Approval is Required Before Duquesne May Divest its Generator Step-Ups and Other Facilities Used to Transmit Electric Energy in Interstate Commerce***

Duquesne's plan to divest its generating assets includes the disposition not only of generating units but also of associated facilities used to transmit power that the generators have produced. The Commission has jurisdiction to review the proposed disposition of such facilities (if their value exceeds \$50,000) under Section 203 of the Federal Power Act. Thus, Duquesne may not divest such facilities without prior Commission approval.

Duquesne's Generation Auction Plan (at 16 & n.16, reproduced in Attachment 2) states:

Duquesne intends to divest all of the assets and liabilities that are related to its generating stations and to retain all that are related to its transmission assets.

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As a general matter, the point of physical demarcation between the retained transmission assets and the divested generation assets is the high voltage bushings of the main unit step-up transformer(s) and the station service transformer(s).

Appendix A of the Generation Auction Plan details the assets to be divested, and specifically lists Duquesne's interests in the "main step-up transformer" for various plants as assets to be divested. See Attachment 2 hereto at, *e.g.*, the detail page for the Cheswick Station ("Physical Assets Included in Sale" include "Main step-up and station service transformers").

The Commission has recently reaffirmed that it has jurisdiction over generator step-up transformers ("GSUs") even though such facilities are booked to generation for accounting purposes and functionalized to generation (and transmission ancillary services) for ratemaking purposes. *Kentucky Utilities Co.*, Opinion No. 432, 85 F.E.R.C. ¶ 61,274 at 62,112 n. 37 (1998). *Kentucky Utilities* recognizes that GSUs transform and assist in moving power for the

benefit of the generation seller and its generation customers, rather than for third-party transmission customers. Nonetheless, it remains true that GSUs transform and assist in moving their generator's power, as opposed to producing power. Thus, for jurisdictional purposes, they are "transmission" facilities.

This is settled law. In *Utah Power & Light Company v. Pfost*, the Supreme Court observed that the process of transmitting power "begins ... definitely at the generator." 286 U.S. 165, 181 (1932).

Thus, in *Hartford Electric Light Co. v. FPC*, 131 F.2d 953, 963 (2d Cir. 1942), the Commission argued that facilities connecting the generator to the bus and the facilities connecting the bus to the substation outside the plant were, for jurisdictional purposes, transmission facilities subject to the Commission's jurisdiction. Since the company continued to own the portions of those facilities that were located within the walls of the generating plant, the Commission argued that the company owned transmission facilities subject to the Commission's jurisdiction, thereby rendering it a "public utility." 131 F.2d at 963, n.20.

The Commission dismissed the objection that the facilities at issue were classified by the Commission's accounting rules as part of a generating plant, noting that accounting classifications do not control questions of jurisdiction. *Id.* See also *Holyoke Power & Elec. Co.*, 58 F.E.R.C. ¶ 61,159 at 61,477-78 (1992) ("Commission jurisdiction is not determined by which account a particular asset may be recorded in.") While the Second Circuit found it unnecessary to consider the Commission's argument, the Commission's position in *Hartford* is consistent with *Kentucky Utilities*.

Duquesne may or may not plan to seek Commission approval for its divestiture of generator step-up transformers, and may or may not plan to include in any application the other

facilities that move power from its turbines to the high-voltage transmission grid. Duquesne's Generation Auction Plan minces words in describing Duquesne's intentions in this regard. Although the Plan states (at 37) that FERC has Section 203 authority to "review the transfer of any transmission facilities," the Plan also states (at 16, quoted in full above) that Duquesne plans to retain the entirety of its "transmission assets." Thus, it is not clear whether Duquesne views any of the assets to be transferred as "transmission facilities" subject to Section 203.

To the extent that Duquesne seeks statutorily required approvals, of course, this portion of this Complaint will be moot, and may be deemed withdrawn. However, even if Duquesne does file for Section 203 approval with regard to, *e.g.*, generator step-up transformers, it is important that the Commission's review not be straitjacketed by an erroneous view that divestiture of the generators themselves requires no FERC approval.

***C. Section 203 Approval is Required Before Duquesne May Divest its Contracts, Accounts and Other Intangible "Facilities" Used for Sales at Wholesale in Interstate Commerce***

In *Hartford*, the Second Circuit rejected the proposition that the universe of potentially jurisdictional facilities was limited to transmission facilities and generation facilities. Rather, the court found a third category of facilities that may be used as facilities for the sale of electric energy at wholesale in interstate commerce and, thus, may be FERC jurisdictional. That category of facilities includes a company's corporate organization, contracts, accounts, memoranda, papers and other records. *Hartford*, 131 F.2d at 961.

In subsequent cases, the Commission has adverted to such intangible facilities in order to demonstrate that power marketers and other entities owning no physical facilities for the generation or transmission of power are nevertheless public utilities subject to FERC jurisdiction. *E.g.*, *Enron Power Marketing, Inc.*, 65 F.E.R.C. ¶ 61,305 (1993), *reh'g and*

*clarification granted on other grounds*, 66 F.E.R.C. ¶ 61,244 (1994); *Multitrade Limited Partnership*, 63 F.E.R.C. ¶ 61,252 at 62,691-92 (1993) (FPA jurisdiction attaches when the Commission accepts a voluntary rate filing by an entity that has not yet commenced operation) (citing *Ocean State Power*, 38 F.E.R.C. ¶ 61,140 at 61,378 (1987)); *Citizens Energy Corp.*, 35 F.E.R.C. ¶ 61,198 (1986).

As with its generator step-up transformers and the other facilities discussed in Part IV.B above, Duquesne may or may not plan to seek all the requisite Section 203 approvals needed to divest its contracts and the accounts, memoranda, papers, or other records used in connection with the sale of electric energy at wholesale in interstate commerce. Duquesne's Generation Auction Plan does state (at 37) that the Commission has Section 203 authority to review any transfer of jurisdictional contracts, but omits any indication of plans to file for approval to dispose of the books, records, and other intangible facilities related to the contracts, and does not expressly state that Duquesne will file even as to the contracts. To the extent that Duquesne seeks statutorily required approvals, of course, this portion of this Complaint will be moot, and may be deemed withdrawn. However, even if Duquesne does file for Section 203 approval with regard to some or all of these materials, it is important that the Commission's review not be straitjacketed by an erroneous view that divestiture of the generators themselves requires no FERC approval.

## **V. REMEDY SOUGHT**

Citizen Power asks the Commission to declare that it has jurisdiction over the facilities that Duquesne proposes to divest, and to direct Duquesne not to consummate the proposed divestiture without first obtaining all necessary Commission approvals.

**ATTACHMENT 1**