

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

AMERICAN PUBLIC POWER
ASSOCIATION and

CITIZEN POWER, INC.,

Petitioners.

Docket No. EL99-____-000

PETITION FOR DECLARATORY ORDER

I. INTRODUCTION

The American Public Power Association (APPA) is a national trade association that represents the interests of more than two thousand state-, municipal- and other local-government-owned electric utilities. Citizen Power, Inc. (Citizen Power) is a non-profit organization dedicated to seeking safe, clean and affordable energy for all Pennsylvania citizens. APPA and Citizen Power (collectively, “the Petitioners”) file this petition for a declaratory order pursuant to Rule 207 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.207 (1998).

The Petitioners request that the Commission affirm its jurisdiction to review, under Section 203(a) of the Federal Power Act, 16 U.S.C. § 824b(a) (1998), public utility dispositions of generating facilities, valued above \$50,000, that are used to generate power for wholesale sales in interstate commerce.¹ Such transactions are occurring with increasing frequency as electric utilities respond to Federal and state restructuring initiatives. Petitioners believe that

¹ Contemporaneous with the filing of the instant petition, Citizen Power is filing a complaint against Duquesne Light Company alleging that Duquesne plans to divest itself of jurisdictional facilities valued in excess of \$50,000 without seeking all necessary Commission approvals. The jurisdictional facilities identified in Citizen Power’s complaint include Duquesne’s generating facilities, transmission facilities appurtenant to the generating units, and

Commission review is necessary to ensure that such transactions do not result in concentrated ownership of generating resources, which would undermine the pro-competitive ends of opening transmission access. Petitioners also believe that Commission review is necessary to ensure that shifting ownership of generation does not adversely impact interstate transmission grids or harm consumers who had relied upon the transferred generation's output.

Federal review of generation dispositions is required because review by individual states—though important—is not adequate to protect the public interest. Individual states cannot effectively regulate transactions with wide-spread, interstate consequences. Yet the large-scale shifts in generation ownership that are now underway, and the even larger shifts on the horizon,² are bound to have consequences beyond the states in which the generation facilities are located. Indeed, to the extent that the Commission succeeds in opening transmission access, the Commission increases the probability that transactions involving generating facilities located in one state will significantly affect facilities and consumers located in other states.

Moreover, the success of the Commission's effort to increase competition by eliminating restrictions on transmission access depends, in a real sense, on the Commission's ability to review large scale transactions involving generating facilities. By opening transmission access, the Commission is moving towards restraining a major historical source of monopoly power. But if a few public utilities are able to reconstitute that monopoly power by concentrating

intangible facilities, such as contracts, accounts and records. The instant petition focuses only on the Commission's jurisdiction under Section 203(a) to review proposed dispositions of generating assets.

² According to the Edison Electric Institute (EEI), "52.9 gigawatts (GW), or 13.3 percent of the total of investor-owned electric utility fossil and hydro generation capacity, had been made available for auction [in 1998], a 46.3 percent increase over 1997 levels." See Edison Electric Institute, *Divestiture Action & Analysis* at 1 (Jan./Feb. 1999). Moreover, EEI explained, as auction prices increase, utilities are looking increasingly toward negotiated deals. *Id.* at 3. See *infra* at 23.

ownership of generating facilities in a particular market, then the Commission's efforts to promote competition by opening transmission access will have been largely wasted.

In arguing that Section 203 of the Federal Power Act requires Commission approval of planned dispositions, Petitioners are aware of previous cases in which the Commission has held that it lacks jurisdiction to review proposed dispositions of generating facilities under Section 203. *E.g., Duquesne Light Company*, 84 F.E.R.C. ¶ 61,309 (1998).³ However, those cases lacked substantial analysis of the relevant statutory language and were, for the reasons discussed below, wrongly decided. They are also inconsistent with cases decided by two United States Courts of Appeals,⁴ with each of the several decisions in which the Commission has engaged in substantive analysis of the relevant statutory language,⁵ and with the Commission's own regulation implementing Section 203 – which dates back to 1947, not so long after the section's passage. Those authorities all indicate that the Commission *does* have jurisdiction over generating facilities insofar as those facilities are used to supply power sold at wholesale in interstate commerce. While that jurisdiction is limited to the exercise of powers specifically enumerated in the Act, those statutory powers (and thus responsibilities) include Commission review under Section 203 of dispositions of generation assets.

³ See also *California Independent System Operator Corp.*, 84 FERC ¶ 61,016 (1998); *Duke Energy Moss Landing LLC*, 83 F.E.R.C. ¶ 61,317 (1998); *Western Kentucky Energy Corp.*, 83 F.E.R.C. ¶ 61,336 (1998); *Century Power Corp.*, 72 F.E.R.C. ¶ 61,045 n.13 (1995); *City of New Orleans*, 55 F.E.R.C. ¶ 61,221 (1991) (disclaiming jurisdiction over asset transfer but asserting jurisdiction over rates affected by the transfer); *Pacificorp Elec. Operations, Inc.*, 54 F.E.R.C. ¶ 61,296 (1991); *Consumers Power Co.*, 53 F.E.R.C. ¶ 61,382 (1990); *Green Mountain Power Corp.*, 53 F.E.R.C. ¶ 61,035 n.15 (1990); *Entergy Services, Inc.*, 51 F.E.R.C. ¶ 61,376 (1990); *El Paso Electric Company*, 36 F.E.R.C. ¶ 61,055 (1986); *Montana Power Company*, 35 F.E.R.C. ¶ 61,084 (1986); *Public Service Co. of New Mexico*, 33 F.E.R.C. ¶ 61,325 (1985); *South Carolina Electric & Gas Co.*, 29 F.E.R.C. ¶ 61,350 (1984); *United Illuminating Co.*, 29 F.E.R.C. ¶ 61,270 (1984); *Virginia Electric and Power Company*, 25 F.E.R.C. ¶ 61,261 (1983); *Arizona Public Service Company*, 32 F.P.C. 1525 (1964); *Pacific Power & Light Company*, 55 F.P.C. 2165 (1976); *West Tennessee Power & Light Co.*, 1 F.P.C. 766 (1938).

⁴ *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir.), *vacated as to allocations and remanded*, 822 F.2d 1105 (D.C. Cir. 1987)); *Hartford Elec. Light Co. v. FPC*, 131 F.2d 953 (2d Cir. 1942).

II. PARTIES AND COMMUNICATIONS

APPA is a national trade associating representing the interests of the country's two thousand public power systems. APPA's members include municipally-owned systems, public power districts, irrigation and water districts, state-chartered authorities and utilities, rural electric distribution cooperatives and generation and transmission cooperatives. APPA represents its members before Congress, the courts, the Commission, and other federal agencies.

Citizen Power is a non-profit organization, based in Pittsburgh, Pennsylvania. It is dedicated to seeking safe, clean and affordable energy to Pennsylvania consumers. As indicated in the complaint filed by Citizen Power along with this Petition, Citizen Power has numerous members who reside within the service territory of Duquesne Light Company and who are served, at least in part, by facilities that Duquesne has proposed to divest.

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III. JURISDICTION

The Commission has jurisdiction over the instant petition under sections 201, 203 and 309 of the Federal Power Act, 16 U.S.C. §§ 824, 824b and 825h (1998).

⁵ *Middle South Energy, Inc.*, Opinion No. 234-A, 32 F.E.R.C. ¶ 61,425 (1985), *aff'd sub nom. Mississippi Industries v. FERC*, *supra* n.4.

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IV. ARGUMENT: THE COMMISSION SHOULD AFFIRM ITS JURISDICTION TO REVIEW PROPOSED DISPOSITIONS OF GENERATION ASSETS IN EXCESS OF \$50,000

Section 201(b) of the Federal Power Act grants the Commission jurisdiction over generating facilities used to produce power sold at wholesale in interstate commerce. The Commission's jurisdiction over such generating facilities is limited to that which is necessary to allow the Commission to exercise the powers specifically enumerated in the Act. The Commission has explicitly recognized that Section 201 grants it jurisdiction over generating facilities sufficient to allow it to fulfill its responsibilities under Sections 205 and 206 of the Act, but, inexplicably, the Commission has generally refused to adopt a parallel analysis with respect to Section 203.

The Commission's conclusory (if oft-repeated) rejection of jurisdiction over generating facilities for purposes of Section 203 cannot be squared with its decision in *Middle South Energy, Inc.*, 32 F.E.R.C. ¶ 61,425 (1985), or with the D.C. Circuit's opinion on review of that decision. Nor can the rejection of jurisdiction for purposes of Section 203 be squared with the Second Circuit case on which the Commission relied in *Middle South Energy*. Both appellate courts considered the language of Section 201, reviewed its legislative history, and held that the Commission possessed jurisdiction over generating facilities used to produce electric energy sold at wholesale in interstate commerce.

A. *The Language and History of Federal Power Act Section 201 Support the Commission's Jurisdiction*

When Congress enacted the Federal Power Act, it had three main purposes in mind. First, Congress sought to fill a gap in regulatory ratemaking authority created by the Supreme Court's decision in *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric*

Company, 273 U.S. 83 (1927).⁷ Second, Congress sought to combat accounting abuses that had arisen in the regulatory void following *Attleboro*. Third, and most relevant to the instant proceeding, Congress sought to encourage a thorough (but carefully monitored) reorganization of the industry. In conjunction with the contemporaneous Public Utility Holding Company Act, Congress aimed to replace far-flung holding companies with utilities operating integrated systems; to encourage interstate commerce in bulk electricity; and to provide for federal regulation of matters that state authorities were unable or might become unable to regulate effectively.

Congress realized that, in order to accomplish its purposes, it was necessary to give the Commission jurisdiction over the facilities used in the interstate transactions it was to regulate. Consequently, Congress granted the federal commission jurisdiction over “all facilities for such [interstate] transmission or sale [at wholesale in interstate commerce] of electric energy .” Federal Power Act § 201(b)(1), 16 U.S.C. § 824 (1998). Generation facilities used to supply power transmitted in interstate commerce and sold at wholesale are clearly facilities used in FERC-regulated transactions. Indeed, there can be no FERC-regulated wholesale sale of electricity unless there exists a generating facility to produce the electricity. Thus, the statutory grant of jurisdiction over “all facilities” was broad enough to encompass—and was intended to establish—jurisdiction over such upstream generating facilities. *See Hartford Electric Light Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942).

However, Congress also realized that an unlimited grant of federal jurisdiction over generating facilities would encroach unnecessarily in areas where states could regulate

⁷ *See Jersey Central Power & Light Co. v. FPC*, 319 U.S. 61, 67 (1943) (“The primary purpose of Title II, Part II, of the 1935 amendments to the Federal Power Act ... was to give a federal agency power to regulate the sale of electric energy across state lines.”)

effectively.⁸ For example, Congress wished to make clear that the previously-enacted federal licensing jurisdiction over hydroelectric generating facilities (under Part I of the Act) was not being extended to other types of generating facilities. Furthermore, Congress wished to make clear that entities would not be deemed “public utilities” subject to federal regulation by dint of owning generation facilities *not* used to generate power for interstate wholesale sales. Congress therefore included limiting language designed both to make clear that generating facilities not used to supply wholesale interstate power were outside the Commission’s jurisdiction, and to emphasize that it was not giving the Commission general, licensing-like jurisdiction over generating facilities used to supply wholesale interstate power. In Section 201(b), Congress clarified that it was providing jurisdiction over such facilities only to the extent necessary to allow the Commission to exercise the powers (and to fulfill the responsibilities) specifically enumerated in the statute.

Accordingly, Section 201(b) provides that:

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...*

Federal Power Act § 201(b)(1), 16 U.S.C.S. § 824(b)(1) (1998) (emphasis added).⁹

Whether the Commission has jurisdiction over proposed dispositions of generating facilities turns on the proper interpretation of the phrase, “except as specifically provided in this

⁸ For example, states traditionally and effectively exercised jurisdiction over the physical aspects of generating plants (such as their location and manner of operation), and over the valuation of such facilities for retail rate purposes.

⁹ For ease of reference, the entire italicized phrase will be referred to hereafter as the “but” clause. The phrase, “except as specifically provided in this Part and the Part next following,” will be referred to as the “except” phrase. The statutory cross-reference to “this Part and the Part next following” is to Federal Power Act Parts II and III, §§ 201-321, 16 U.S.C. §§ 824-825, as the U.S. Code Service and U.S. Code Annotated republications of the statute make clear.

Part and the Part next following.” The insertion of that phrase was one of several changes made in conference specifically to forestall the overly restrictive interpretation of Section 201 that the Commission has nevertheless advanced—namely, that the Commission has no jurisdiction over generating facilities at all.¹⁰ The conference committee added the “except” phrase 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 necessary in the public interest. 16 U.S.C.S. § 824 (1998). The Committee intended those phrases to “remove any doubt” whether the Commission possessed jurisdiction over generating facilities. H. Rep. No. 1903, 74th Cong., 1st Sess. 74 (1935); *Mississippi Industries*, 808 F.2d at 1543.

Furthermore, the same Congress that enacted FPA § 201 also enacted what is now numbered FPA § 206(d).¹¹ This provision explicitly refers to “production ... of electric energy by means of facilities under the jurisdiction of the Commission.” Although the specific purpose of this provision is not centrally relevant here,¹² the wording chosen by Congress makes clear that it viewed “facilities under [federal] jurisdiction” as including generation facilities used to produce power for both wholesale and retail markets.

In light of Section 201(b)’s language and history, it is plain that Congress intended for the Commission to exercise jurisdiction over interstate wholesale generating facilities¹³ “as

¹⁰ Indeed, the Commission has gone so as to replace the “except” phrase with ellipses, thereby changing the meaning of the sentence. *California Independent System Operator Corp.*, 84 F.E.R.C. ¶ 61,016 at 61,074 (1998) (“Section 201(b) of the Federal Power Act states that the Commission ‘shall not have jurisdiction ... over facilities used for the generation of electric energy.’ Thus, issues regarding PG&E’s sale of the Morro Bay generating unit are outside the Commission’s jurisdiction.”) (ellipses in original).

¹¹ 16 U.S.C. § 824e(d). This provision, formerly numbered FPA § 206(b), has been part of FPA Part II since Part II was enacted.

¹² This provision empowers the federal Commission to investigate and determine the cost of production or transmission for use in setting retail rates.

¹³ We use the phrase “interstate wholesale generating facilities” as shorthand to refer to those facilities that produce power sold at wholesale in interstate commerce.

specifically provided” in Parts II and III of the Act. Accordingly, the Commission has jurisdiction to apply its rate-making powers, under Sections 205 and 206 of the Act, to sales involving interstate wholesale generating facilities. Likewise, the Commission has jurisdiction to apply its disposition-review powers, under Section 203 of the Act, to proposed dispositions of interstate wholesale generating facilities.

This interpretation of Section 201(b) respects its text, gives effect to Congress’ limitation of federal power over generating facilities, and respects the role of state authorities in regulating such facilities. Moreover, as demonstrated below, it is consistent with federal appellate case law and with every Commission decision that analyzes the relevant language in detail.

B. Federal Appellate Decisions and a Well-Reasoned Commission Decision Support the Commission’s Jurisdiction to Review Generation Dispositions Under Section 203

As discussed above, Section 201(b)(1) grants the Commission jurisdiction over “all facilities” used in connection with jurisdictional transactions but it limits the nature of the Commission’s jurisdiction over certain enumerated facilities. As to the facilities listed in the “but” clause of Section 201(b)(1), the Commission’s jurisdiction is limited to that which is necessary in order to exercise those powers and to fulfill those responsibilities that are specifically enumerated elsewhere in the Act. This interpretation is consistent with the Commission’s decision in *Middle South Energy*, with the Second Circuit case on which the Commission relied, and with the D.C. Circuit’s opinion on review of the Commission’s decision. In both appellate cases, one decided before the Supreme Court’s decision in *Connecticut Light & Power Co.*¹⁴ and one decided after it, the Courts concluded that the

¹⁴ *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945).

Commission has jurisdiction over generating facilities used to produce power sold at wholesale in interstate commerce.

In *Middle South Energy*, the Commission considered jurisdictional challenges to its decision to reallocate, among affiliated system companies, the capacity costs of certain nuclear generating facilities. The companies argued that the Commission lacked jurisdiction to reallocate the capacity costs because Section 201(b)(1) did not provide for Commission jurisdiction over generating facilities. The companies also argued that the Commission lacked jurisdiction over Middle South Energy because that company owned no transmission facilities or other facilities subject to federal jurisdiction, and therefore was not a “public utility.”¹⁵ Considering Section 201(b)(1), the Commission rejected the proposition that the “but” clause deprives it of all jurisdiction over generating facilities. Specifically, the Commission held that it could not “interpret the ‘but’ clause of Section 201(b)(1) as nullifying the authority granted ... in the first sentence of section 201(b)(1), in situations where generation facilities are used for interstate wholesale sales.” 32 F.E.R.C. at 61,947.

The Commission drew support for its holding from *Hartford Electric Light Co.* In that case, the Commission determined that the Hartford Electric Light Company was a “public utility,” bound to comply with the Commission’s Uniform System of Accounts, because the Commission determined that the company owned jurisdictional facilities. On appeal, the company argued that it was not a “public utility” because its only facilities were generation facilities over which the Commission allegedly lacked jurisdiction. The Second Circuit rejected that argument and sustained the Commission’s decision on several independent grounds. First,

¹⁵ See *id.* at 61,944 and 61,948, text accompanying n.6. As enacted, FPA § 201(e) defined “public utility” to include any person owning or operating facilities subject to the Commission’s jurisdiction under any provision of

the Court determined that the company’s “corporate organization, contracts, accounts, memoranda, papers and other records” were “facilities” used in the sale of electric energy at wholesale in interstate commerce. 131 F.2d at 961. Second—and most significant for present purposes—the Court found that “generation facilities, where used as aids to such [interstate wholesale] sales, are within the Commission’s jurisdiction under § 201(b).” *Id.* As a result of this second finding, the Court noted, the disposition of such generating facilities would be subject to review by the Commission under Section 203.

The Court observed that, for purposes of determining whether the company was a “public utility,” it seemed to make “little practical difference” whether the Court rested its decision on the Commission’s jurisdiction over the company’s contracts and accounts or on the Commission’s jurisdiction over generating facilities used as aids to wholesale interstate sales. But the Court recognized that failure to decide the second question would leave the Commission’s powers under Section 203 uncertain. 131 F.2d at 963 n.20. Accordingly, the Second Circuit made a point of holding explicitly that the Commission had jurisdiction over generating facilities used in connection with sales at wholesale in interstate commerce. *Id.* at 961. This petition simply asks the Commission to reaffirm the Section 203 jurisdiction that the Second Circuit explicitly recognized.

As the Commission recounted in *Middle South Energy*, the Supreme Court later criticized some of the Second Circuit’s reasoning but left the key parts of the *Hartford* decision intact. In *Connecticut Light & Power Company*, a case regarding the Commission’s jurisdiction over local distribution facilities, the Supreme Court criticized the *Hartford* court’s interpretation of the “but” clause in Section 201(b) as a negatively-worded *grant* of jurisdiction, greater in scope than

jurisdiction created by the first part of the sentence. The *Hartford* court had interpreted the “but” clause as providing in some circumstances for jurisdiction over facilities that could not, by definition, be used in connection with interstate transmission or sales at wholesale in interstate commerce. 131 F.2d at 962. The Supreme Court rejected that interpretation but specifically noted—and left intact—the *Hartford* court’s alternative holding that the Commission could exercise jurisdiction over generating facilities when those facilities were “used as facilities for interstate wholesale sales.” *Connecticut Light & Power Co.*, 324 U.S. at 528 n.6.

In *Middle South Energy*, the Commission’s review of *Hartford* and *Connecticut Light & Power* led it to “reject the argument that we have no jurisdiction over the USPA sales because Grand Gulf is a generating facility not subject to our jurisdiction.” 32 F.E.R.C. at 61,948. The Commission also rejected the argument that it lacked jurisdiction over Middle South Energy “because it does not own facilities subject to [Commission] jurisdiction.” *Id.* The latter holding is particularly significant here because it recognized Commission jurisdiction over the generating facilities themselves (insofar as such jurisdiction was necessary to exercise its powers under Section 206) and not simply over the sale of power. That is, MSE’s ownership of interstate wholesale generation made Middle South a “public utility,” whose interstate wholesale sales were therefore subject to Section 206.

On appeal, the D.C. Circuit affirmed the Commission’s jurisdictional ruling, stating that MSE’s Grand Gulf nuclear plant was a “facility subject to the jurisdiction of the Commission” because output from the plant was sold at wholesale in interstate commerce. *Mississippi Industries v. FERC*, 808 F.2d 1525, 1540 (D.C. Cir.), *vacated in other part and remanded*, 822 F.2d 1105 (D.C. Cir. 1987)). The D.C. Circuit also added to the Commission’s analysis of

to FPA §§ 210-212, such as transmission-owning governmental utilities.

Connecticut Light & Power. The D.C. Circuit noted that *Connecticut Light & Power* addressed the “local distribution” limitation on Commission jurisdiction rather than the “generating facilities” limitation. *Mississippi Industries*, 808 F.2d at 1544.¹⁶ That distinction made a difference because local distribution facilities by definition do not constitute “facilities used for interstate wholesale sales.” Whereas generators may constitute facilities used for interstate wholesale sales because they produce the power being sold, local distribution facilities are used after the wholesale transaction is complete, to effect the downstream delivery of the power to retail customers.¹⁷

More importantly, the D.C. Circuit recognized that the Supreme Court had accepted the *Hartford* court’s holding “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.” 808 F.2d at 1544. The D.C. Circuit further noted that, “under the clear terms of the statute, the Commission has been awarded jurisdiction over generating facilities ‘to the

¹⁶ The D.C. Circuit might also have noted that *Connecticut Light & Power* presented a particularly compelling case for finding that the Commission lacked jurisdiction. In that case, the relevant company actively restructured its business and divested itself of jurisdictional facilities following the enactment of the Federal Power Act. The company’s candidly admitted purpose was to avoid regulation by the Federal Power Commission by ridding itself of jurisdictional facilities. When the case was decided by the Commission, the company owned only a few facilities over which the Commission claimed jurisdiction, and by the time the case reached the Supreme Court it owned only one such facility—a substation that stepped-down voltage from 66 kV to 13.8 and 4.6 kV. 324 U.S. at 519. On the basis of the company’s ownership of that one facility, the Commission asserted jurisdiction over all of the company’s accounting practices. *Id.*

¹⁷ Lines that operate at low voltages are sometimes used to deliver wholesale sales or third-party transmission service. The Commission has determined that such lines are transmission facilities, even if they operate at so-called “distribution” voltages. See *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] FERC 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).

extent provided in other sections,’ including jurisdiction necessary to effectuate regulation of interstate wholesale rates.’¹⁸

On other occasions when it has discussed Section 201 at length, the Commission has reached the same conclusion that it reached, and was affirmed on, in the *Middle South Energy* case. In Order 888, the Commission examined the extent of its jurisdiction over generation in the course of concluding that it lacks authority to regulate the environmental aspects of jurisdictional activities. There, the Commission stated that it does have “authority over ... the disposition and merger of facilities used for such [interstate wholesale] sales.” Order No. 888 at 31,883. Decades earlier, in *Continental Oil Co.*, 18 F.P.C. 296, 299-300 (1957), the Commission’s predecessor summarized *Hartford* as holding that the Federal Power Act “confer[s] jurisdiction over facilities for sale or, disjunctively, for transmission,” *i.e.*, “for the wholesale of electric energy in interstate commerce,” and followed that holding under parallel provisions of the Natural Gas Act.

In light of these decisions, it is remarkable that elsewhere, the Commission continues categorically, and without explanation, to disclaim jurisdiction over proposed dispositions of generating facilities. In *Hartford*, 131 F.2d at 963 n.20, the Second Circuit expressly noted that its jurisdictional finding entailed Commission authority to review generation asset dispositions under Section 203. In *Mississippi Industries*, 808 F.2d at 1545 n.74, the D.C. Circuit found “jurisdiction necessary to effectuate regulation of interstate wholesale rates” under Section 206, on a basis that logically compels a finding of jurisdiction here. *See also Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 383 (1988) (“it is reasonable to regard

¹⁸ *Id.* at 1545 n.74. *Mississippi Industries* cannot be distinguished on the ground that MSE had only wholesale, not retail, customers. The Federal Power Act recognizes that production facilities used to serve both wholesale and

FERC's § 824e(a) authority to set wholesale rates as precisely an example of jurisdiction 'specifically provided').

The Commission has articulated no basis for concluding that Section 201 provides jurisdiction over interstate wholesale generating facilities for purposes of Sections 205 and 206, *see* 808 F.2d at 1545 n.74, but not for purposes of Section 203. While the Commission has held that it has no jurisdiction over the *physical* aspects of generating facilities,¹⁹ Section 203 need not implicate such matters. As the Commission has correctly observed, reviewing the proposed disposition of assets under Section 203 is an exercise of *economic* regulatory authority. *See* Order No. 888 at 31,882-81 (listing the Commission's authority over the disposition of assets used for wholesale interstate sales among the "matters directly related to the *economic* aspects of transactions resulting from such facilities") (emphasis in original). In that regard, Section 203 is analogous to Sections 205 and 206, and if the Commission has jurisdiction over particular generating facilities for purposes of one section, it has jurisdiction over those facilities for purposes of the other sections.

To read the Federal Power Act in a way that recognizes jurisdiction over generating facilities for purposes of sections 205 and 206, but not for section 203, is to forget that Congress had in mind more than one purpose, more than just rate regulation, when it passed the Act. Section 203 was not a disfavored step-child but an integral part of the statutory scheme.

[A] prime purpose of the Federal Power Act 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

retail customers are "facilities under the jurisdiction of the Commission," *i.e.*, under the federal commission's FERC's concurrent jurisdiction. *See* FPA § 206(d).

¹⁹ *See* Order No. 888 at 31,882 (no authority over "*operation* of generating facilities") (emphasis added); Order No. 888-C at 31,883 (1998) (no authority over the "*physical* aspects of generating facilities") (emphasis added).

properties” as a result of the Public Utility Holding Company Act of 1935.

Duke Power Company 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) (testimony of Solicitor DeVane)). In light of Section 203’s genesis, it is not only permissible but fitting that Section 203 should serve to protect the public against an uneconomic realignment of generation assets following the Commission’s institution of open transmission access.

C. The Commission’s Implementing Regulations Demonstrate that the Commission Has Jurisdiction Over Transactions Involving Interstate Wholesale Generating Facilities

Its categorical disclaimers of jurisdiction notwithstanding, the Commission’s own implementing regulations demonstrate that the Commission has jurisdiction to review transactions involving interstate wholesale generating facilities. Those regulations, 18 C.F.R. Part 33, apply to all public utilities seeking authority under Section 203 of the Federal Power Act (*see* 18 C.F.R. § 33.1(a)) and set out the required form and contents of applications for such authority. Like the statute, the Commission’s regulations apply not only to transactions involving transmission facilities but, also, to transactions involving “facilities used for the ... sale at wholesale of electric energy in interstate commerce.” 18 C.F.R. § 33.1(a)(2). *See also* 18 C.F.R. § 33.2(d) (requiring applicants to describe “the facilities owned or operated for transmission of electric energy in interstate commerce *or* the sale of electric energy at wholesale in interstate commerce.”)

The Commission’s use of the disjunctive “or” in the regulations implementing Section 203 (mirroring the structure of Section 201) is significant. It signifies that the two categories—facilities used for interstate transmission and facilities used for sales of energy at wholesale in interstate commerce—are not the same thing, and it further signifies that *both* categories are

covered by Section 203. That section and the implementing regulations apply not only to interstate transmission facilities but also to generating facilities that are used for the sale of energy at wholesale in interstate commerce. *Compare Duke Power*, 401 F.2d at 950 (finding no jurisdiction over distribution facilities used for *retail* sales).

D. That States Possess Concurrent Jurisdiction to Review Proposed Dispositions of Generating Assets Does Not Alter the Analysis

Because of the structure of today's industry, the Commission and state regulatory authorities share concurrent jurisdiction over the proposed disposition of most generating facilities. As the Commission has noted, "there are rarely separate retail and wholesale generating facilities." Order No. 888-A at 30,414. Most generating facilities supply power for both wholesale and retail sales. Thus, subject to limits imposed by the U.S. Constitution regarding rate regulation (*see, e.g., Attleboro*) and to limits imposed by state constitutions and legislation, state regulatory authorities generally exercise broad jurisdiction over most generating facilities. They exercise jurisdiction over the physical aspects of such facilities (*e.g., their licensing and siting*); and as retail regulators they exercise jurisdiction over certain economic aspects of those facilities, including the jurisdiction to review proposed dispositions of assets. *See, e.g.,* Order No. 888 at 31,637 (discussing "fundamental state regulatory authorities, including authority to regulate the vast majority of generation asset costs, the siting of generation and transmission facilities, and decisions regarding retail service territories").

Because Section 201(a) of the Federal Power Act articulated a policy that Federal regulation was "to extend only to those matters which are not subject to regulation by the States," 16 U.S.C. § 824(a) (1998), some might argue that the Commission lacks jurisdiction over a proposed asset disposition if it is subject to state review. But Section 201(a) is a declaration of general policy, not a specific provision delineating the precise contours of federal

jurisdiction. Nor does Section 201(a) take away from the jurisdiction that Congress granted in Section 201(b). As the Supreme Court has explained, this “policy declaration... is “one of great generality,” and “cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.” *Connecticut Light & Power*, 324 U.S. at 527. *See also Duke Power*, 401 F.2d at 938.

Moreover, the language, structure and legislative history of the Federal Power Act all indicate that Congress expected federal jurisdiction to overlap with state jurisdiction in many instances.²⁰ *See Hartford*, 131 F.2d at 964 (“Congress obviously contemplated that there would, in many cases, be both federal and state regulation.”) *See also F.P.C. v. East Ohio Gas Co.*, 338 U.S. 464, 473-74 (1950) (“That a state commission might also have some regulatory power would not preclude exercise of the Commission’s function. Nor does the Act purport to abolish all overlapping”) (internal citations omitted). In particular, “Section 203 was ... added with full awareness that this was not a provision needed to close a constitutional gap, and that the states had jurisdiction to accomplish this regulation.” *Duke Power*, 401 F.2d at 935 n.41. Congress realized that having the legal power to act was not the same as having the practical ability to act effectively, and Congress set out to establish Federal regulation of matters that were, either legally or practically, “beyond the pale of effective state supervision.” *Id.* at 935. Foremost among those matters that are, in practice, beyond the pale of effective state supervision are transactions that are likely to have significant economic consequences on interstate wholesale power markets outside the state exercising jurisdiction.

²⁰ As the Second Circuit pointed out, “Section 209(b) unmistakably recognizes the likelihood of duality in regulation and is designed to mitigate its effects, by providing for ‘conferences’ and ‘joint hearings’ by the Federal and State Commissions.” 131 F.2d at 964. Section 206(d), which is also discussed in Part IV.A above, likewise recognizes this duality. This provision explicitly lists generation (“production”) facilities as facilities “under the jurisdiction of the Commission,” and provides that where such facilities are also used to generate power for retail sales, the federal commission may investigate their costs in order to assist state commissions in setting retail rates.

E. Policy Considerations Strongly Favor the Assertion of Commission Jurisdiction to Review Large Scale Dispositions of Generating Facilities Used to Produce Power Sold at Wholesale in Interstate Commerce

If the Commission has jurisdiction over generating facilities for purposes of Section 203 and if the value of the facilities being transferred to a new owner exceeds \$50,000, Section 203 review of the proposed transaction is both mandatory and essential to the Commission's mission. Section 203 review is mandatory because the statute prohibits public utilities from disposing of jurisdictional facilities valued above \$50,000 unless they first obtain the Commission's public interest approval.

While Petitioners do not believe the Commission has discretion to disclaim jurisdiction or to decline to review proposed dispositions under Section 203,²¹ Petitioners also note that there are substantial policy reasons favoring the assertion of jurisdiction and Section 203 review. Indeed, the Commission itself articulated these policy considerations when it formulated its policy statement on utility mergers, *Policy Statement Establishing Factors the Commission Will Consider in Evaluating Whether a Proposed Merger is Consistent with the Public Interest*, Order No. 592, Docket RM96-6-000 (Dec. 18, 1996), *reprinted in* 61 Fed. Reg. 68,595 (Dec. 30, 1996), *order on reconsideration*, Order No. 592-A, 79 F.E.R.C. ¶ 61,321, 62 Fed. Reg. 33,341 (1997). Of particular relevance here, the Commission recognized explicitly that mergers may result in significant increases in generation market power, which are contrary to the public interest; that open transmission access may not suffice to ameliorate the harm of concentrated generation ownership; and that shifting generation ownership may adversely impact transmission

²¹ The fact that the Commission has *jurisdiction* does not, of course, eliminate all Commission discretion as to how it may reasonably *exercise* that jurisdiction. The Commission may adopt reasonable policies limiting the degree of scrutiny it will afford to transactions that are demonstrated to be unlikely to have significant competitive impacts. Indeed, the Commission has adopted just such an approach in its Merger Policy Statement and its proposed revisions to Part 33. *See infra* at n.26.

capability. Such considerations apply with equal force to generation dispositions as they do to corporate mergers. For policy purposes, the salient feature is not the label attached to the transaction but the potential for concentrating economic resources in the hands of a few.²²

The need for Commission review of proposed reorganizations is particularly acute now, as industry restructuring gallops ahead. As the Commission has recognized, “[t]he electric industry’s rapid restructuring, and the Commission’s regulatory response to it, have made the effect of mergers on competition, and the way the Commission evaluates that effect, critically important.” 61 Fed. Reg. at 68,599. *See also Revised Filing Requirements Under Part 33 of the Commission’s Regulations*, F.E.R.C. Stat. & Regs. ¶ 32,528 at 33,363 (1998) (Notice of Proposed Rulemaking) (discussing the “growing importance of analyzing the competitive effects of such mergers on emerging competitive markets”). While the Commission’s open access policy has helped to reduce barriers to competition in generation markets, that policy will not eliminate barriers completely and it does not guarantee—especially not during the transition phase—the vitality of competition in particular markets. “[E]ven in an open access environment, markets may not work perfectly or even well.” 61 Fed. Reg. at 68,603. “This is particularly the case during the transition from a monopoly cost-of-service market structure to a competitive market-based industry.” *Id.* Barriers to entry, such as physical transmission constraints and the need to pay cumulative transmission tolls to cross multiple systems (*id.* at 68,601), still exist.

²² There is also a second way in which disclaiming jurisdiction over generation dispositions risks exalting form over substance. If sale for resale of electrical output is subject to rate regulation under §§ 205 and 206, but a sale of unit ownership is not jurisdictional, then an output sale (e.g., a unit power contract) could be structured as a sale of an ownership interest in the unit, e.g., as a sale-leaseback, to avoid Commission jurisdiction. Compare PUHCA § 32(a)(2)(B), 15 U.S.C. § 79z-5a(a)(2)(B) (definition of Exempt Wholesale Generator equating lease of eligible EWG facility to “a sale of electric energy at wholesale for purposes of sections 205 and 206 of the Federal Power Act”).

Such barriers create conditions under which utilities may acquire generation market power. While cost-of-service regulation previously mitigated (but did not eliminate) the impact of generation market power on consumers, market power issues become substantially more significant in an environment where energy prices are “deregulated” and left to the market. “A concentration of generation assets that allows a company to dominate a market will dampen or preclude the benefits of competition.” *Id.* at 68,599. Accordingly, the Commission has indicated that Section 203’s public interest test requires 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.

Because concentration resulting from sales of generating assets is just as harmful to consumers as concentration resulting from mergers, the Commission should review proposed dispositions of generating assets under the same standards as mergers. It would be anomalous to “pay close attention” to the potentially anti-competitive consequences of mergers while allowing the same anti-competitive consequences to be achieved, without even potential scrutiny, through public utility dispositions of generating assets alone.²³ Indeed, the Commission has recognized that it is the substance of a proposed transaction, not its form, that matters. The Commission’s

²³ Consider two hypothetical transactions, similar in economic effect, that would be treated differently. In both hypotheticals, one public utility wants to acquire the generation resources of another public utility, which constitute the bulk of the second utility’s assets. The remainder of the second utility’s assets consist of a few facilities (collectively valued at more than \$50,000) over which the Commission has traditionally exercised jurisdiction. If the first utility were to acquire the second utility outright, the Commission would review the transaction under Section 203, and a significant part of the Commission’s analysis would focus on the transaction’s competitive impact in generation markets. But if the Commission were not to exercise jurisdiction over divestitures of generating assets, the utilities could evade regulatory scrutiny by structuring the transaction so that the second utility *sells* its generating resources to the first utility and continues in existence for the sole purpose of retaining its remaining facilities. Indeed, once the generation sale and its competitive impact was a *fait accompli*, the second utility could proceed to sell its remaining assets to the first utility. This hypothetical demonstrates that the Commission cannot count on using its jurisdiction to review dispositions of generator step-up transformers as a “hook” for reviewing the competitive impacts of generation divestitures, as seems to be contemplated in *Kentucky Utils. Co.*, Opinion No. 432, 85 F.E.R.C. ¶ 61,274 at 62,112 n.37 (1998). Through phased or partial dispositions,

proposed revisions to its Part 33 filing requirements for merger applicants indicate that the requirements would apply “whether the transfer of control is effectuated, directly or indirectly, by merger, consolidation or other means.” F.E.R.C. Stat. & Regs. ¶ 32,528 at 33,365.

Congress itself realized that limiting federal antitrust review to mergers accomplished by stock acquisition—and failing to provide for review of asset transactions—rendered such review “ineffective.” See *Brown Shoe Co. v. United States*, 370 U.S. 294, 311 (1962). Thus, Congress amended Section 7 of the Clayton Act in 1950 to “plug the loophole” in the original act (*id.* at 314) by providing for federal review of the acquisition of *assets* as well as stock (*id.* at 316). While the Commission has likewise determined that the means by which control is transferred does not matter, the import of that decision is negated by the Commission’s refusal to exercise jurisdiction over generation. Under the Commission’s approach, public utility mergers are scrutinized for their impacts on generation markets but dispositions—even if they involve the very same generating facilities—are not. By refusing to review acquisitions and sales of generating assets, the Commission has opened a loophole that Congress, in amending the Clayton Act, expressly disapproved.

Finally, to the extent that it succeeds, the Commission’s open access policy increases the need for federal review of proposed generation dispositions. By facilitating commerce between distant suppliers and customers, open access should make it more likely that transactions involving generating facilities in one state will have significant economic consequences for customers located in other states. This could occur if the acquired generation assets serve a

review of the public interest effects of the generation sale can all too easily be separated from review of the public interest effects of the step-up sale.

multi-state geographic market; or it could occur if shifting ownership of generation assets create constraints that limit interstate transmission capacity.²⁴

Without a federal forum, however, this situation results in a catch-22. On one hand, if generating facilities may be regulated only by the state in which they are located, it is unlikely that out-of-state interests will be protected adequately.²⁵ On the other hand, if states were to assert jurisdiction over “foreign” generating facilities (via long-arm statutes, for example), the result would be propagation of multiple, inconsistent regulations.

In short, the Commission must review proposed dispositions of utilities’ generating assets in order to safeguard competition and to protect out-of-state consumers who will be affected by the transactions. As the Commission surely realizes, this is not a small-scale issue. According to EEI, electric utilities announced plans to transfer in 1998 ownership of units with capacity totaling nearly 53 gigawatts.²⁶ *See supra* n.2. Of the 91 U.S. investor-owned electric utilities surveyed by EEI, 32 have announced either partial or complete divestiture of their generating assets. *Id.* at 4. The last time the electric industry faced such a drastic reorganization in

²⁴ *See* 61 Fed. Reg. at 68,608 (“Applicants should also present evidence regarding how transmission capability will be affected by the merger. Transmission line loadings are likely to change as a result of the merging parties’ combined operations.”) *See also* F.E.R.C. Stat. & Regs. ¶ 32,528 at 33,371-2 (recognizing that potential suppliers’ ability to serve a market is affected by physical transmission capacity and by the allocation of rights to use such transmission capacity).

²⁵ Consider, for example, a hypothetical in which a utility owning generating facilities in State A (the power from which is consumed in State B as well as State A) decides to sell those facilities to a consortium that will raze the facilities to make way for a new football stadium. State A, which receives all of the increased sales taxes and other benefits from the stadium, may be inclined to permit the transaction even if it harms consumers in State B. Moreover, any mitigation measures ordered by State A’s regulatory authority might well benefit only the consumers of that State.

²⁶ As indicated above, the Commission should recognize that exercising its jurisdiction to review generating asset transactions need not commit it to consuming valuable resources in the review of numerous small scale transactions. Just as the Commission has adopted an initial analytical screen to distinguish between mergers that are likely to have adverse competitive impacts and those that are not, the Commission could adopt a similar threshold test to identify proposed dispositions that are likely to have adverse competitive impacts. Indeed, sometimes it would be unnecessary even to conduct a full-fledged screen analysis. *See* F.E.R.C. Stats. & Regs. ¶ 32,528 at 33,375 (“[t]here are mergers where the filing of a full-fledged horizontal or vertical screen analysis may not be

response to a changing legal framework, Congress enacted Section 203 to give the Commission the power—and the responsibility—to ensure that the realignment did not harm the public interest. *See Duke Power Company*, 401 F.2d at 942. The Commission still possesses that power and that responsibility. It should not shrink from the task Congress assigned it.

warranted because it is relatively easy to determine that such [a] merger proposal will not have an adverse impact on competition”).

V. REMEDY SOUGHT

Petitioners ask the Commission to declare that it has jurisdiction to review, under Section 203 of the Federal Power Act, proposed dispositions of generating facilities valued in excess of \$50,000 that are used to generate power for wholesale sales in interstate commerce. As public utilities across the nation are moving forward with plans to dispose of their generation assets, a declaration is needed promptly.

Respectfully submitted,

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