

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

American Public Power Association and Citizen Power, Inc.		Docket No. EL99-40-000
Citizen Power, Inc. v. Duquesne Light Company		Docket No. EL99-39-000
Citizen Power, Inc. v. FirstEnergy Corp. and the FirstEnergy Operating Companies		Docket No. EL00-94-000

**PETITIONERS’
REQUEST FOR REHEARING**

Pursuant to 16 U.S.C. § 825*l* and 18 C.F.R. § 385.713, the American Public Power Association (“APPA”) and Citizen Power, Inc. (“Citizen Power”) (collectively, “Petitioners”) hereby request rehearing of the Order Disclaiming Jurisdiction Over Certain Dispositions, *American Public Power Association et al.*, 94 F.E.R.C. ¶ 61,104 (Feb. 7, 2001) (“Order”). All citations to the Order herein are to the slip opinion.

I. ERRORS ALLEGED

Pursuant to 18 C.F.R. § 385.713(c)(1), Petitioners hereby “state concisely the alleged error[s] in the final decision or final order.”

1. By concluding that it lacks jurisdiction under Sections 201 and 203 of the Federal Power Act (“FPA”) over the disposition of generation facilities used to produce power sold at wholesale in interstate commerce (hereinafter “interstate wholesale generation facilities”), the Commission has erred in the following respects:

- a) The Commission erred in concluding, contrary to the plain meaning of Sections 201 and 203, that “Section 201(b)(1) expressly exempts from the Commission’s jurisdiction ‘facilities used for the generation of electric energy.’” Order at 4 (referring to what the Commission terms the “Generation Exemption”).

b) The Commission erred in asserting that Petitioners' reliance on other "language in Section 201(b)(1) which qualifies the Generation Exemption" (*id.*) would somehow "muddy the waters" (*id.*). Instead, the plain meaning of Section 201(b)(1) cannot be understood without reference to *both* the Generation Exemption (which Petitioners have called the "but" clause) *and* the "except as specifically provided" language (which the Order terms a qualification of the Generation Exemption and which Petitioners referred to as the "except clause").

c) The Commission erred by ignoring the reality that courts have already construed the plain meaning of Sections 201 and 203 in accordance with Petitioners' interpretation, and that those decisions are binding upon it.

d) Even if Sections 201 and 203 were ambiguous, the Commission has failed to give a reasoned basis for its interpretation of the statute.

e) The Commission erred in asserting that "there is no precedent, legislative history, or case law which would support a contrary conclusion" (Order at 5). The Commission failed to give reasoned consideration to the precedent, legislative history and case law brought to its attention by Petitioners.

f) The Commission erred in relying on the fact that it "has held repeatedly that section 203 does not apply to dispositions of only generation facilities" (Order at 4). As demonstrated by Petitioners, those cases failed to adhere to court precedent and departed without reasoned explanation from the Commission's own prior holdings that Section 203 applies to dispositions of generating facilities.

2. To the extent the Commission interpreted the Petition as asking it to declare that it has jurisdiction to review dispositions of *all* generating facilities, not merely interstate wholesale generating facilities (*see* Order at 5 (asserting that "[t]here is no necessary nexus between the interstate transmission or sale of electric energy ... and the disposition of a generation facility by itself")), the Commission has misconstrued the relief requested. Petitioners requested that the Commission affirm its jurisdiction to review dispositions of *interstate wholesale* generating facilities, *i.e.*, generating facilities used to produce power sold at wholesale in interstate commerce.

3. The Commission erred by rejecting on procedural grounds Petitioners' answers to various motions and intertwined other pleadings.

II. ARGUMENT

The Order (at 4-5) relies on four grounds to support its conclusion that it lacks jurisdiction to review dispositions of interstate wholesale generating facilities:

- (1) “the statutory text,” particularly on what it terms the “Generation Exemption” in FPA § 201(b)(1);
- (2) the asserted absence of any “precedent, legislative history, or case law which would support a contrary conclusion;
- (3) the fact that “the Commission has held repeatedly that section 203 does not apply to dispositions of only generation facilities”; and
- (4) the asserted absence of any “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.”

Parts II.A.1, II.A.2, II.A.3, and II.B below demonstrate in turn the error in each of these four grounds. Part II.C concerns a procedural error.

A. *The Commission Erred in Concluding that Interstate Wholesale Generation Facilities are Not Jurisdictional Facilities*

1. The plain meaning of the statutory text confers jurisdiction

The Commission erred in concluding that the statutory text “expressly exempts from the Commission’s jurisdiction ‘facilities used for the generation of electric energy’” (Order at 4) and dismissing references to other statutory text as attempts to “muddy the waters” (*id.*). The express terms of Section 201 state that “[t]he 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 generation of electric energy” (emphasis added).

The wording of this pivotal sentence, while convoluted as a result of the legislative to-and-fro discussed in Part II.A.2 below, is nevertheless unambiguous. Its

first clause provides, all-inclusively, that the Commission's jurisdiction shall extend over *all* facilities for the transmission or sale of electric energy in interstate commerce. Its second clause (what the Order calls a "Generation Exemption") starts to limit this jurisdiction, but only in a manner that is immediately qualified by the third clause (the "except as specifically provided" language).

The "except as specifically provided" language can only mean that there *are* circumstances in which the Commission has jurisdiction over facilities used for the generation of electric energy sold at wholesale in interstate commerce. Read as a whole, the so-called Generation Exemption and the "except as specifically provided" language mean that the Commission lacks plenary jurisdiction over generation facilities (*e.g.*, licensing jurisdiction comparable to its jurisdiction over hydroelectric facilities pursuant to Part I of the Act), but possesses jurisdiction for the purpose of exercising the regulatory powers provided in Parts II and III of the Act.

Because of the "except" language, Section 201 cannot reasonably be read the way the Commission appears to read it: as providing the Commission with *no* jurisdiction over generating facilities. In parsing the statutory text, the Commission must give meaning to each of the clauses in the pivotal sentence. Yet the Order fails to do so. Instead, it arbitrarily dismisses Petitioners' reliance on the "except as specifically provided" language as "muddy[ing] the waters." The Order seems to suggest that the quoted clause can be ignored because it inconveniently interferes with the Commission's present interpretation. That is not reasoned decisionmaking.

Furthermore, the Commission has offered no explanation why Section 201 should be read to confer jurisdiction over interstate wholesale generating facilities for purposes

of rate regulation under Sections 205 and 206,¹ generation coordination encouragement and disposition conditioning under Sections 202 and 203, production facility cost determination under Section 206(d), service adequacy regulation under Section 207, *etc.*, but should not be read to confer jurisdiction for purposes of asset-disposition review under Section 203. If the Commission's jurisdiction extends to interstate wholesale generating facilities for these purposes, then they are "facilities subject to the jurisdiction of the Commission" within the meaning of Section 203(a). That phrase looks back to Section 201 for the delineation of jurisdictional facilities, and Section 201 provides that the Commission does, within limitations, have jurisdiction over generation facilities. Consequently, dispositions of interstate wholesale generation facilities valued above \$50,000 are subject to Section 203 review.

2. Precedent, legislative history, and case law all support jurisdiction

Because the plain meaning of Section 201 is clear and demonstrates that the Commission has jurisdiction over interstate wholesale generating facilities "as provided" in Parts II and III, including Section 203, the Commission should have granted the requested relief. Even if the statute were ambiguous, the Commission's interpretation would not be entitled to deference unless it were reasonable and the product of reasoned decisionmaking. As shown below, it is not.

The Commission has opined that "there is no precedent, legislative history, or case law which would support a contrary conclusion" (*id.*). But directly relevant

¹ The Commission acknowledges that it does have jurisdiction for those purposes. See Order at 5 n.12 (citing *Mississippi Indus. v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987)).

precedent, legislative history and case law do exist, and the Commission neither acknowledged them nor responded to them in a reasoned fashion.

a) Precedent and case law

The Commission erred in concluding that there exists no prior case law supportive of Petitioners' position. Petitioners did not invent their analysis of Section 201(b)(1) and the Commission's jurisdiction. It was set forth in 1941 by a unanimous Commission that (in the words of the U.S. Supreme Court) included "men intimately familiar with the background and history of the Act — Leland Olds, Basil Manly, Claude L. Draper, and Clyde L. Seavey."² In *Hartford Electric Light Co.*, that Commission expressly rejected the view that the Commission lacked any jurisdiction over generation:

Hartford urges [that]... it is exempt from our jurisdiction under section 201(b) of the Act, because the electrical facilities are in the nature of generating facilities or facilities used for local distribution. It argues that under section 201(e) of the Federal Power Act, a public utility is defined as "any person who owns or operates facilities subject to the jurisdiction of the Commission"; that under section 201(b) generating and local distribution facilities are excluded from our jurisdiction; that the facilities between the generators and the bushings on the wall of its steam generating plant are facilities used for generation and local distribution of electric energy; *ergo*, these facilities are not within our jurisdiction and, therefore, Hartford is not a public utility within the meaning of the Act.

* * *

... Hartford's contention is wrong in its analysis of Section 201 (b) of the Act. The first sentence of this section sets forth the scope of the operation of the Act, namely, that its provisions shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce. The first clause in the second sentence defines our jurisdiction over facilities. It

² *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).

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 359, 366-67 (1941).

The *Hartford* Commission’s interpretation was specifically adopted by the U.S. Court of Appeals for the Second Circuit, which found (a) that “the Commission, under § 201(b), has jurisdiction of generation facilities when used in connection with wholesale interstate sales, because jurisdiction of facilities for such sales is ‘specifically provided’ in that section,” and (b) that such jurisdiction authorizes the Commission, pursuant to FPA § 203, to review generation dispositions. *Hartford Electric Light Co. v. FPC*, 131 F.2d 953, 962-63 & n.20 (2d Cir. 1942).

Furthermore, any attempt to read the FPA text differently in this regard from the way the *Hartford* Commission did must confront the fact that, in drafting FPA Section 206(d), Congress referred expressly to the “production ... of electric energy by means of facilities under the jurisdiction of the Commission,” and conferred authority to investigate and 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 demonstrates two important points of Congressional intent. First, that there were to be “production ... facilities under the jurisdiction of the Commission.” Second, that the Commission’s jurisdiction over production facilities is not simply a function of — but rather extends beyond — its authority to set wholesale rates. Similarly, Section 207 authorizes the Commission to require that electric energy be generated, if the order does not “compel the enlargement of generating facilities” — *e.g.*, it authorizes the Commission to require sales from idle existing generation. *See Hartford*, 2 F.P.C. at 367. If the Commission lacked jurisdiction over generating facilities altogether, the more narrow anti-enlargement limitation would have been superfluous.

Nor does *Hartford* stand alone in acknowledging that the Commission has jurisdiction to review dispositions of interstate wholesale generating facilities. An even earlier case, *Baton Rouge Elec. Co. and Louisiana Steam Generating Corp.*, 1 F.P.C. 740, 740-41 (1938) found that “a steam generating plant” operated by Louisiana Steam Generating Corp. constituted a jurisdictional public utility facility whose disposition was subject to FPA § 203 review.³

Similarly, the Commission relied on the *Hartford* majority opinion in 1957 when it asserted jurisdiction over natural gas production facilities owned by Continental Oil

³ *See also City of Los Angeles v. Nevada-California Elec. Corp.*, 2 F.P.C. 104, 109 (1940) (stating that the previously disposed generating plant and other facilities of Los Angeles Gas and Electric Corporation “may have been subject to our jurisdiction under section 203 of the Federal Power Act”). Several intervenors in opposition relied on *West Tennessee Power & Light Co.*, 1 F.P.C. 766 (1938) as an example of an early disclaimer of § 203 jurisdiction over interstate wholesale generation. However, as detailed in Petitioners’ tendered March 30, 1999 Answer (at 16-17), *West Tennessee* refrained from asserting jurisdiction only as to “local” generation facilities, *i.e.*, those not viewed as facilities for interstate wholesales. Thus, that case did not hold that the Commission lacks authority over dispositions of *interstate wholesale* generating facilities.

Company. *See Continental Oil Co.*, 18 F.P.C. 296 at 299, *order on reh'g*, 18 F.P.C. 528 (1957), *aff'd*, 266 F.2d 208 (5th Cir. 1959). Citing *Hartford*, the Commission held that it had jurisdiction over facilities used to effectuate interstate wholesales even if the facilities were production facilities.⁴ 18 F.P.C. at 299-300. The Commission reached that decision even though the Natural Gas Act's jurisdictional provisions lack language corresponding to the phrases inserted into the Federal Power Act to clarify that the Commission possesses jurisdiction over generation for some purposes. *Compare* 16 U.S.C. § 824 *with* 15 U.S.C. § 717; *see generally* Petition for Declaratory Order at 8 (discussing legislative history and H. Rep. No. 1903, 74th Cong. 1st Sess. 74 (1935); Part b), *infra*.

More recently, the Commission and D.C. Circuit decisions in the *Grand Gulf* case⁵ reaffirmed the proposition that interstate wholesale generating facilities are jurisdictional. In that case, the Commission had 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. We thus rejected 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*.

Middle South Energy, 32 F.E.R.C. at 61,948 (emphasis added). The D.C. Circuit affirmed this holding:

⁴ The Fifth Circuit noted the Commission's holding with approval, 266 F.2d at 210-11, and even cited *Hartford* itself, *id.* at 211 n.4, but went on to affirm the Commission on different grounds.

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, vacated in other part and remanded*, 822 F.2d 1105 (D.C. Cir. 1987).

The facts here reveal that MSE sells Grand Gulf's energy ... at wholesale in interstate commerce. Thus, under Section 201 of the Act, MSE is a "public utility," and FERC retains jurisdiction over its sales *and facilities*.

Mississippi Industries, 808 F.2d at 1540 (emphasis added).

Reviewing the language of the statute, the D.C. Circuit specifically emphasized that Section 201(b)'s "except" phrase preserved federal jurisdiction over generation "as specifically provided" in FPA Parts II-III. *See* 808 F.2d at 1543 (quoting Section 201(b) and italicizing the "except" phrase). The court then noted that the FPA declares "federal regulation of matters relating to generation to the extent provided in [Parts II and III]" to be necessary in the public interest. *Id.* While the Commission's actions involved a regulation of rates, the court was clear that the regulation of rates did involve an exercise of jurisdiction over the relevant facilities. The court agreed with the Commission's observation that "allocating cost does, to some extent, result in the 'regulation of matters relating to generation.'" *Id.* But the court deemed such regulation permissible because "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 (emphasis added, internal quotation omitted). The D.C. Circuit acknowledged that the Commission *had* exercised jurisdiction over generation; it just had not done so "in any way that violates the FPA." *Id.* at 1543. Indeed, the D.C. Circuit characterized prior case law as having "accept[ed] 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." *Id.* at 1544-45.

Thus, contrary to the Order's characterization (at 5 n.12) of *Mississippi Industries*, that case did not merely "uphold[] the Commission's jurisdiction over generation facilities for ratemaking purposes, where the allocation of power from, or costs relating to, generating facilities affect or are the subject of interstate wholesale rates." Rather, it found that Grand Gulf I generation facilities constituted jurisdictional facilities, which made MSE a jurisdictional "public utility."

The Commission is bound by these cases. Where courts have spoken to the meaning of a regulatory statute, their interpretation has the force of *stare decisis* and the Commission is not free to depart therefrom. *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *see also Bankers Trust New York Corp. v. United States*, 2000 WL 1346141 at 7 (Fed. Cir. 2000). As to the issue presented here, the courts have held that the Commission has jurisdiction over generating facilities used in connection with wholesale sales and that such jurisdiction extends to Section 203 review of generation-asset dispositions. The Commission erred in reaching a contrary result.

b) Legislative History

The Commission also erred in concluding (Order at 5) that no legislative history supports Petitioners' position. As prepared by the Federal Power Commission and submitted to Congress (in February 1935, as part of S.1725, which also included the Public Utility Holding Company Act), Part II of the FPA began with a statement that

The provisions of this title shall apply 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. *The Commission shall have jurisdiction over all facilities for such transmission, sale, and/or production of energy by any means* and over all facilities connected therewith as parts of a system of power transmission

situated in more than one State, 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.

S.1725, 74th Cong. Part II, § 201(a) (emphasis added). *See also Federal Water Power Act, 1935*: Hearings on H.R. 5423 Before the House Interstate & Foreign Commerce Comm., 74th Cong. 385 (statement of FPC Commissioner Seavey) (stating that the Commission’s expanded jurisdiction would cover “the production of energy for such [interstate commerce] transmission and sale”); *id.* at 549-50, 570 (testimony of FPC Solicitor DeVane), discussed *infra*.

The Senate Commerce Committee reported out FPA Part II under a substitute bill numbered S.2796. It left unchanged the language underlined above, while simplifying and clarifying the clauses that came after it to exclude federal jurisdiction over “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)(emphasis added).

This language — the progenitor of the “but” clause — came directly from NARUC comments.⁶ Those same comments expressly *supported* federal jurisdiction over “all facilities for such [interstate wholesale] transmission, sale, and/or production of energy by any means.” NARUC Comments at 748.

⁶ *See Public Utility Holding Company Act, 1935*: Hearings Before the Senate Interstate Commerce Comm., 74th Cong. 748 (statement of H. Lester Hooker, Chairman of the NARUC Legislative Comm.). In construing FPA § 203, the Supreme Court has noted that the NARUC comments were influential in delineating the bounds of federal jurisdiction. *Jersey Central Power & Light Co. v. FPC*, 319 U.S. 61, 77 n.23 (1943). NARUC then stood for the National Association of Railroad and Utilities Commissioners.

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 Section 203, numbered Section 205 during the mark-up) 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 necessary to effectively carry out regional planning and coordination." *Id.* at 560.

As noted above, the Senate followed the NARUC/DeVane approach. Its Commerce Committee Report explained:

Jurisdiction is asserted also [in addition to rate jurisdiction over wholesale sales] over all interstate transmission lines whether or not there is sale of the energy carried by those lines *and over the generating facilities which produce energy for interstate transmission and sale. It is obvious that no steps can be taken to secure the planned coordination of this industry on a regional scale unless all of the facilities, other than those used solely for retail distribution, are made subject to the jurisdiction of the Commission.* Facilities used only for intrastate commerce or local distribution are expressly excluded from the operation of the act.

.... The physical inseparability of generation and transmission, the fact that one cannot take place without the other, makes regulation of transmission impossible unless generation is also controlled.

S. Rep. No. 621 at 48-49 (1935) (emphasis added).

The House of Representatives initially took a different approach. Its Commerce Committee proposed to amend the Senate bill to wholly remove federal jurisdiction over generating facilities, by adding a broadly worded proviso that the federal Commission “shall not have jurisdiction over facilities used for the generation of electric energy.” 79 Cong. Rec. S1960 (1935) (reporting House-passed version).⁷ Although this amendment initially passed the House, the House-Senate Conference Committee significantly altered it so as to preserve NARUC’s and the Senate’s intent to assert federal jurisdiction over generating facilities used for interstate wholesale sales.

Specifically, the Conference Committee added the “except phrase,” which was enacted and remains in § 201(b) today:

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...*

⁷ The amendment was motivated principally by concern that federal jurisdiction over generating facilities might not be constitutional, and secondarily by the fact that “over 82 percent” of electric energy was then consumed within the state where it was produced. 79 Cong. Rec. H10377-78 (1935) (statement of Rep. Lea) (June 28, 1935). (Given today’s constitutional jurisprudence and interstate bulk power markets, neither concern would have any force were Congress to face these issues today.) The House amendment also was intended to be sensitive to state commission comments, *id.* at 10384, but in fact NARUC’s comments supported federal jurisdiction over interstate wholesale generation, as discussed above.

Federal Power Act § 201(b)(1), 16 U.S.C.S. § 824(b)(1) (1998) (emphasis added).⁸ The Conference Committee Report described the except phrase as “a clarifying phrase added to remove any doubt as to the Commission’s jurisdiction over facilities used for the generation and local distribution of electric energy to the extent provided in other sections of this part and the part next following.” H. R. Rep. No. 1903 at 74 (1935).

The Conference Committee also made a parallel change to § 201(a). *Id.* As amended in conference and enacted, § 201(a) declares it necessary in the public interest to institute “Federal regulation *of matters relating to generation* to the extent provided in this Part and the Part next following *and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce.*”⁹ The Commission’s position would abdicate the generation-related regulation that Congress expressly declared necessary.

In short, the Conference report and other legislative history “remove any doubt” that the Commission has jurisdiction to exercise, as to interstate wholesale generation facilities, the substantive powers granted elsewhere in FPA Parts II-III.

3. The Commission cannot rely on its repeated conclusory disclaimers of jurisdiction

Rather than addressing the precedent and legislative history Petitioners cite, the Commission ignored that material and relied on the fact that it “has repeatedly held that

⁸ For ease of reference, Petitioners refer to the entire italicized phrase as the “but” clause, and to the underlined phrase (“except as specifically provided in this Part and the Part next following”) as the “except” phrase.

⁹ See also *Mississippi Industries*, 808 F.2d at 1543 (relying on the Conference Report to conclude that FPA § 201(b) does give FERC “jurisdiction over generating facilities” to the extent of the substantive powers conferred by subsequent sections of FPA Parts II and III).

section 203 does not apply to dispositions of only generation facilities.”¹⁰ Petitioners have acknowledged from the outset that several decades after the FPA was enacted (and after living memories of its legislative history had faded) a line of Commission decisions arose that held against Commission jurisdiction of generation dispositions. However, the Commission cannot justify its action here by relying on those cases, because they suffer from the same flaws as the instant Order. They depart from Commission precedent and appellate case law without either acknowledging that authority or offering reasoned explanations for departing therefrom.

Each of the four cases collected in footnote 10 of the Order as representative examples of the Commission’s repeated holdings disclaiming jurisdiction was (a) acknowledged (along with other such cases) in Petitioners’ opening pleadings, and (b) devoid of any analysis of the parsing, history, or judicial construction of the relevant statutory language. They simply collect prior cases where the Commission announced the conclusion that it lacked such jurisdiction.¹¹ The treatment of this point on appeal from *Consumers Power Co.*, 53 F.E.R.C. 61,382 (1990), was similarly conclusory.¹²

¹⁰ Order at 4 & n.10 (emphasis added) (citing four cases: “See, e.g., Duquesne Light Company, 84 FERC ¶ 61,309, 62,406 (1998); Entergy Services, Inc., 51 FERC ¶ 61,376, 62,285-86 at n.27, reh’g denied, 52 FERC ¶ 61,317 (1990); United Illuminating Company, 29 FERC ¶ 61,270, 61,558 (1984).”)

¹¹ *United Illuminating*, 29 FERC at 61,558-59 & n.1, does cite *Hartford*, but only as a “cf.” cite for the proposition that “a lease may have characteristics similar to those of a jurisdictional unit sale of power.” Nowhere does it grapple with the majority holding of *Hartford*, 131 F.2d at 961, that “generation facilities, when used as aids to such sales [wholesales in interstate commerce], are within the Commission’s jurisdiction under § 201(b).”

¹² The appeal from *Consumers*, namely *Michigan Public Power Agency v. FERC*, 963 F.2d 1574 (D.C. Cir. 1992), concerned whether the Commission could and should have ordered a transmission-access or ownership remedy. All appellate parties simply left unchallenged the assumption that, as the Commission had held below, it lacked jurisdiction over sales of generation facilities themselves. Indeed, none of the appellate briefs even cited *Hartford* or *Mississippi Industries*. The only party who even touched on the jurisdictional issue was the Commission, whose entire discussion of the subject consisted of the following short paragraph:

Tracing the chain of conclusory citations back to its source leads to *Arizona Public Serv. Co.*, 32 F.P.C. 1525 (1964). *Arizona* concerned a facility located in McNary, Arizona that had generated industrial steam, 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 ("the 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 Commission order cites no cases or legislative history.

Given its uncontested genesis and shallow analysis, *Arizona* would hardly be compelling authority even if it did hold that interstate wholesale generating facility dispositions were 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. 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). If McNary was then connected at all to the interstate

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).

FERC Brief at 32, ellipses in original brief. No party to the appeal took issue with this conclusory statement. Accordingly, the Court's passing statement that the Palisades generating plant sale was "one over which FERC does not even have jurisdiction," 963 F.2d at 1582, hardly constitutes a considered overruling of the same Court's jurisdictional affirmance in *Mississippi Industries* or a considered conflict with the Second Circuit's jurisdictional affirmance in *Hartford*.

transmission grid, it was as a load center at the end of radially situated transmission.¹³ The brief *Arizona* order contains no indication that the 8 MW facility was viewed as generating power that flowed out of the load center and thence to sale at wholesale in interstate commerce.

In short, none of the cases cited in the Commission's Order provide an adequate justification for departing from *other* Commission cases and appellate case law holding that the Commission has jurisdiction to review dispositions of interstate wholesale generating facilities. If the Commission was going to depart from those decisions it was obliged — and remains obliged — both to acknowledge its change of course and to offer a reasoned explanation for that departure. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970). The Commission cannot bootstrap its Order here, and avoid the obligation of reasoned decisionmaking, by relying on previous cases that themselves failed to take account of Commission and appellate precedent.

B. The Commission May Have Erred in Misconstruing the Relief Requested by Petitioners

The Petition filed by APPA and Citizen Power made plain their contention that Sections 201 and 203 give the Commission jurisdiction to review the disposition of generating facilities *used to produce electricity sold at wholesale in interstate commerce*. Moreover, the Duquesne and FirstEnergy cases (Docket Nos. EL99-40 and EL00-94) directly involve dispositions of generating facilities long used to produce electricity sold at wholesale in interstate commerce. Nevertheless, the Commission supports its Order by

¹³ Petitioners have not been able to ascertain the precise situation in 1964, but have seen that on the April 1970 Arizona Public Service Company System Map published in the 1971 edition of MOODY'S PUBLIC UTILITY MANUAL (the oldest edition readily available to the Petitioners) at 835, the McNary area was at the very end of a radial pair of lines, and not otherwise connected to the grid.

asserting that “[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.” Order at 5.

The point of this very terse statement is not clear, but it may indicate that the Commission has misconstrued the relief requested. Perhaps the Commission meant to observe that some generation facilities (*e.g.*, those in Alaska, Hawaii, or ERCOT) may have no connection to sales at wholesale in interstate commerce and thus would be outside the purview of Section 203 review. That would be true, but inapposite to the issue in dispute. Petitioners have not asked the Commission to declare that it has jurisdiction to review dispositions of *all* generating facilities. Petitioners’ position has been and remains that the Commission has jurisdiction over generation facilities used for *interstate wholesale* transactions. Thus, if the Commission’s Order rests on a misapprehension of the relief requested, the Order should be modified to grant the more limited declaration Petitioners actually sought.

Alternatively, perhaps the Commission’s point was that the disposition of a generating facilities might be structured so as not to affect sales of the output of those facilities. Again, that is true, but not significant. A merger can be structured so as not to affect sales by the merging companies, but that has never been considered a reason to deny jurisdiction over mergers. To the contrary, the Commission exercises its public interest jurisdiction over mergers so as to ensure that, among other things, wholesale customers are held harmless. Certainly it is possible that a generation facility disposition *can* affect sales of the output of the disposed facility, *e.g.*, if the new owner is financially unstable, or if the contract is for a percentage of unit power as available, and the new

owner will change operational practices that affect when and at what output level the disposed unit produces power.

Or perhaps the point was that a facility disposition is not itself a sale of energy output. Again, that is true, but not significant. The Commission's authority as to jurisdictional facilities goes beyond regulating sales of their output. A public utility's sale of a transmission facility is not itself a sale of transmission service, but is subject to § 203 review; a public utility's security issuance is not itself a sale of service, but is subject to § 204 review.

Lastly, perhaps the point was that a sale of an interstate wholesale generating facility can be structured to exclude its associated facilities, such as generation step-up transformers, that the Commission now treats as generation for rate purposes but as transmission for jurisdictional purposes. *See, e.g., Kentucky Utils. Co.*, Opinion No. 432, 85 F.E.R.C. ¶ 61,274 at 62,112 n.37 (1998). If so, that would be a statement of the conclusion that interstate wholesale generators are not jurisdictional facilities, not a statement of a reason for reaching that conclusion.

C. Petitioners' Answers to Various Motions and Intertwined Other Pleadings Should Have Been Accepted for Consideration

The Order also indicated that the Commission declined to accept a number of pleadings filed in the above-captioned dockets. Among the pleadings rejected were a March 30, 1999 Answer filed by APPA and Citizen Power in Docket No. EL99-40-000, a March 30, 1999 Answer filed by Citizen Power in Docket No. EL99-39-000, and an August 30, 2000 Answer filed by Citizen Power in Docket No. EL00-94-000. As the Order notes, Rule 213(a) of the Commission's Rules of Practice and Procedure prohibits answers to protests and answers to answers unless otherwise authorized.

However, as discussed in the pleadings themselves, those rejected answers responded not only to protests and answers but to motions and requests for summary dismissal that were intertwined with them. For example, the pleadings filed by Duquesne Light Company (“Duquesne”), the Electric Power Supply Association (“EPSA”), and the Arizona Public Service Company (“AzPS”) in Docket No. EL99-40-000 contained within their protests explicit requests for summary dismissal or rejection. *See, e.g.*, Duquesne at 2, 11; EPSA at 8; AzPS at 9-10.¹⁴ These requests, which Petitioners had a right to answer (*see* 18 C.F.R. § 385.213(a)(3)), endorsed and relied upon the same statutory construction advanced by the Edison Electric Institute in its protest and contained largely parallel arguments.

The Commission therefore should have accepted the answers tendered by APPA and Citizen Power, either as responses as-of-right to motions to dismiss or as a matter of discretion to aid its resolution of an important matter. *See, e.g., Arizona Public Service Co.*, 82 F.E.R.C. ¶ 61,132 at 61,497 n.30 (1998) (accepting an answer “because it helps clarify the matters under discussion”); *Union Electric Co.*, 58 F.E.R.C. ¶ 61,247 at 61,815 (1992) (accepting answer to a protest because it provided useful information); *North Carolina Municipal Power Agency v. Duke Power Co.*, 40 F.E.R.C. ¶ 61,138 at 61,404 (1987) (finding it in the public interest to permit all salient issues to be raised at the pleadings stage of that proceeding); *Ohio Power Co.*, 46 F.E.R.C. ¶ 61,180 at 61,595 (1992) (“the filing at issue here is complex and our resolution of the issues is aided by

¹⁴ Similarly, Duquesne Light Company’s March 15, 1999 Answer to Citizen Power’s Complaint in Docket No. EL00-39-000 requested (at 11) that the Commission dismiss the complaint summarily. In its Answer to Duquesne Light Company’s Motion for Summary Dismissal, Citizen Power therefore noted (at 2) that it had a “right to respond pursuant to Rule 213(a)(3).” Likewise, FirstEnergy’s August 15, 2000 Answer to

[the answer to the protest]”); *Arizona Public Service Co.*, 48 F.E.R.C. ¶ 61,075 (1989) (answer to protest accepted because it aided the Commission’s consideration of the issues); *Vermont Elec. Power Co.*, 48 F.E.R.C. ¶ 61,330 at 62,085 (1989) (same).

III. CONCLUSION

The issue presented here is simply the threshold jurisdictional question whether the Commission has any direct authority to consider conditioning or disapproving dispositions of interstate wholesale generation. There may well be specific dispositions, or even entire categories of dispositions, that the Commission could justifiably find to be incapable of injuring the public interest. But even the most ardent supporter of generation consolidation can imagine a situation in which a disposition would warrant federal Commission scrutiny. There have already been widespread sales of generating capacity, as shown by the EEI survey of 32 announced divestitures referenced in the Petition (at 23-24) and by the EPSA compilation (appended to EPSA’s March 15 pleading) of 70+ gigawatts of generation currently being divested by 26 utilities. These sales are likely to accelerate, and the absence of a transmission facility “hook” for Commission review is likely to become increasingly common as the industry restructures to separate generation ownership from transmission ownership. Suppose that two generation-only companies, having each previously divested their transmission facilities to a Regional Transmission Organization as encouraged by the Commission’s Order No. 2000,¹⁵ come to control a region’s entire interstate wholesale generating business, and

Citizen Power’s complaint (at 1-2) in Docket EL00-94-000 moved to dismiss the complaint on the grounds that it failed to state a claim on which relief could be granted, and Citizen Power had a right to respond.

¹⁵ *Regional Transmission Organizations*, Order No. 2000, [1996-2000 Regs. Preambles] F.E.R.C. Stats. & Regs. ¶ 31,089 (1999), *order on reh’g*, Order No. 2000-A, [1996-2000 Regs. Preambles] F.E.R.C. Stats. &

one proposes to sell its generating facilities to the other. Should this Commission have no Section 203 opportunity to review the disposition's consistency with the public interest?

The Commission should make clear that it does have such jurisdiction. Setting aside the fact that the Commission cannot simply define away jurisdiction conferred by Congress, it makes no sense, from a policy perspective, to review mergers while ignoring other forms of generation asset transfers. To scrutinize the effect on competition in one instance but not the other, when both types of transactions can produce the same generation market power, is a flawed policy indeed. It elevates form over substance and fails to protect the public interest.

For the foregoing reasons, the Commission should have granted, and should promptly proceed to grant on rehearing, the requested complaint predicate and Declaration: that the Commission has jurisdiction to review, under Section 203 of the Federal Power Act, proposed dispositions of interstate wholesale generating facilities with a value above \$50,000.

Respectfully submitted this 9th Day of March, 2001,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 9th day of March, 2001, caused the foregoing document to be sent by first class mail to all parties on the list compiled by the Secretary of the Commission in this proceeding.

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