

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

In the Matter of JEA

)

Docket No. EL18-200-000

**JOINT PROTEST OF
THE AMERICAN PUBLIC POWER ASSOCIATION,
THE LARGE PUBLIC POWER COUNCIL,
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
AND THE TRANSMISSION ACCESS POLICY STUDY GROUP**

Pursuant to the September 18, 2018, notice issued by the Federal Energy Regulatory Commission (“Commission” or “FERC”) in the above-captioned proceeding, the American Public Power Association (“APPA”), the Large Public Power Council (“LPPC”), the National Rural Electric Cooperative Association (“NRECA”), and the Transmission Access Policy Study Group (“TAPS”) (collectively, “Public Power Associations”) hereby file this joint protest in response to JEA’s September 17, 2018, petition for declaratory order (“Petition”).¹ As discussed below, the Commission should deny the Petition.

I. INTRODUCTION

It is with regret that the Public Power Associations are compelled to intervene in this matter and protest the Petition filed by JEA, a public power utility serving the City of Jacksonville, Florida and surrounding area.² The Public Power Associations take no position on the underlying dispute between JEA and the Municipal Electric Authority of Georgia (“MEAG Power”) regarding the parties’ respective rights and obligations under the Amended and Restated Power Purchase Agreement (“PPA”) between them. The legal issues raised by the Petition

¹ Petition for Declaratory Order of JEA Regarding the Jurisdictional Nature of a Power Purchase Agreement Under the Federal Power Act (Sept. 17, 2018), eLibrary No. 20180917-5182 (“Petition”). Each of the Public Power Associations has filed separate motions to intervene in this docket.

² JEA was formerly known as the Jacksonville Electric Authority.

relating to the Commission’s jurisdiction, however, are of profound importance – and concern – to the Public Power Associations and their members.

The principal argument raised in the Petition – that the Commission has jurisdiction over the PPA based on the nature of the underlying transaction notwithstanding the fact the seller is a Federal Power Act (“FPA” or “Act”) section 201(f) entity – is contrary to the plain language of the statute, has been soundly rejected by the courts, and is contrary to long-standing Commission precedent. Of particular significance are the Ninth Circuit’s 2005 decision in *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005) (“*Bonneville*”), and the D.C. Circuit’s subsequent ruling in *Transmission Agency of Northern California v. FERC*, 495 F.3d 663 (D.C. Cir. 2007) (“*TANC*”), neither of which is cited in the Petition.³ These cases are compelling authority that the general grant of jurisdiction over wholesale sales in interstate commerce contained in FPA section 201(b) does not override the specific jurisdictional exclusions for municipal and cooperative utilities reflected in section 201(f), section 205, and section 206.⁴

The exclusion of public power utilities from the Commission’s jurisdiction over wholesale sales, moreover, does not leave a “regulatory gap,” as JEA contends. Because the plain language of FPA sections 201(f) and 205 bars the relief JEA seeks, there is no gap to fill. Congress is well aware that public power utilities engage in interstate sales of wholesale power but has chosen to expressly deprive the Commission of jurisdiction over those transactions, except in the narrow circumstances not relevant here of short-term sales by certain 201(f) entities

³ See also *Delta-Montrose Elec. Ass’n*, 151 FERC ¶ 61,238 (denying request for Commission declaration of jurisdiction over wholesale requirements contract between 201(f) entities), *reh’g denied*, 153 FERC ¶ 61,028 (2015).

⁴ Municipal utilities and cooperative utilities are sometimes collectively referred to herein as “public power utilities.”

through organized markets.⁵ Even if there were a regulatory gap in this situation, “it would not be of the sort Congress was worried about in enacting” the FPA.⁶

JEA’s disclaimers notwithstanding, the jurisdictional arguments made in the Petition, were they to be accepted by the Commission, would be unlikely to remain restricted to the specific factual circumstances of the PPA. Commission endorsement of JEA’s erroneous arguments would create uncertainty over potential Commission regulation of an untold number of public power transactions and activities long acknowledged to be outside the scope of the FPA.⁷ Such a significant and unanticipated expansion of the Commission’s regulatory activities in contravention of unambiguous statutory limitations would upset long-settled expectations of market participants and the financial community.

II. DESCRIPTION OF THE PETITION

JEA and MEAG Power are parties to the PPA, under which MEAG Power has agreed to sell JEA a portion of the output of Plant Vogtle Units 3 and 4 (“Vogtle Units”), currently under construction in Burke County, Georgia.⁸ The output will be transmitted from Georgia to Florida and resold by JEA. Citing these arrangements, the Petition asserts that “the transactions contemplated under the PPA involve the sale at wholesale in interstate commerce by MEAG to JEA of electricity, capacity and ancillary services”⁹ The Petition acknowledges that the exemption contained in FPA section 201(f) applies to both MEAG Power and JEA, but claims

⁵ FPA Section 206(e), 16 U.S.C. § 824e(e).

⁶ *City of Clarksville v. FERC*, 888 F.3d 477, 485 (D.C. Cir. 2018) (rejecting argument that Commission regulation of interstate sale and transportation of natural gas by a municipal gas company under the Natural Gas Act (“NGA”) was justified by the need to avoid a regulatory gap).

⁷ Including perhaps, on a retroactive basis never contemplated by the contracting parties.

⁸ *See* Petition at 3-6.

⁹ *Id.* at 1.

that the exemption “is not relevant to the jurisdictional nature of the PPA as a facility for the sale of energy at wholesale in interstate commerce.”¹⁰

The Petition contends that particular features of the PPA, the status of the Vogtle Units, and the pendency of litigation between JEA and MEAG Power support the need for the Commission to assert jurisdiction over the PPA.¹¹ JEA states in this regard that its “Petition is expressly tailored to the specific facts and circumstances associated with this specific PPA between MEAG and JEA.”¹² The Petition asserts that “JEA is not seeking a blanket declaration of jurisdiction on any other PPA or wholesale transaction between other public entities or any other party.”¹³

Despite JEA’s claim of case-specific facts and circumstances, it is difficult to see how the legal issue it raises can be cabined. The Petition requests a determination that the Commission has “jurisdiction over the PPA (and the transactions therein) under Section 201(b)(1) of the FPA, even though MEAG and JEA are each exempt from regulation by the Commission as ‘public utilities’ under Section 201(f) of the FPA[.]”¹⁴ More specifically, JEA asks the Commission to issue an order:

1. [D]eclaring that the PPA and the underlying sale of electric energy and related products by MEAG to JEA are wholesale transactions in interstate commerce, and are thus subject to the Commission’s exclusive jurisdiction under FPA Section 201(b);
2. Declaring the PPA between MEAG and JEA is a “facility” for such wholesale transactions in interstate commerce, and [is] thus subject to the Commission’s exclusive jurisdiction under FPA Section 201(b); and

¹⁰ *Id.* at 2.

¹¹ *Id.* at 8.

¹² *Id.* at 2.

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 2.

3. Finding that, as a facility for such wholesale transactions in interstate commerce, MEAG is obligated as the Seller to present the PPA to the Commission for review and approval under the FPA.¹⁵

III. PROTEST

A. The Commission’s General Jurisdiction over Interstate Wholesale Sales Does Not Override the FPA’s Specific Exclusions for Public Power Utilities

The Commission “is a creature of statute” and “has no power to act . . . unless and until Congress confers power upon it.”¹⁶ The Commission cannot grant the relief JEA seeks because the FPA precludes it.

1. The Relief JEA Seeks Is Contrary to the Plain Language of the FPA

Although JEA grounds its argument in the language of section 201(b), the relief it seeks requires the exercise of the Commission’s authority under FPA section 205. JEA asks the Commission for a declaration that the PPA is subject to its jurisdiction and, thus, that “MEAG is obligated as the Seller to present the PPA to the Commission for review and approval under the FPA.”¹⁷ JEA argues that such review is necessary to “ensure that the rates, terms and conditions contained within the PPA (along with their implementation by MEAG) are ‘just and reasonable’ and are not ‘unduly discriminatory or preferential.’”¹⁸ The obligation to file wholesale sales agreements for review and approval by the Commission to ensure they are just and reasonable resides in FPA section 205. The language of section 205, construed in light of section 201(f) and the exclusion of public power utilities from the FPA’s definition of public utility, is fatal to JEA’s petition.

¹⁵ *Id.* at 15-16.

¹⁶ *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004).

¹⁷ Petition at 16.

¹⁸ *Id.* at 15; *see also id.* at 13 (suggesting that the Commission should “assert its exclusive jurisdiction over MEAG’s interstate sale of electricity at wholesale to JEA under the PPA, and its exclusive jurisdiction under FPA Sections 205 and 206 to review the terms and conditions associated with that interstate sale by MEAG”).

Section 205 restricts the Commission’s rate review authority of wholesale sales of electric energy to those made “by any public utility.”¹⁹ The Commission cannot regulate MEAG Power’s wholesale sales under the PPA because MEAG Power is not a public utility within the meaning of the statute. JEA concedes that MEAG Power is not a “public utility” as defined in the FPA, but denies the implications.²⁰ By itself, the limited reach of section 205 warrants dismissal of JEA’s Petition.²¹

Reading section 205 in conjunction with section 201(f) just as definitively compels denial of the relief sought. The Petition acknowledges that MEAG Power falls within the scope of FPA section 201(f),²² which states that “[n]o provision in [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, . . . unless such provision makes specific reference thereto.”²³ As the Ninth Circuit has observed, “[t]he sweep of this exemption is huge. Nothing in subchapter II applies to the United States or any

¹⁹ 16 U.S.C. § 824d(a).

²⁰ See Petition at 11. The FPA defines “public utility” as “any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter” 16 U.S.C. § 824(e). This definition requires a public utility to be a “person,” which the FPA defines as “an individual or a corporation.” 16 U.S.C. § 796(4). The FPA’s definition of “corporation,” however, specifically excludes “municipalities.” The FPA defines “corporation” as: “any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include ‘municipalities’ as hereinafter defined.” 16 U.S.C. § 796(3). The Act, in turn, defines “municipality” to mean: “a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.” 16 U.S.C. § 796(7). Thus, a municipality is not a “corporation,” and by turn not a “person,” and therefore not a “public utility” under the FPA. See, e.g., *Bonneville*, 422 F.3d at 916-917. As an instrumentality of the State of Georgia, MEAG Power is not a “public utility” as defined in the FPA. Electric cooperatives that receive financing from the Rural Utilities Service (“RUS”) have long been deemed not to be “public utilities” under the FPA. See, e.g., *Bonneville*, 422 F.3d at 918 n.8 (and FERC orders cited therein). Under amendments included in the Energy Policy Act of 2005, RUS-financed electric cooperatives and those selling less than 4,000,000 megawatt hours of electricity per year are also among the entities generally excluded from the Commission’s authority by FPA section 201(f). See 16 U.S.C. § 824(f).

²¹ This accords fully with the D.C. Circuit’s recent decision in *City of Clarksville*, 888 F.3d 477, where the court held that FERC could not exercise regulatory jurisdiction over a municipality’s interstate sales of natural gas because it was not a regulated natural gas company within the meaning of the NGA.

²² Petition at 2.

²³ 16 U.S.C. § 824(f).

state, including any political subdivision, unless the statute makes specific reference to any of these entities.”²⁴ There is no language in section 205 (or anywhere else in the statute) that surmounts the jurisdictional exclusion of section 201(f) to grant the Commission regulatory authority over MEAG Power’s sales to JEA under the PPA.

Disregarding this straightforward jurisdictional framework, the Petition focuses almost exclusively on the language in FPA section 201(b), which states that the provisions of Part II of the Act “shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce”²⁵ The Petition also asserts, with no elaboration or supporting citations, that the PPA is a “facility” subject to the Commission’s jurisdiction under FPA section 201(b).²⁶ The Petition’s core contention is that section 201(b) gives the Commission jurisdiction over wholesale sales in interstate commerce, and “[o]nce electricity or natural gas is placed in interstate commerce, the Commission has jurisdiction over that sale – *regardless of the parties involved.*”²⁷ Notwithstanding that the wholesale sales at issue will be made by an instrumentality of the State of Georgia (MEAG Power), JEA asserts that the Commission has jurisdiction over the PPA because it provides for wholesale sales in interstate commerce. The broad exemption granted to governmental entities under FPA section 201(f), the

²⁴ *Bonneville*, 422 F.3d at 915; *see also TANC*, 495 F.3d at 674 (stating that “Section 201(f) of the FPA unequivocally exempts from subchapter II ‘any political subdivision of a State . . . unless [included by] specific reference’” (alterations in original)).

²⁵ 16 U.S.C. § 824(b)(1). *See also* Petition at 9-11.

²⁶ *See* Petition at 12.

²⁷ *Id.* at 11 (emphasis added). Indeed, the heading for the relevant section of the Petition states: “In reviewing its jurisdiction under FPA § 201(b), the Commission looks to the nature of the underlying transaction, and not the entities involved.” *Id.*

Petition argues, “is not relevant to the jurisdictional nature of the PPA as a facility for the sale of energy at wholesale in interstate commerce.”²⁸

JEA’s argument violates the core canons of statutory construction. The Petition’s only answer to section 201(f) is to read it out of the statute. That is impermissible. It is the tribunal’s “duty ‘to give effect, if possible, to every clause and word of a statute.’”²⁹ This rule has particular import when a statutory term, such as section 201(f), occupies a “pivotal . . . place in the statutory scheme.”³⁰ JEA’s singular focus on section 201(b) also runs afoul of the basic precepts that a statute is to be read as a whole, and that the specific prevails over the general. Section 201(b) does not exist in a vacuum and cannot be used to override the regulatory demarcations of sections 201(f), 205, and 206. Here, the Commission should give effect to section 201(f) and the statute as a whole by denying the Petition and acknowledging that it does not have authority to exercise jurisdiction over the PPA.

2. JEA’s Position Is Contrary to Precedent

JEA’s position that FPA section 201(b) confers jurisdiction on the Commission based on the nature of the underlying transaction, *regardless* of the identity of the entities involved, has been soundly rejected by the courts, most notably by the Ninth Circuit in *Bonneville*.³¹ That case involved a challenge by Bonneville Power Administration and public power utilities to Commission orders directing them to pay refunds on sales that they had made into the California

²⁸ *Id.* at 2. In asserting that FPA section 201(f) is “simply not relevant,” the Petition (at 11) claims that “the Commission has found on numerous occasions that public entities are in fact subject to the FPA to the extent they avail themselves of interstate transactions.” However this statement is not supported by a single citation to an order where the Commission has made such a finding.

²⁹ *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menache*, 348 U.S. 528, 538-39 (1955)).

³⁰ *Id.*

³¹ *Bonneville*, 422 F.3d at 911, 914-23; *see also, e.g., Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator*, 561 F.3d 904, 918 (8th Cir. 2009); *TANC*, 495 F.3d at 674-75; *City of Clarksville*, 888 F.3d at 483-84 (interpreting equivalent provisions of the NGA).

ISO and California Power Exchange spot markets during the period of severe market dysfunction in 2000-2001.³² The public power utilities argued that, as FPA section 201(f) entities and/or entities that fell outside the FPA's definition of public utility, they were not subject to the Commission's refund authority under Part II of the FPA. The Commission sought to defend its refund orders based on the jurisdictional grant over wholesale sales under FPA section 201(b)(1).³³ Framing the issue similar to the way JEA does here, the Ninth Circuit in *Bonneville* stated:³⁴

The dispute centers on whether the general applicability of the FPA to "the sale of electric energy at wholesale in interstate commerce," contained in § 201(b)(1), overrides more specific FPA provisions that exclude non-public utilities and governmental entities from FERC's authority to enforce just and reasonable rates and to order refunds. *See* §§ 201(f), 205, and 206.

The court in *Bonneville* concluded that the general grant of jurisdiction in FPA section 201(b) could not override the specific exemptions from FERC authority for FPA section 201(f) entities and/or entities that are not public utilities as defined in the FPA.³⁵ The Commission's authority to order refunds for unjust and unreasonable rates, the court reasoned, was based on provisions in Part II of the FPA that could not be applied to such entities. Relying on the "basic principle of statutory construction . . . that the specific prevails over the general,"³⁶ the court concluded that the specific statutory exemption for governmental entities in FPA section 201(f) cabined the more general statement of the Commission's authority in section 201(b). Accepting the Commission's interpretation, the court remarked, "could . . . render a nullity multiple

³² *See Bonneville*, 422 F.3d at 911-14.

³³ *See id.* at 916.

³⁴ *Id.* at 914-15.

³⁵ *Id.* at 911, 916, 920.

³⁶ *Id.* at 916.

provisions of the FPA,” including section 201(f) itself.³⁷ The court observed in this regard that “[i]f FERC could invoke plenary jurisdiction over ‘the sale of electric energy,’ then Congress could have saved time and ink by not bothering to narrow that jurisdiction.”³⁸ “FERC’s attempt to order refunds based on its *general* jurisdiction over wholesale sales of electric energy in interstate commerce contained in § 201(b)(1) contravenes the more *specific* provisions of the FPA that limit FERC’s authority over governmental entities, *see* § 201(f), and limit FERC’s authority to ensure just and reasonable rates and to order refunds to ‘public utilities,’ *see* §§ 205, 206(b).”³⁹

The D.C. Circuit applied similar reasoning two years later in *TANC* when presented with a challenge to a Commission order requiring the City of Vernon, a California municipal electric utility, to make refunds of transmission rates collected through the California ISO tariff.⁴⁰ The Commission argued that, even though Vernon was exempt from its jurisdiction under FPA section 201(f), the Commission could require Vernon to make refunds based on its authority to ensure that California ISO rates remained just and reasonable.⁴¹ Following the Ninth Circuit’s reasoning in *Bonneville*, the D.C. Circuit agreed with petitioners that “FERC’s refund authority under the FPA is ultimately determined by the ‘identities of the sellers subject to the refund order.’”⁴²

More recently, in *City of Clarksville v. FERC*, the D.C. Circuit rejected the Commission’s argument that its general jurisdiction over the transportation and sale of natural gas in interstate

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 920 (original emphasis).

⁴⁰ *TANC*, 495 F.3d 663.

⁴¹ *See id.* at 674.

⁴² *Id.* (quoting *Bonneville*, 422 F.3d at 911).

commerce under section 1(b) of the NGA (similar to section 201(b) of the FPA) provided it with jurisdiction to regulate transportation and sales by the City of Clarksville, Tennessee, a municipal gas company that was not a jurisdictional “natural gas company” under the NGA (the counterpart of a “public utility” under the FPA).⁴³ Similar to JEA’s argument here, the Commission in *City of Clarksville* contended that its general authority under NGA section 1(b) meant “that Clarksville’s identity as a municipality is essentially irrelevant” because it had dedicated natural gas to interstate commerce pursuant to a service agreement with another out-of-state municipal utility.⁴⁴ The court disagreed with the Commission’s assertion of jurisdiction over the arrangement, observing that “the articulation of the scope of FERC’s jurisdiction [in NGA section 1(b)] does not mean that Congress gave FERC jurisdiction over everything within those three areas.”⁴⁵ Section 1(b) of the NGA, the court said, “is not power-conferring or jurisdiction-creating and should not be read to say that FERC has jurisdiction over anything and everything related to the transportation and sale for resale of natural gas in interstate commerce.”⁴⁶

JEA’s position is also contrary to Commission precedent. For example, in *Delta-Montrose Electric Association*,⁴⁷ the Commission denied a petition for declaratory relief asking (in part) that the Commission exercise jurisdiction over a wholesale requirements contract between two section 201(f) non-jurisdictional entities.⁴⁸ The Commission held that the contract

⁴³ *City of Clarksville*, 888 F.3d at 485. Parallel provisions of the FPA and NGA are construed *in pari materia*. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

⁴⁴ *City of Clarksville*, 888 F.3d at 485.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 151 FERC ¶ 61,238.

⁴⁸ *Id.* P 1.

was “not subject to Commission regulation under sections 205 and 206 of the FPA because the exemption contained in section 201(f) of the FPA is applicable to [the seller].”⁴⁹ In *New West Energy Corporation*, the Commission held that a section 201(f) entity could not even voluntarily submit to Commission jurisdiction or waive the section 201(f) exemption, and as a consequence the Commission had no authority to accept a rate schedule from a section 201(f) entity for filing under section 205.⁵⁰

Nothing in the Petition rebuts the statutory analysis and precedent set forth above. Indeed, the Petition does not even cite *Bonneville* or *TANC*. Aside from quoting the statutory text from FPA section 201(b), the primary authorities on which JEA relies are the Supreme Court’s 1953 ruling in *United States v. Public Utilities Comm’n*, 345 U.S. 295 (1953) (“*U.S. v. PUC*”), and a 1966 decision from the Eighth Circuit, *Arkansas Power & Light Co. v. FPC*, 368 F.2d 376, (8th Cir. 1966) (“*Arkansas P&L*”). The Petition cites *U.S. v. PUC* and *Arkansas P&L* for its core claim that “[o]nce electricity or natural gas is placed in interstate commerce, the Commission has jurisdiction over that sale – regardless of the parties involved.”⁵¹ Neither of the cases remotely supports that proposition.

U.S. v. PUC is inapposite because it concerns sales *by* a Commission-jurisdictional public utility. The question decided in *U.S. v. PUC* was whether the FPA applied to wholesale power sales by public utilities *to* municipalities. The Court held that when Congress defined the term “sale of electric energy at wholesale” as “a sale of electric energy to any person for resale” in subsection 201(d) of the FPA, it was not using the term “person” as defined in section 3(4) of the FPA, and thus did not exclude wholesale sales by public utilities to municipalities from

⁴⁹ *Id.* P 26.

⁵⁰ *New W. Energy Corp.*, 83 FERC ¶ 61,004 (1998).

⁵¹ Petition at 11 (citing *U.S. v. PUC*, 345 U.S. at 313-14; *Arkansas P&L*, 368 F.2d at 383).

regulation under Part II of the FPA.⁵² The Court held that using the Act's defined terms "person," "corporation," and "municipality" in section 201(d) "in support of an indirect exception to Part II has no support in the statutory scheme as a whole," because other provisions of the FPA expressly enable municipalities purchasing power from a public utility to seek relief from the Commission and reviewing courts.⁵³

To the extent that the Petition suggests that the Court's finding that a municipality may be a "person" for purposes of FPA section 201(d) can support the exercise of jurisdiction over MEAG Power's sales under the PPA, JEA gets the *U.S. v. PUC* case backwards. The Court held that Congress's use of "person" in subsection 201(d) was of "no significance."⁵⁴ Thus, even had the Court found the municipality to be a "person" as that term is peculiarly used in section 201(d), that finding would have "no significance" for JEA's purposes (authority over sales). The Court nowhere suggested that the municipality in that case was a "person" under section 3(4) and thus a "public utility" under section 201(e).⁵⁵ The case certainly does not support the proposition that the Commission has jurisdiction over all wholesale sales in interstate commerce regardless of the parties involved.⁵⁶

⁵² *U.S. v. PUC*, 345 U.S. at 312-16.

⁵³ *Id.* at 312. JEA correctly cites the holding of *U.S. v. PUC* in noting that JEA can be considered a "person" to which a wholesale is being made for purposes of FPA section 201(d). *See* Petition at 10. This says nothing, however, about the Commission's authority to regulate a wholesale sale from a municipal utility such as MEAG Power.

⁵⁴ *U.S. v. PUC*, 345 U.S. at 313.

⁵⁵ To the contrary, it was undisputed by the parties and accepted by the Court for purposes of its decision that the municipality was not a "person" as defined in section 3(4) of the FPA, because that fact was the predicate for challenging the Commission's jurisdiction over the disputed sales to the municipality.

⁵⁶ *See City of Clarksville*, 888 F.3d at 484 (rejecting argument that *U.S. v. PUC* supported a conclusion that a municipal gas utility could be considered a "person" and, therefore, a "natural gas company" subject to the Commission's jurisdiction under section 7 of the NGA).

The Petition's reliance on *Arkansas P&L* is equally unavailing. JEA asserts that the case stands for the proposition that "the municipal exemption applies to the party's status as a public utility under the FPA and 'not to the Commission's jurisdiction over sales in interstate commerce for resale.'"⁵⁷ Like *U.S. v. PUC*, *Arkansas P&L* does not concern the Commission's exercise of jurisdiction over a 201(f) entity's wholesale sales in interstate commerce but simply holds that the Commission has jurisdiction over wholesale sales by a public utility to a non-public utility. The portion of *Arkansas P&L* cited by the Petition is discussing the exemption under FPA section 201(b) for "facilities used in local distribution,"⁵⁸ not the exemptions for non-public utilities.⁵⁹ The case provides no support for the assertion that the Commission may exercise jurisdiction over a non-public utility's wholesale sales in interstate commerce.

In sum, the Commission should reject the Petition's claim that the general articulation of the Commission's authority over interstate wholesale transactions and facilities used for such transactions in FPA section 201(b) can override the specific exemptions for municipal and cooperative utilities in sections 201(f), 205, and 206. Because the PPA provides for wholesale sales by MEAG Power, a non-public utility generally exempt from the Commission's authority under Part II of the FPA by section 201(f), the PPA is not subject to the Commission's jurisdiction under section 201(b). MEAG Power is not obligated to file the PPA for review and approval by the Commission under section 205 of the FPA, and indeed, the Commission does

⁵⁷ Petition at 11 (quoting *Arkansas P&L*, 368 F.2d at 383).

⁵⁸ *Arkansas P&L*, 368 F.2d at 383.

⁵⁹ In particular, the court is summarizing an earlier Seventh Circuit decision, *Indiana & Michigan Electric Co. v. FPC*, 365 F.2d 180 (7th Cir. 1966), that concluded that wholesale sales made by a *public utility* were not exempt from the Commission's jurisdiction because the sales were made from distribution facilities. The court concluded that the exclusion of local distribution facilities from the Commission's jurisdiction under FPA section 201(b) did not render public utility wholesale sales made using such facilities non-jurisdictional.

not have authority to accept such a filing, because that process applies exclusively to “public utilities.”

B. The Commission Should Reject the Petition’s “Regulatory Gap” Arguments

The Petition argues that failure by the Commission to assert jurisdiction over the PPA will leave a regulatory gap.⁶⁰ JEA argues, in particular, that MEAG Power claims it is not subject to the jurisdiction of the Georgia Public Service Commission.⁶¹ Absent Commission jurisdiction, JEA argues, “there is no entity that would have the ability to oversee or otherwise regulate those sales. This is the very ‘regulatory gap’ that the FPA was designed to address after *Attleboro*.”⁶²

JEA is wrong. There is no gap to fill. In drafting Part II of the FPA, Congress carved out specific exemptions for municipal utilities. The unequivocal exemptions in the FPA for municipal and cooperative utilities cannot be read out of the statute under the rubric of gap filling. As the Petition notes, the FPA’s grant of jurisdiction over wholesale sales and transmission in interstate commerce was a response to the Supreme Court’s *Attleboro* ruling. If Congress was concerned that interstate sales by public power utilities would go unregulated, it certainly could have included them within the scope of the Commission’s jurisdiction rather than providing express exemptions.⁶³ As the Commission has noted, “[t]he legislative history of the FPA shows clearly that Congress was deliberate and careful in its efforts not to impose FPA public utility regulation on states and municipalities, even if they transmitted power across state

⁶⁰ See Petition at 12-13.

⁶¹ *Id.*

⁶² *Id.* at 13 (citing *Pub. Util. Comm’n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)).

⁶³ Cf. *Bonneville*, 422 F.3d at 916 (observing that “[w]hen Congress wanted a provision of FPA subchapter II to apply to governmental entities, it knew how to so specify.”).

lines.”⁶⁴ Following *Bonneville*, as noted above, Congress in 2005 amended the FPA to provide limited refund authority for wholesale sales by certain non-public utilities in organized markets, indicating that Congress recognizes and is content with the fact that public power utilities remain largely outside the Commission’s jurisdiction regarding interstate wholesale sales.⁶⁵ Even if it were in any way correct to say that the PPA falls within a regulatory gap, “it would not be the sort Congress was worried about in enacting” the FPA.⁶⁶ The FPA “was passed in the context of, and in response to, great concentrations of economic . . . power vested in power trusts.”⁶⁷ Congress acted “to curb abusive practices of public utility companies.”⁶⁸

As a more general matter, it is simply incorrect to suggest that public power utilities are unregulated. Municipal utilities are governed by their consumer-owners through locally elected or appointed public officials serving on utility boards or city councils. Decisions about pricing, services, reliability, building power plants, purchasing wholesale power, and setting service policies are made locally and reflect the values and choices of the community.⁶⁹ MEAG Power, for example, is a joint action agency governed by a nine-member board of directors, the members of which are elected to three-year terms by an elections committee, which consists of

⁶⁴ *New W. Energy Corp.*, 83 FERC at 61,018.

⁶⁵ FPA Section 206(e), 16 U.S.C. § 824e(e). If, as JEA suggests, the Commission already possessed plenary authority over interstate wholesale sales by public power utilities, there would have been no reason for Congress to amend FPA section 206 to provide this limited refund authority.

⁶⁶ *City of Clarksville*, 888 F.3d at 485.

⁶⁷ *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973). See also *Salt River Project Agr. Improvement & Power Dist. v. FPC*, 391 F.2d 470, 475 (D.C. Cir. 1968) (explaining abuses of investor-owned utilities that led to passage of Part II of the FPA).

⁶⁸ *Gulf States Utils. Co.*, 411 U.S. at 758. The D.C. Circuit rejected FERC’s gap filling in *City of Clarksville* because the NGA was intended to protect consumers from exploitation at the hands of privately owned natural gas companies. *City of Clarksville*, 888 F.3d at 485.

⁶⁹ Similarly, electric cooperatives are governed by boards of directors elected by their member-owners. And in some states, municipal utilities or electric cooperatives are subject to rate regulation by state public utility commissions—including their wholesale rates, consistent with the FPA.

one representative from each of MEAG Power’s participant communities. Those communities in turn are locally regulated by their governing bodies, be they city councils, utility commissions or like entities.

C. The Jurisdictional Ruling JEA Seeks Is Sweeping In Scope

The Petition’s core jurisdictional argument – that the PPA is subject to the Commission’s jurisdiction as a facility used for interstate wholesale sales regardless of MEAG Power’s status as a non-public utility – does not rest on any particularly unique facts. JEA points to a number of aspects of the PPA and the relationship between JEA and MEAG Power that it contends support an assertion of Commission jurisdiction and that also serve to limit any jurisdictional ruling to the PPA.⁷⁰ JEA argues, for example, that the PPA is “highly distinctive,” because, among other things, MEAG Power is selling electricity at wholesale to JEA in Florida, MEAG Power has said that the Georgia Public Service Commission does not have jurisdiction over the PPA, the Vogtle Units have experienced significant cost overruns, and the PPA has unique terms and conditions.⁷¹ The factors cited by JEA (other than the identity of the seller and the wholesale interstate nature of the sales) are not relevant to the question of jurisdiction that JEA asks the Commission to decide. The “specific facts and circumstances” that JEA identifies are not material to its jurisdictional argument.⁷²

JEA’s argument is that wholesale sales in interstate commerce by FPA section 201(f) entities are subject to the Commission’s jurisdiction.⁷³ While the Public Power Associations

⁷⁰ See Petition at 2-3, 13-14.

⁷¹ *Id.* at 3.

⁷² *Id.* at 2.

⁷³ The fact that the PPA contemplates sales from generating units in Georgia to a purchaser in Florida does not make the transaction particularly distinctive in today’s regional power markets. Moreover, almost all energy injected onto the transmission grid is deemed to be in interstate commerce, *see, e.g., FPC v. S. Cal. Edison Co.*, 376 U.S. 205

appreciate JEA’s statement that it “is not seeking a blanket declaration of jurisdiction on any other PPA or wholesale transaction between other public entities or any other party,”⁷⁴ the expansive jurisdictional pronouncement it seeks is far more in the nature of a rule of general application than a fact-specific adjudication. If the Commission were to accept this erroneous position, it would be unlikely to remain restricted to the specific factual circumstances of the PPA, with potentially severe and adverse consequences. It would create uncertainty over potential Commission regulation of a substantial number of public power transactions and activities long regarded as outside the scope of the FPA. This would be a profound regulatory shift that could severely upset the long-settled expectations of market participants. Commission regulation of public power sales might threaten debt-financing covenants or adversely affect public power utilities’ access to capital.⁷⁵ Even if the Commission had the authority to grant JEA’s Petition (and it does not), that cannot be a sound or desired policy.

IV. CONCLUSION

For the reasons set forth herein, the Public Power Associations urge the Commission to deny JEA’s Petition.

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(1964), and, thus, a host of wholesale sales by public power utilities could be swept up by the declaratory relief requested in the Petition.

⁷⁴ Petition at 2-3.

⁷⁵ On October 3, 2018, the Nebraska Public Power District (“NPPD”) filed a motion to intervene and request for expedited action in this proceeding in which NPPD stated that “NPPD is further concerned that the mere specter of such a declaration by the Commission may pose a meaningful immediate and ongoing business risk to NPPD since NPPD on advice of counsel has determined to disclose the JEA Petition in the official statements accompanying NPPD’s bond issuances this month.” Motion to Intervene and Request for Expedited Action of the Nebraska Public Power District 5 (Oct. 3, 2018), eLibrary No. 20181003-5122. NPPD stated further that “[t]he Petition, then, could have significant consequences for NPPD’s ability to cost-effectively finance its operations, and in turn harm the financial interests of NPPD and its customers.” *Id.*

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Transmission Access Policy Study Group

Dated: October 15, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated on this 15th day of October, 2018.

/s/ Peter J. Hopkins

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