

153 FERC ¶ 61,259
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

New York Transco, LLC
Central Hudson Gas & Electric Corporation
Consolidated Edison Company of
New York, Inc.
Niagara Mohawk Power Corporation
New York State Electric & Gas Corporation
Orange and Rockland Utilities, Inc.
Rochester Gas and Electric Corporation

Docket No. EC15-45-001

ORDER DENYING REHEARING

(December 1, 2015)

1. On December 4, 2014, Consolidated Edison Company of New York, Inc./Orange and Rockland Utilities, Inc., Niagara Mohawk Power Corporation, New York State Electric & Gas Corporation/Rochester Gas and Electric Corporation, and Central Hudson Gas & Electric Corporation (collectively, Applicant NYTOs), and New York Transco, LLC (NY Transco) (together with Applicant NYTOs, Applicants) filed, pursuant to sections 203(a)(1)(A) and 203(a)(1)(B) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² an application requesting authorization to transfer from Applicant NYTOs to NY Transco certain transmission facilities, and related books, records and accounts (the Transaction Assets), in connection with the development of

¹ 16 U.S.C. § 824b(a)(1)(A)-(B) (2012).

² 18 C.F.R. pt. 33 (2015).

five transmission projects in New York (Transmission Projects) (Proposed Transactions).³

2. The Commission dismissed the Application because the facilities Applicant NYTOs proposed to transfer pursuant to the Proposed Transactions were not subject to the Commission's jurisdiction under FPA section 203.⁴

3. The New York Association of Public Power (New York Public Power), together with the National Rural Electric Cooperative Association (Rural Cooperative Association), the American Public Power Association (American Public Power), and the American Antitrust Institute (Antitrust Institute), sought rehearing of the Commission's order.⁵ As discussed in further detail below, we deny the request for rehearing.

I. Background

A. The Application

4. According to Applicants, the Transaction Assets to be transferred pursuant to the Proposed Transactions would have included certain new transmission equipment that would become part of the Transmission Projects, but that would not be energized at the time of closing of the Proposed Transactions,⁶ and related books and records, including

³ Joint Application for Authorizations Under Section 203 of the Federal Power Act for Dispositions and Acquisitions of Transmission Assets and Request for Waivers, Docket No. EC15-45-000 (filed Dec. 4, 2014) (Application). Concurrently with the Application, the New York Independent System Operator, Inc. (NYISO) filed, on behalf of NY Transco and Applicant NYTOs, an application proposing a transmission formula rate and requesting approval of transmission rate incentives and a transmission cost allocation method. *See* Application for Acceptance of Transmission Formula Rate and Approval of Transmission Rate Incentives and Cost Allocation Method, Docket No. ER15-572-000 (filed Dec. 4, 2014) (NY Transco Rates Filing).

⁴ *N.Y. Transco, LLC*, 151 FERC ¶ 61,005 (2015) (*NY Transco*). The Commission issued an order on the NY Transco Rates Filing concurrently with *NY Transco*. *N.Y. Indep. System Operator, Inc.*, 151 FERC ¶ 61,004 (2015).

⁵ Request of the New York Association of Public Power, National Rural Electric Cooperative Association, American Public Power Association, and the American Antitrust Institute for Rehearing, Docket No. EC15-45-000 (filed May 1, 2015) (Request for Rehearing).

⁶ Application at 12.

the balance of construction work in progress (CWIP) accrued by the applicable Applicant NYTO in connection with the Transmission Projects, any unamortized regulatory assets as recognized by the Commission and not included in CWIP, and accounts reflecting associated material and supplies.⁷

5. In the Application, Applicants stated that “the precise Transaction Assets to be transferred from each of the Applicant NYTOs to NY Transco will continue to change until the time of closing as the Applicant NYTOs continue development work in their respective portions of the [Transmission Projects].”⁸ Accordingly, Applicants requested that the Commission approve the transfer of all Transaction Assets related to the Transmission Projects as those assets may exist at the time when each of the Proposed Transactions was consummated, including the associated books, records, and the balance of CWIP accounts accrued by the Applicant NYTOs in connection with the Transmission Projects, any unamortized regulatory assets as recognized by the Commission and not included in CWIP, and accounts reflecting associated materials and supplies.

B. Order Dismissing Application

6. In its order dismissing the Application, the Commission found that Applicants established that the transmission facilities to be transferred pursuant to the Proposed Transactions were not yet in existence, energized or in service.⁹ In particular, the Commission noted that Applicants stated that “the transmission equipment to be transferred ‘will not be energized at the time of closing’ and that the Proposed Transactions do not involve ‘the transfer of any existing and energized conductor, transformer, or substation.’”¹⁰ The Commission also noted that, according to Applicants, the Transmission Projects were in the early permitting and development stage and would not be in-service at the time they would be transferred to NY Transco.¹¹

⁷ The Transmission Projects were part of two groups of transmission projects: the Transmission Owner Transmission Solution transmission projects (also known as the TOTS Projects), which were selected and approved by the New York Public Service Commission (New York Commission), and the AC Projects, which, at the time of the Application, were being evaluated by the New York Commission in a competitive solicitation initiated by the New York Commission. *Id.* at 7.

⁸ *Id.*

⁹ *NY Transco*, 151 FERC ¶ 61,005 at P 16.

¹⁰ *Id.* (quoting Application at 2, n.19).

¹¹ *Id.*

7. The Commission stated that, under its precedent, transmission facilities that are not in service are not subject to the Commission's jurisdiction.¹² Based on the information provided in the Application, the Commission concluded that the facilities that Applicants proposed to transfer pursuant to the Proposed Transactions were not, and would not be, in service at the time of closing and therefore were not subject to the Commission's jurisdiction under FPA section 203. Accordingly, the Commission dismissed the Application for lack of jurisdiction.¹³

II. Discussion

A. Procedural Matters

8. On May 1, 2015, the Rural Cooperative Association, American Public Power and the Antitrust Institute (together, Late Intervenors) filed a motion to intervene out-of-time. Late Intervenors acknowledge that parties seeking intervenor status after the Commission has issued a dispositive order bear a substantial burden, but claim that their late intervention is justified because "they could not have reasonably anticipated that jurisdiction would be an issue" in this proceeding.¹⁴ On May 15, 2015, Applicants filed an answer in opposition to the motion to intervene out-of-time.¹⁵ In addition to opposing the late-filed motion to intervene, Applicants filed a response to the Request for

¹² *Id.* P 16 (citing *PacifiCorp*, 132 FERC ¶ 61,018, at P 20 (2010) (*PacifiCorp*) (citing *Gamma Mariah, Inc.*, 44 FERC ¶ 61,442 (1988) (*Gamma Mariah*)); *Idaho Power Company*, 132 FERC ¶ 61,019, at P 20 (2010) (*Idaho Power*) (same)).

¹³ Based on its dismissal of the Application for lack of jurisdiction, the Commission dismissed as moot the protests of the Application. *Id.* n.21.

¹⁴ Motion to Intervene Out-of-Time of the National Rural Electric Cooperative Association, American Public Power Association, and the American Antitrust Institute at 1-2, Docket No. EC15-45-000 (filed May 1, 2015) (Motion to Intervene Out-of-Time) (citing *Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104, at PP 69, 111, 129 (2015)).

¹⁵ Applicants' Answer in Opposition to Movants' Motion to Intervene Out-of-Time and Reply to Request for Rehearing, Docket No. EC15-45-000 (filed May 15, 2015).

Rehearing. On May 22, 2015, New York Public Power and Late Intervenors filed an answer in response to Applicants.¹⁶

9. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.¹⁷ We find that Late Intervenors have not met this higher burden of justifying their late intervention. As noted by Late Intervenors, however, they have filed the Request for Rehearing jointly with New York Public Power, which is a party to this proceeding.¹⁸ Accordingly, although we are denying Late Intervenors' late intervention in this proceeding, their interests will be represented by New York Public Power.¹⁹

10. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure,²⁰ prohibits an answer to a request for rehearing. Accordingly, we reject Applicants' answer to the Request for Rehearing. As we are rejecting Applicants' answer to the Request for Rehearing, we will likewise reject the answer filed by New York Public Power and Late Intervenors.

¹⁶ Motion for Leave to Answer and Answer of the New York Association of Public Power, National Rural Electric Cooperative Association, American Public Power Association and the American Antitrust Institute, Docket No. EC15-45-000 (filed May 22, 2015, as corrected by errata filed May 26, 2015).

¹⁷ See, e.g., *Consol. Edison Co. of NY, Inc. v. PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,227, at P 67 (2015); *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹⁸ Motion to Intervene Out-of-Time at 4.

¹⁹ See, e.g., *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 12 (2006).

²⁰ 18 C.F.R. § 385.713(d)(1).

B. Substantive Matters**1. The Commission's Disclaimer of Jurisdiction Does Not Constitute an Arbitrary Departure from Existing FPA Section 203 Policy****a. Request for Rehearing**

11. New York Public Power argues that the Commission's ruling in *NY Transco* departs, without acknowledgement or explanation, from several Commission policies, namely: "(1) to interpret section 203 broadly so as to effectuate its purposes, (2) to treat transmission facilities that *will* be used in interstate commerce after acquisitions as 'facilities subject to the jurisdiction of the Commission' ...and (3) to treat as 'jurisdictional facilities' the books, records and papers used to aid in the provision of jurisdictional services."²¹

12. Noting that Applicants sought authorization for the Proposed Transaction under FPA sections 203(a)(1)(A) and 203(a)(1)(B), New York Public Power states that the Commission has explained that the purposes of these provisions "was to provide a mechanism for maintaining oversight of the facilities of public utilities, and preventing transfer of control over those facilities that would be detrimental to consumers and/or investors or that would inhibit the Commission's ability to secure the maintenance of adequate service and the coordination in the public interest of [jurisdictional] facilities."²² New York Public Power also argues that the Commission has previously concluded that FPA section 203 should not be "read narrowly."²³

13. According to New York Public Power, it is for this reason that the Commission has consistently interpreted its authority under FPA section 203 broadly, and for decades reviewed public utility acquisitions of transmission facilities owned by governmental, i.e. non-jurisdictional utilities, even though those facilities are, by definition, non-jurisdictional facilities until after they are transferred. New York Public Power observes that the Commission has stated that when a public utility merges its jurisdictional facilities with "those of any other person" under FPA 203(a)(1)(B), "those" refers to Commission-jurisdictional facilities. As a result, New York Public Power concludes that to reconcile that statement with its assertion of jurisdiction over public utility acquisition

²¹ Request for Rehearing at 3 (emphasis in original).

²² *Id.* at 4 (quotations omitted) (citing *Enova Corp. and Pacific Enterprises*, 79 FERC ¶ 61,107, at 61,489 (1997) (*Enova*)).

²³ *Id.*

of transmission facilities owned by non-jurisdictional utilities, the Commission must be interpreting “those” to also include facilities that will become jurisdictional facilities.

14. To illustrate this point, New York Public Power cites arguments advanced by the Commission before the Court of Appeals for the D.C. Circuit (D.C. Circuit) in *Citizens for Allegan County, Inc. v. FPC*.²⁴ In *Citizens*, the Commission argued that the acquisition by a public utility, Consumers Power Company, of an electric system owned by a non-jurisdictional municipal utility “might result in a situation” where the transmission lines at issue “were subject to use for interstate transmission of energy.”²⁵ New York Public Power states that the court, however, did not address these arguments, as it found alternate grounds to reach the merits.

15. New York Public Power also argues that there is a parallel between the Commission’s interpretation of its jurisdiction over public utility acquisitions of municipal utility transmission facilities and its interpretation of the scope of its authority under FPA section 305.²⁶ New York Public Power explains that in *Norman Barker, Jr.*,²⁷ the Commission addressed the FPA section 305 application of Mr. Norman Barker, Jr. to sit on the boards of both Southern California Edison Company and Interstate Capital, a securities underwriter. Although Mr. Barker argued that he did not require Commission approval to hold the interlocking positions because the underwriter’s corporate charter barred it from underwriting public utility securities, the Commission rejected this argument, concluding that the underwriter’s potential ability to underwrite public utility securities in the future was enough to give it jurisdiction.²⁸

²⁴ 414 F.2d 1125 (D.C. Cir. 1969) (*Citizens*).

²⁵ Request for Rehearing at 6 (emphasis added) (quotations omitted) (quoting *Citizens*, 414 F.2d at 1134-1135, n.15).

²⁶ 16 U.S.C. § 825d (2012). FPA section 305 governs, among other things, interlocking directorates, and prohibits any person from holding the position of officer or director of more than one public utility, or from holding the position of officer or director of a public utility, and the position of officer or director of any bank, trust company, banking association, or firm authorized by law to underwrite or participate in the marketing of securities of a public utility, or officer or director of any company supplying electrical equipment to such public utility, unless the holding of such positions shall have been authorized by order of the Commission. 16 U.S.C. § 825d(b)(1).

²⁷ 53 FERC ¶ 61,223 (1990) (*Norman Barker*).

²⁸ Request for Rehearing at 6 (citing *Norman Barker*, 53 FERC ¶ 61,223 at 61,932-33).

16. New York Public Power argues that if, as the Commission states, its concern is with transfers of control of jurisdictional facilities that might harm consumers or impede coordination, “it is difficult to see how the potential harm to consumers would be any less where the transfer involves facilities that will be energized, as compared to transfers involving transmission facilities that have already been energized.”²⁹ New York Public Power also asserts that the Commission’s ruling in *NY Transco* is difficult to square with certain delegated orders wherein office directors have approved FPA section 203 applications by owners of transmission facilities still under construction to sell those facilities to third parties.³⁰

17. Finally, New York Public Power questions the Commission’s ruling in *NY Transco* insofar as it concerns the books, records and accounts related to the facilities Applicants intended to transfer to NY Transco as part of the Proposed Transactions. According to New York Public Power, the Commission has treated as jurisdictional facilities the books, papers and records “utilized in connection with transmission in interstate commerce and sales for resale in interstate commerce.”³¹ New York Public Power claims that, in accepting and suspending Applicants’ FPA section 205 rate filing, the Commission exercised jurisdiction over NY Transco as a public utility. New York Public Power argues that since NY Transco had no energized transmission facilities, the only basis for the Commission’s exercise of jurisdiction must have been the same books, papers and records NY Transco acquired in the Proposed Transactions. New York Public Power asserts that the Commission’s actions beg the question of how the same Transaction Assets that the New York transmission owners transferred to NY Transco were “jurisdictional facilities” giving the Commission authority to regulate NY Transco as a public utility under FPA section 205 but were not “jurisdictional facilities” for purposes of FPA section 203.

18. New York Public Power concludes that, in *NY Transco*, the Commission read FPA section 203 narrowly, resulting in the Commission disclaiming jurisdiction over the disposition of transmission assets whose only purpose will be to provide transmission service in interstate commerce, and failing to engage in any analysis of whether the books, records and papers Applicants included as Transaction Assets constituted “jurisdictional facilities” as that term has been used throughout the Commission’s history. While New York Public Power acknowledges that the Commission is free to modify its interpretation of an ambiguous statute or to change its policies generally, New York

²⁹ *Id.* at 7.

³⁰ *Id.* n.11.

³¹ *Id.* at 8 (citing *Hartford Electric Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942)).

Public Power states that the Commission must “display an awareness that it *is* changing position” and “must show that there are good reasons for the new policy.”³²

b. Commission Determination

19. We deny rehearing. New York Public Power’s primary argument is that the Commission departed from the policy that FPA section 203 “should not be ‘read narrowly,’ lest transactions ‘escape Commission oversight.’”³³ The foundation for New York Public Power’s argument is the Commission’s decision in *Enova*. In that case, the Commission considered a petition for an order disclaiming jurisdiction over the reorganization of Enova Corporation (Enova) and Pacific Enterprises into a newly-formed holding company. In denying the request for the petition, based on the finding that approval under FPA section 203 was required for the disposition of the jurisdictional facilities of Enova’s public utility subsidiaries, San Diego Gas & Electric Company, a traditional electric company, and Enova Energy, a power marketer, the Commission examined closely the language and legislative history of FPA section 203. The Commission’s discussion of FPA section 203 in *Enova*, however, does not support the overly broad principle that New York Public Power claims it does, nor does it expand the reach of the Commission’s jurisdiction under FPA section 203.

20. As an initial matter, in *Enova*, the Commission recognized that while the traditional focus of facilities has been on physical facilities,³⁴ the term had also been expanded to include paper facilities.³⁵ At no point, however, did the Commission suggest that facilities that do not provide Commission-jurisdictional service are within the scope of FPA section 203. Indeed, such an approach would have been inconsistent with the jurisdictional standard of FPA section 201,³⁶ which states that the FPA shall apply to the “transmission of electric energy in interstate commerce” and to facilities for “such transmission.”³⁷ The Commission’s discussion of the limited case law then-available

³² *Id.* at 10 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis in original)).

³³ Request for Rehearing at 4.

³⁴ *Enova*, 79 FERC ¶ 61,107 at 61,489 (“physical facilities, such as transmission lines and related equipment, for example.”).

³⁵ *Id.* (“‘facilities’ also has been defined to include contract, accounts, memoranda, papers, and other records . . .”).

³⁶ 16 U.S.C. § 824(b)(1).

³⁷ *Id.*

demonstrates that the Commission's jurisdiction under FPA section 203 is limited by the jurisdictional status of the facilities at issue. In discussing one of the leading cases regarding the Commission's jurisdiction under FPA section 203, *Duke Power Co. v. FPC*,³⁸ the Commission stated "the *Duke* decision supports the conclusion that one of the fundamental prerequisites of FPA section 203 jurisdiction is the presence of jurisdictional facilities. In other words, the Commission's corporate jurisdiction follows facilities subject to the jurisdiction of the Commission."³⁹

21. In *Enova*, the Commission concluded that the text of FPA section 203 supports "an interpretation that FPA section 203 was intended to encompass a variety of actions involving jurisdictional facilities, as opposed to an attempt to enumerate every mechanism conceivable in 1935 for transferring control ("disposing") of jurisdictional facilities."⁴⁰ The Commission thus recognized that while there are many methods for transferring jurisdictional facilities, and that the Commission should not view the scope of the transactions to which FPA section 203 applies narrowly, FPA section 203 is at all times limited to those transactions that concern jurisdictional facilities.⁴¹

22. As explained in *NY Transco*, the facilities addressed by the Application are not jurisdictional facilities and would not be jurisdictional facilities at the time of the Proposed Transactions. Thus, dismissal of the Application based on the Commission's lack of jurisdiction was proper. First, Applicants stated that the Transmission Projects were in the early permitting and development stage and would not be in-service at the time they were transferred to NY Transco.⁴² Second, Applicants noted the Transmission Projects would also not be energized at the time of closing of the Proposed Transactions,⁴³ and thus could not, by definition, provide jurisdictional service.

³⁸ 401 F.2d 930 (D.C. Cir. 1968) (*Duke*).

³⁹ *Enova*, 79 FERC ¶ 61,107 at 61,491. The Commission also concluded that the *Duke* court's fundamental holding was that FPA section 203 "is triggered only where jurisdictional facilities are involved." *Id.*

⁴⁰ *Id.* at 61,490.

⁴¹ This point is further supported by the Commission's discussion of the legislative history of FPA section 203, which it found indicates that "the focus of section 203 is on the disposition of control of jurisdictional facilities, however such disposition might be effected (*i.e.*, through sale, lease, merger, consolidation, or acquisition of securities, or otherwise)." *Id.*

⁴² Application at 2.

⁴³ *Id.*

Third, Applicants explained that the Proposed Transactions did not involve the transfer of any existing and energized conductor, transformer, or substation.⁴⁴ Based on these facts, the Transmission Projects were not jurisdictional facilities and therefore, the Commission did not have jurisdiction over them pursuant to FPA section 203. To find, as New York Public Power advocates, that the Commission had jurisdiction based on Applicants' intended use of the Transmission Projects for jurisdictional service or as jurisdictional facilities at some point in the future would expand the scope of the Commission's jurisdiction under FPA section 203 beyond the limits imposed by the statute, and could encompass facilities that Congress never intended for the Commission to have authority over.

23. We also disagree with New York Public Power's claim that since NY Transco had no energized transmission facilities, the only basis for the Commission's exercise of jurisdiction in the NY Transco Rates Filing must have been the same books, papers, and records NY Transco would acquire pursuant to the Proposed Transactions. As an initial matter, both the Commission and Applicants recognized that the proposed transmission formula rates would only be implemented after Applicants received the necessary regulatory approvals and the transmission projects were transferred to NY Transco and placed into service. In addition, the Commission has addressed transmission rate incentives applications for transmission facilities that were in the building or planning stages,⁴⁵ and also considered such applications in concert with companion FPA section 203 applications that addressed transmission facilities that were already existing and in service.⁴⁶ In both sets of circumstances, however, the proposed transmission rates are contingent on, among other things, approval and closing of the proposed transaction, approval of the proposed transmission rates, and the transmission facilities actually being

⁴⁴ *Id.* at 13.

⁴⁵ *See, e.g., Desert Sw. Power, LLC*, 135 FERC ¶ 61,143 (2011) (granting in part and denying in part transmission rate incentives for transmission project in California Independent System Operator Corporation); *ITC Great Plains, LLC*, 126 FERC ¶ 61,223 (2009) (granting in part and denying in part transmission rates incentives for transmission projects in Southwest Power Pool, Inc.).

⁴⁶ *See, e.g., Startrans IO, L.L.C.*, 122 FERC ¶ 61,306 (2008) (granting in part and denying in part transmission rate incentives, and establishing settlement judge procedures, related to applicant's acquisition of certain transmission interests). Concurrently with that order, the Commission issued an order approving applicant's companion application to acquire the transmission interests under FPA section 203. *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307 (2008) (authorizing acquisition of certain transmission interests in existing transmission facilities).

placed into service. Thus, there is no inconsistency in disclaiming jurisdiction under FPA section 203 while proceeding with review of proposed FPA section 205 transmission rates and incentives, which necessarily take effect only after the facilities are placed into service. The Commission's typical approach only appears inconsistent in the unique circumstances of this case because the Commission determined in *NY Transco* that Applicants did not need authorization under FPA section 203. While the Commission must still address under FPA section 205 the jurisdictional transmission rates that NY Transco will charge once the Transmission Projects are placed into service, Applicants do not require authorization under FPA section 203 to transfer those facilities because, based on the facts in the application, they are not subject to the Commission's jurisdiction under FPA section 203.

24. Further, as explained above, New York Public Power cites to arguments raised by the Commission before the D.C. Circuit. Those arguments, however, were not addressed by the court, which found alternate grounds to reach the merits. New York Public Power acknowledges this point. Likewise, New York Public Power's reliance on *Norman Barker* does not support New York Public Power's position or compel the Commission to reach a different result in this case. In that case, as noted, Mr. Barker argued that he did not require Commission approval to hold the interlocking positions because the underwriter's corporate charter barred it from underwriting public utility securities. The Commission rejected this argument, however, finding that the "voluntary action of an entity to restrict its own ability to underwrite public utility securities does not divest the Commission of jurisdiction over interlocks which would *otherwise be jurisdictional under section 305(b)*."⁴⁷ By its own terms, the Commission's finding in *Norman Barker* was limited to a finding of jurisdiction under FPA section 305(b). Accordingly, we do not find New York Public Power's argument on this point persuasive.

25. Finally, we do not find New York Public Power's reliance on non-binding delegated orders persuasive. As the Commission has explained, "actions taken by its staff pursuant to delegated authority 'do not constitute precedent binding the Commission in future cases.'"⁴⁸

⁴⁷ *Norman Barker*, 53 FERC ¶ 61,223 at 61,933 (emphasis added).

⁴⁸ *Midwest Generation, LLC*, 95 FERC ¶ 61,231, at 61,799 (2001) (*Midwest Generation*) (quoting *Phoenix Hydro Corp.*, 26 FERC ¶ 61,389, at 61,870 (1984) (footnotes omitted), *aff'd*, *Phoenix Hydro Corp. v. FERC*, 775 F.2d 1187, 1191 (D.C. Cir. 1985)). See also *Millennium Pipeline Co., LLC*, 145 FERC ¶ 61,088, at n.11 (2013); *Midwest Indep. Transmission Sys. Operator, Inc.*, 124 FERC ¶ 61,277, at P 12 (2008); *Chehalis Power Generating, L.P.*, 123 FERC ¶ 61,038, at P 65 (2008).

2. The Commission's Disclaimer of Jurisdiction Will Not Unnecessarily Limit Its Ability to Protect the Public Interest

a. Request for Rehearing

26. New York Public Power argues that because the Commission has treated dicta from prior decisions as binding precedent, it has ignored the ramifications its disclaimer of jurisdiction would have on its ability to protect the public interest. New York Public Power claims that as both *PacifiCorp* and *Idaho Power* arose under FPA section 205, and *Gamma Mariah* arose under the Public Utility Regulatory Policies Act, the Commission's pronouncement on the scope of FPA section 203 in those cases constituted dicta.⁴⁹ New York Public Power asserts that in all three cases, the Commission articulated the issues implicated by the filings in those proceedings, which issues did not include any FPA section 203 matters, but that the Commission nevertheless made declarations regarding issues related to FPA section 203. New York Public Power concludes that the passages from those cases the Commission relied on in *NY Transco* are thus "classic dicta" because they were unnecessary to the disposition of the cases in which they appear. According to New York Public Power, the Commission, by relying on dicta, did not perform a detailed analysis that a *de novo* review of the jurisdiction issue would have entailed and, as a result, did not consider the potential ramifications of its ruling or the soundness of the dicta upon which it relied.⁵⁰

27. New York Public Power further faults what it views as the Commission's "narrow interpretation" of its authority under FPA section 203 as also limiting the Commission's ability to protect the public interest. Although New York Public Power recognizes the Commission's discretion to adopt varying interpretations of the statutes it administers, New York Public Power states that the Commission's interpretations must be reasonable. New York Public Power notes that the courts have held that agency interpretations of ambiguous statutes that depart, without explanation, from earlier interpretations are arbitrary and therefore unreasonable under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*⁵¹ New York Public Power advances several arguments on this point.

28. First, New York Public Power argues that by adopting a limited definition of "jurisdictional facilities," the Commission ignores its own prior determinations that, to ensure that transactions that may be detrimental to the public do not escape review, it

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 13.

⁵¹ 467 U.S. 837 (1984).

should not interpret its FPA section 203 jurisdiction narrowly.⁵² New York Public Power notes, for example, that some intervenors had asserted that even though NY Transco's transmission facilities would be under the NYISO's control, the company's owners might still have incentives to favor projects in which they shared joint ownership over individual transmission projects owned by others. The Commission's disclaimer of jurisdiction over the Application, however, prevented the Commission from reaching the merits of the argument.

29. Second, New York Public Power argues that the Commission's disclaimer of jurisdiction is "mystifying" in light of its recent decision in *Public Service Company of Colorado*.⁵³ New York Public Power asserts that, in that case, the Commission "stretched" to find that "transfers" under FPA section 203 included a public utility's involuntary relinquishment of transmission assets to a newly formed municipal electric utility in a condemnation proceeding.⁵⁴ New York Public Power views as inconsistent the Commission's efforts to construe FPA section 203 to reach facilities relinquished involuntarily in condemnation proceedings and its disclaimer of jurisdiction in *NY Transco* when its policy against narrow interpretation "screams" for the Commission to find jurisdiction in the latter case.⁵⁵

30. New York Public Power argues further that the Commission's finding that it will only assert jurisdiction over the transfer, merger or consolidation of transmission facilities that are already in operation is at odds with its construction of FPA section 203 as amended by the Energy Policy Act of 2005.⁵⁶ New York Public Power notes that, in amending FPA section 203 to add what is now FPA section 203(a)(1)(D), Congress used the word "existing" to qualify the Commission's authority over the acquisition of generation facilities, and argues that the Commission has, in effect, improperly read the

⁵² Request for Rehearing at 14 (citing *Enova*, 79 FERC ¶ 61,107).

⁵³ 149 FERC ¶ 61,228 (2014).

⁵⁴ Request for Rehearing at 15.

⁵⁵ *Id.* at 16.

⁵⁶ Pub. L. No. 109-58 § 1284(e), 119 Stat. 594, 980 (2005).

word “existing” to qualify its jurisdiction over dispositions of “facilities subject to the jurisdiction of the Commission,” thereby narrowing the scope of FPA section 203.⁵⁷

31. New York Public Power observes that when the Energy Policy Act of 2005 established a \$10 million threshold for amended FPA sections 203(a)(1)(A) and (C) and new sections 203(a)(1)(D) and 203(a)(2), the Commission rejected arguments that the \$10 million threshold should also apply to mergers and consolidations under FPA section 203(a)(1)(B) because the specific language of that provision did not impose a dollar threshold on mergers or consolidations, and that reading one into the statute would violate the rules of statutory construction.⁵⁸ New York Public Power argues that the same logic applies with respect to distinguishing between the Commission’s jurisdiction over “facilities subject to the jurisdiction of the Commission” and the disposition of an “existing generation facility.” According to New York Public Power, had Congress intended to limit Commission oversight of the disposition of transmission facilities to those already in existence and energized, it could easily have added “existing” before “facilities subject to the jurisdiction of the Commission.”

32. Finally, New York Public Power asserts that the Commission’s new, narrow interpretation of FPA section 203 represents an implicit abandonment of the Commission’s policy interpreting “facilities subject to the jurisdiction of the Commission” to include books, papers, and records used to facilitate jurisdictional services. New York Public Power claims that by properly treating New York Transco’s FPA section 205 “rate filing and related documents as jurisdictional facilities” in the order on the NY Transco Rates Filing, while simultaneously declaring in this proceeding

⁵⁷ Under FPA section 203(a)(1)(A), as revised by the Energy Policy Act of 2005, no public utility shall, without first having secured an order of the Commission authorizing it to do so, “sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000.” 16 U.S.C. § 824b(a)(1)(A). Under FPA section 203(a)(1)(D), which was added by the Energy Policy Act of 2005, no public utility shall, without first having secured an order of the Commission authorizing it to do so, “purchase, lease, or otherwise acquire an existing generation facility (i) that has a value in excess of \$10,000,000; and (ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.” 16 U.S.C. § 824b(a)(1)(D)(i)-(ii).

⁵⁸ Request for Rehearing at 17 (citing *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200, at P 32 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006)).

that the Transaction Assets were not jurisdictional facilities for purposes of FPA section 203, the Commission acted arbitrarily and unreasonably.⁵⁹

b. Commission Determination

33. We deny rehearing. As with the majority of the arguments addressed above, the additional arguments advocated by New York Public Power require the Commission to exceed the bounds of FPA section 203 and reach facilities that are not within the jurisdictional scope of its authority under that provision of the FPA.

34. We reject New York Public Power's argument that the Commission's findings in *PacifiCorp*, *Idaho Power*, and *Gamma Mariah* regarding the FPA section 203 issues implicated by the filings addressed in those decisions are somehow unreliable. The findings in those decisions that the Commission relied upon in *NY Transco* were articulated in response to issues raised in those proceedings. As the courts have stated on countless occasions, the Commission must respond meaningfully to the arguments before it,⁶⁰ which is what the Commission did in *PacifiCorp*, *Idaho Power*, and *Gamma Mariah*. New York Public Power's argument that the Commission should discount those findings is unpersuasive.

35. New York Public Power also faults the Commission for adopting what it characterizes as a limited definition of jurisdictional facilities since by doing so it was unable to address the merits of certain arguments regarding the impact of the Proposed Transaction. Arguments by protestors, however, no matter how meritorious, cannot bring a transaction that is otherwise not jurisdictional under the jurisdiction of the Commission. Where the facilities that are the subject of an application for approval under FPA section 203 are not under the jurisdiction of the Commission, no amount of argument by intervenors can make those facilities or the transaction jurisdictional. Further, once the Commission has disclaimed jurisdiction over a transaction, the Commission has no basis upon which to address any arguments on merits.

36. Similarly, we do not agree with New York Public Power's suggestion that the Commission's decision in *Public Service Company of Colorado* somehow compels the Commission to find the facilities at issue in the Application are subject to its jurisdiction. *Public Service Company of Colorado* addressed a petition for declaratory order in which the petitioner asked the Commission to address, among other issues, whether the City of Boulder, Colorado's (City of Boulder) acquisition of certain facilities currently owned by

⁵⁹ *Id.* at 18-19.

⁶⁰ See, e.g., *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998).

Public Service Company of Colorado by condemnation required prior Commission approval under FPA section 203. The jurisdictional status of the facilities to be acquired by the City of Boulder pursuant to condemnation, however, was not at issue. The primary issue concerned whether the transfer by condemnation was a jurisdictional activity under FPA section 203. Accordingly, *Public Service Company of Colorado* is not relevant to this proceeding, nor does it support New York Public Power's position that the Commission did have jurisdiction over the facilities at issue in the Application.

37. We also do not agree with New York Public Power's statutory construction arguments. Prior to 2005, the Commission had no jurisdiction under FPA section 203 over a public utility's acquisition of generating facilities. Thus, in adding FPA section 203(a)(1)(D), Congress gave the Commission new authority. However, in order not to confer jurisdiction over acquisitions of power plants under development or construction and not yet in service, Congress limited the Commission's jurisdiction to acquisitions of "existing generation facilities." Contrary to New York Public Power's assertion, there was no need for the Commission to read the word "existing" into FPA section 203(a)(1)(A) in order to reach the result in *NY Transco*. Except as otherwise provided, the Commission's jurisdiction under the FPA is limited by section 201.⁶¹ As relevant here, section 201 provides that the FPA shall apply to the "transmission of electric energy in interstate commerce" and to facilities for "such transmission."⁶² A facility that has not been placed in service is not used for jurisdictional service. In that regard, Applicants stated that the Transmission Projects were in the early permitting and development stage and would not be in-service at the time they were transferred to NY Transco;⁶³ Applicants noted the Transmission Projects would not be energized at the time of closing of the Proposed Transactions,⁶⁴ and thus could not, by definition, provide jurisdictional service; and finally, Applicants explained that the Proposed Transactions did not involve the transfer of any existing and energized conductor, transformer, or substation.⁶⁵

⁶¹ 16 U.S.C. § 824(b)(1).

⁶² *Id.*

⁶³ Application at 2.

⁶⁴ *Id.*

⁶⁵ *Id.* at 13.

Consistent with precedent, as the Transmission Projects were not used in interstate commerce,⁶⁶ the Commission disclaimed jurisdiction over the Application in *NY Transco*.

38. Finally, we disagree with New York Public Power that *NY Transco* somehow represents a repudiation of the Commission's policy of interpreting facilities subject to the jurisdiction of the Commission to include books, papers, and records used to facilitate jurisdictional services. As explained above, the treatment of the Application and the NY Transco Rates Filing is not inconsistent. The Commission disclaimed jurisdiction over the Proposed Transactions under the FPA section 203 because the Transmission Assets, as described by Applicants, were not jurisdictional at the time of the Application, nor would they be at the time of the closing of the Proposed Transactions. In contrast, the NY Transco Rates Filing proposed transmission formula rates that would be charged at some future date, once the transmission facilities were placed into Commission-jurisdictional service.

The Commission orders:

The request for rehearing is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁶ See, e.g., *Jersey Power & Light Co. v. Fed. Power Comm'n*, 319 U.S. 61, 72-73 (1943) (reviewing determination by Federal Power Commission, the Commission's predecessor, that Jersey Power & Light Company was a public utility under the FPA and explaining that "Commission power does not extend over all connecting transmitting facilities but only over those which transmit energy actually moving in interstate commerce. Mere connection determines nothing."); *Cliffs Elec. Serv. Co. & Upper Peninsula Generating Co.*, 32 FERC ¶ 61,372, at 61,837 (1985) (stating that FPA section 203 "would not apply to any [applicants'] facilities which are not involved in the transmission or sale for resale of electric energy in interstate commerce.").

