

UNITED STATES OF AMERICA 111 FERC ¶ 61,006  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, and Joseph T. Kelliher.

Perryville Energy Partners, L.L.C. and  
Entergy Services, Inc. on behalf of  
Entergy Louisiana, Inc.

Docket No. EL04-118-001

ORDER DENYING REHEARING

(Issued April 5, 2005)

1. On November 5, 2004, Tractebel Energy Marketing, Inc. (Tractebel), filed a request for rehearing of the Commission's October 6, 2004 Order, which granted Perryville Energy Partners, L.L.C.'s (PEP) petition<sup>1</sup> that the Commission disclaim jurisdiction under section 203 of the Federal Power Act (FPA)<sup>2</sup> over PEP's sale of a generation-only facility (Perryville facility) to Entergy Louisiana, Inc. (Entergy Louisiana).<sup>3</sup> In this order, we will deny Tractebel's request for rehearing as discussed below. This order implements the FPA's mandate that the Commission not have jurisdiction, except as specifically provided, over facilities used solely for the generation of electric energy.

**Background**

2. In their July 14, 2004 filing (July 14 Filing), the Petitioners requested that the Commission disclaim jurisdiction over the sale of the Perryville facility to Entergy Louisiana. The Perryville facility is a 718 MW electric generation facility near Perryville, Louisiana.

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<sup>1</sup> PEP and Entergy Services, Inc. (Entergy) filed the declaratory order request on behalf of Entergy Louisiana, Inc. (Entergy Louisiana) (collectively, Petitioners).

<sup>2</sup> 16 U.S.C. § 824b (2000).

<sup>3</sup> *Perryville Energy Partners, L.L.C.*, 109 FERC ¶ 61,019 (2004) (October 6 Order).

3. Petitioners stated that the transaction would not include any Commission-jurisdictional facilities, including interconnection or other transmission facilities. PEP stated it intends to keep the interconnection facilities and to provide service over them to Entergy under a cost-of-service transmission rate schedule. Petitioners added that a Commission disclaimer of jurisdiction over this disposition would be consistent with the plain language of the FPA, judicial precedent, and decades of Commission precedent.

4. In its protest of Petitioners' July 14 Filing, Tractebel, along with other intervenors, argued that the Commission should not disclaim jurisdiction over the transaction. Specifically, Tractebel argued that the Commission has jurisdiction over the transaction because Entergy Louisiana is seeking to acquire a facility from which sales in interstate commerce under a Commission-approved market-based rate tariff are and will be made. Tractebel argued that disclaiming jurisdiction would represent a departure from the Commission's long-standing policy regarding exempt wholesale generators<sup>4</sup> and owners of jurisdictional facilities making wholesale sales under a Commission-approved market-based tariff rate.<sup>5</sup> Tractebel also claimed that Petitioners are attempting to evade Commission jurisdiction by focusing on the form of the transaction rather than its substance.

5. In its October 6 Order, the Commission granted Petitioners' request for disclaimer of jurisdiction over the disposition of the generation-only Perryville facility in this proceeding. The Commission noted that section 203 of the FPA states that "no public utility shall sell, lease, or otherwise dispose of the whole of its facilities *subject to the jurisdiction of the Commission*"<sup>6</sup> without authorization from the Commission. The Commission also noted that section 201(b)(1) of the FPA, which defines the scope of Commission jurisdiction, provides that:

The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but *shall not* have jurisdiction, except as specifically provided in this Part and the Part next following, over *facilities used for the generation of electric energy ....*<sup>7</sup>

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<sup>4</sup> 15 U.S.C. § 79z-5a (a)(1) (2000).

<sup>5</sup> Tractebel cited *Oklahoma Gas and Electric*, 108 FERC ¶ 61,004 (2004) (*Oklahoma Gas and Electric*), *reh'g pending*.

<sup>6</sup> 16 U.S.C. § 824b (2000) (emphasis added).

<sup>7</sup> *Id.* at § 824(b)(1)(emphasis added).

The Commission concluded that, since section 201 expressly exempts “facilities used for the generation of electric energy” from Commission jurisdiction unless “specifically provided” for,<sup>8</sup> the Commission cannot claim jurisdiction over Petitioners’ proposed sale of a generation-only facility simply because Petitioners also transmit and/or sell energy at wholesale.

6. Additionally, the Commission noted that the United States Court of Appeals for the District of Columbia Circuit had recently affirmed that the Commission lacks jurisdiction over dispositions of generation-only facilities under FPA section 203.<sup>9</sup>

7. In response to intervenors’ arguments that the Petitioners are attempting to evade Commission jurisdiction, the Commission found that there was no indication on this record that this is a two-step transaction (*i.e.*, that Petitioners plan to transfer the associated jurisdictional transmission facilities following transfer of the generating facility) or that Petitioners are otherwise attempting to deprive the Commission of the jurisdiction that Congress has given it

8. The Commission also rejected Tractebel’s argument that, under the *Oklahoma Gas and Electric* case, if the Commission has jurisdiction over an entity as a public utility, then the Commission must have section 203 jurisdiction over any activity of that entity.

9. Lastly, the Commission stated that the issue of whether Entergy will have market power after the acquisition will be addressed in the Commission’s review of Entergy’s market-based rate authority.

### **Tractebel’s Rehearing Request**

10. In its request for rehearing, Tractebel claims: (1) that the Perryville facility is subject to FPA jurisdiction because the Perryville facility has been and currently is used

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<sup>8</sup> While Tractebel argues that our use of the word “unless” rather than “except as” is of significance, we disagree. Whether as the statute just quoted provides, *i.e.*, “except as,” or as our order explained, *i.e.*, “unless,” our response to the intervenors’ argument is the same; we do not have jurisdiction over a generation-only disposition, because sections 203 and 201 when read together (as we must) do not give us jurisdiction over a generation-only disposition.

<sup>9</sup> See, e.g., *American Pub. Power Ass’n and Citizen Power, Inc.*, 94 FERC ¶ 61,104 at 61,423, *reh’g denied*, 95 FERC ¶ 61,023 (2001), *aff’d*, *Citizen Power Inc. v. FERC*, 38 Fed. Appx. 18 (D.C. Cir.), *cert. denied*, 537 U.S. 1046 (2002).

exclusively by Perryville to sell electric energy at wholesale; (2) that the Commission should not have relied on the prospective severance of generation from interconnection facilities to disclaim jurisdiction; (3) the Commission should have deferred ruling on the petition until such time as the parties had had an opportunity to gather evidence needed to conclusively determine whether any aspect of the transaction is jurisdictional under the FPA (including the effect the transaction could have on competitive markets); (4) the Commission's reading of the FPA in its October 6 Order would render certain provisions of section 201 meaningless and create a gap in state and federal regulation, the type of gap the FPA was enacted to close; (5) that the Commission exercised jurisdiction over generation-only facilities in the *Oklahoma Gas and Electric* case; and (7) the Commission's October 6 Order misconstrues section 203 and effectively views the transaction from the buyer's (Entergy) perspective as opposed to the seller's (Perryville) perspective.

### Discussion

11. We will deny Tractebel's request for rehearing. Tractebel presents little in its request for rehearing that was not already addressed by the Commission in its October 6 Order.

12. The October 6 Order addressed Tractebel's concerns regarding FPA jurisdiction and the use of the Perryville facility to sell electric energy at wholesale;<sup>10</sup> the prospective severance of generation from interconnection facilities to disclaim jurisdiction;<sup>11</sup> how the transaction could affect competitive markets;<sup>12</sup> and the *Oklahoma Gas and Electric* case.<sup>13</sup> Such matters thus need not be further addressed here. The FPA simply does not give the Commission jurisdiction over a generation-only disposition. The Commission has long taken this view and nothing Tractebel has presented persuades us that we were or are incorrect in our interpretations.<sup>14</sup>

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<sup>10</sup> Order 6 Order, 109 FERC ¶ 61,019 at P 13-14.

<sup>11</sup> *Id.* at P 14.

<sup>12</sup> *Id.* at P 17-22.

<sup>13</sup> *Id.* at P 16.

<sup>14</sup> *El Paso Electric Co.*, 36 FERC ¶ 61,055 at 61,119 (1986); *Consumers Power Co.*, 53 FERC ¶ 61,382 at 62,343 (1990); *Duquesne Light Co.*, 84 FERC ¶ 61,309 at 62,406 (1998).

13. Regarding Tractebel's concerns that (1) the Commission's reading of the FPA would create a gap in state and federal regulation, and (2) that the Commission's October 6 Order incorrectly views the transaction from the buyer's (Entergy) perspective as opposed to the seller's (Perryville) perspective, the Commission disagrees.

14. As to the latter argument, we viewed the transaction from the seller's (Perryville) perspective; Perryville was disposing of generation-only facilities and we simply do not have jurisdiction over such dispositions. As to the former, our action does not create an impermissible gap in regulation. Any power sales at wholesale from the Perryville facility will continue to be subject to our jurisdiction under sections 205 and 206 of the FPA,<sup>15</sup> even if we do not have jurisdiction over the disposition under section 203 of the FPA. And, if there is any gap, it is not a gap that the Commission has created or that the Commission has the authority to fill. Rather, it would be a gap Congress permitted and a gap that only Congress can eliminate.

15. In this regard, while Tractebel points to the language of section 201(a) as giving us jurisdiction in the circumstances of a generation-only disposition, the language Tractebel quotes provides that "federal regulation of matters related to generation *to the extent provided in this subchapter [i.e., Part II of the FPA]...is necessary in the public interest....*" While Tractebel focuses on matters "relating to generation," it ignores the next phrase; "to the extent provided in this subchapter [*i.e., Part II of the FPA*]." So, much as Tractebel would like the statute to give us authority over generation-only dispositions, the simple fact is the statute does not.

The Commission orders:

The Commission denies Tractebel's request for rehearing, as discussed in the body of this order.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Deputy Secretary.

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<sup>15</sup> 16 U.S.C. §§ 824d-e (2000).