

166 FERC ¶ 61,124
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Jacksonville Electric Authority

Docket No. EL18-200-000

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued February 21, 2019)

1. On September 17, 2018, pursuant to Rule 207(a)(2) of the Commission's Rules of Practice and Procedure,¹ Jacksonville Electric Authority (JEA) filed a petition for declaratory order (Petition) seeking a determination that the Commission has jurisdiction under section 201(b)(1) of the Federal Power Act (FPA)² over the Amended and Restated Power Purchase Agreement (PPA) between JEA and Municipal Electric Authority of Georgia (MEAG) for the purchase of power from the Plant Vogtle nuclear generating facilities under construction in the state of Georgia. In this order, we deny JEA's Petition and disclaim jurisdiction over the PPA.

I. Background

2. JEA is an independent agency of the City of Jacksonville, Florida and serves end use customers in the Jacksonville, Florida area. MEAG is a public corporation of the state of Georgia and the wholesale electricity supplier for 49 participating political subdivisions in Georgia. MEAG owns a 22.7 percent ownership interest in Plant Vogtle Units 3 and 4, which are nuclear generating facilities under construction in Georgia (collectively, the Project).³

3. Under the PPA, MEAG will sell wholesale capacity, energy and ancillary services to JEA from the Project. In particular, MEAG will sell JEA approximately 41.2 percent of the output, which is approximately 206 MW of capacity, energy, and ancillary

¹ 18 C.F.R. § 385.207(a)(2) (2018).

² 16 U.S.C. § 824(b)(1) (2012).

³ JEA Petition at 5.

services, from MEAG's interest in the Project.⁴ Under the PPA, JEA is responsible for arranging the transmission services necessary to transmit the energy from Georgia into Florida.⁵

4. JEA states that, since late 2017, it has been in discussions with MEAG about the Project, and it has informed MEAG that JEA is in favor of discontinuing the Project due to extensive cost overruns in the Project.⁶ JEA states that, on September 11, 2018, MEAG filed a complaint against JEA in federal district court in Georgia (MEAG Complaint), which requests that the court order JEA to perform its obligations under the PPA.⁷ JEA states that the MEAG Complaint contains a number of allegations that implicate and reinforce the need for the Commission to confirm its jurisdiction under the FPA over the PPA, and to require that the PPA be filed for the Commission's review and approval.⁸

II. Petition

5. JEA seeks an order from the Commission: (1) declaring 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 section 201(b) of the FPA; (2) declaring that the PPA between MEAG and JEA is a "facility" for such wholesale transactions in interstate commerce, and is subject to the Commission's exclusive jurisdiction under section 201(b) of the FPA; and (3) finding that, because the PPA is a facility for wholesale transactions in interstate commerce, MEAG is obligated as the seller to file the PPA at the Commission for the Commission's review and approval under the FPA.⁹ JEA clarifies that its Petition concerns whether the PPA is a jurisdictional agreement under section 201(b) of the FPA, and it does not question the status of MEAG and JEA as public entities that are exempt from the Commission's regulation under FPA section 201(f).¹⁰

⁴ *Id.*

⁵ *Id.* at 6.

⁶ *Id.* at 7.

⁷ *Id.* at 7-8.

⁸ *Id.* at 8.

⁹ *Id.* at 15-16.

¹⁰ *Id.* at 2. Section 201(f) of the FPA states, in relevant part, that: "No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political

6. JEA argues that the FPA grants the Commission exclusive jurisdiction over the PPA and all interstate transactions thereunder because FPA section 201(b) provides the Commission with exclusive jurisdiction over any interstate transmission or interstate sales of electricity for resale, regardless of the entities involved.¹¹ JEA explains that section 201(b) grants the Commission exclusive jurisdiction over several types of electricity transactions, including the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, and all facilities for such transmission or sale of electric energy.¹² JEA states that FPA section 201(c) establishes that “electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof”¹³ JEA states that FPA section 201(d) establishes that the term “sale of electricity at wholesale” means “a sale of electric energy to any person for resale.”¹⁴ JEA argues that because JEA is a “person” under the FPA and it resells the electric energy and related products purchased from MEAG in Georgia under the PPA to its end use customers in Florida (i.e., in interstate commerce from Georgia to Florida), the underlying sale of electric energy by MEAG to JEA under the PPA is subject to this Commission’s jurisdiction under FPA section 201(b).

7. JEA relies principally on two cases to support its argument, *U.S. v. Pub. Util. Comm’n of Cal.*,¹⁵ and *Ark. Pwr. & Light Co. v. FPC*.¹⁶ JEA asserts that these cases stand for the proposition that, once electricity or natural gas is placed in interstate commerce, the Commission has jurisdiction over that sale, regardless of the entities involved.¹⁷ JEA further asserts that the U.S. Supreme Court’s recent decision in *FERC v.*

subdivision of a State . . . or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing . . . unless such provision makes specific reference thereto.” 16 U.S.C. § 824(f) (2012).

¹¹ JEA Petition at 9-10.

¹² *Id.* at 9 (citing 16 U.S.C. § 824(b)(1)).

¹³ *Id.* at 10 (quoting 16 U.S.C. § 824(c)).

¹⁴ *Id.* (quoting 16 U.S.C. § 824(d)).

¹⁵ 345 U.S. 295 (1953) (*CPUC*).

¹⁶ 368 F.2d 376 (8th Cir. 1966) (*Arkansas P&L*).

¹⁷ JEA Petition at 11 (citing *CPUC*, 345 U.S. at 313-14; *Arkansas P&L*, 368 F.2d at 383).

Elec. Pwr. Supply Ass'n confirmed the Commission's broad authority under the FPA to regulate matters that directly affect the sale of wholesale electric power in interstate commerce as "obligat[ing] FERC to oversee *all prices for those interstate transactions* and all rules and practices affecting such prices."¹⁸

8. JEA also claims that the Commission has found on numerous occasions that public entities are in fact subject to the FPA to the extent that they avail themselves of interstate transactions.¹⁹ JEA also asserts that under FPA section 201(f), public entities like MEAG are generally exempt from regulation under the FPA, but only for those activities that are subject to state regulation or matters that are wholly intrastate.²⁰

9. JEA argues that long-held precedent requires the Commission to assert jurisdiction over all interstate transmission and interstate sales of electricity for resale in order to avoid a regulatory gap in oversight,²¹ and therefore the Commission should assert its jurisdiction under the FPA over the PPA. JEA explains that the PPA is not subject to the jurisdiction of Georgia or Florida.²² JEA asserts that, because the PPA allows MEAG to impose conditions on JEA's activities in Florida, but those conditions are not subject to the regulatory oversight of either state, sales under the PPA will evade all regulatory oversight unless the Commission exercises jurisdiction. JEA asserts that this is an example of the "*Attleboro* gap" that the FPA was intended to fill.²³

10. Finally, JEA argues that specific provisions of the PPA make the need for Commission review more apparent. JEA explains that, under the PPA, MEAG can impose conditions on JEA's rates charged to its customers; JEA's operation of its system and use of operating reserves; entities to whom JEA can sell the Project's output; and

¹⁸ *Id.* at 10 (quoting *FERC v. Elec. Pwr. Supply Ass'n*, 136 S. Ct. 760, 767 (2016)) (*EPSA*) (emphasis added)).

¹⁹ *Id.* at 11.

²⁰ *Id.* (citing 16 U.S.C. § 824(f); *Arkansas P&L*, 368 F.2d 383).

²¹ *Id.* at 12 (citing *Pub. Util. Comm'n of R. I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927) (*Attleboro*) (holding the Commerce Clause prevents state and local regulators from regulating certain interstate electricity transactions, including sales for resale across state lines). JEA states that this regulatory gap in oversight has been referred to as the "*Attleboro* gap" and Part II of the FPA was intended to fill that gap. *Id.* (citing *CPUC*, 345 U.S. at 307-8).

²² *Id.* at 13.

²³ *Id.*

JEA's cost recovery from its customers.²⁴ JEA also asserts that the PPA provides no incentives for MEAG to control costs or construction timelines.²⁵ JEA argues that, unless the Commission acts to assert jurisdiction and fill this regulatory gap, there is no agency that will be able to oversee MEAG's activities with respect to the Project and the PPA, and ensure that the rates, terms and conditions in the PPA are just and reasonable.²⁶

III. Notice of Filing and Responsive Pleadings

11. Notice of the Petition was published in the *Federal Register*, 83 Fed. Reg. 48,302 (2018), with interventions and protests due on or before October 17, 2018. Timely-filed motions to intervene were submitted by all of the entities listed in Appendix A to this order, which also lists the abbreviated names for each entity. Twenty-seven public power entities, groups and associations, including MEAG, filed protests (collectively, Protesters).²⁷ American Public Gas Association (APGC) filed comments. Municipal Electric Utilities Association of New York filed a motion to intervene out-of-time. On November 2, 2018, JEA filed an answer to the protests (Answer). On February 1, 2019, the U.S. Department of Energy (DOE) submitted comments out-of-time.

A. Protests

12. Protesters explain that JEA's Petition affects not only the PPA between JEA and MEAG, but potentially causes immediate harm to all public power entities. Protesters state that, despite JEA's attempts to limit its jurisdictional arguments to its contract with MEAG, JEA's arguments, if accepted, would apply to all wholesale sales by all public power entities outside of ERCOT, Alaska, and Hawaii.²⁸ According to Protesters, not

²⁴ *Id.* at 13-14.

²⁵ *Id.* at 14-15.

²⁶ *Id.* at 15.

²⁷ The entities that filed protests are identified in Appendix A to this order. Since all protests advance substantially similar arguments using identical court cases and Commission precedent, we collectively refer to them as Protesters.

²⁸ *See, e.g.* Nebraska Public Power District Motion to Intervene and Request for Expedited Action at 4-5; Public Power Entities Protest at 1 n.2 (granting the Petition would have a broad, adverse impact on all wholesale sales in interstate commerce that are made by state-owned and municipal electric utilities, who are not "public utilities" as defined by the FPA); Public Power Associations Protest at 18 (granting the Petition 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).

only would a Commission order granting JEA's Petition call into question the validity of all such sales, but the mere pendency of JEA's Petition constitutes a risk factor that at least some public power entities believe must be disclosed on their bond issuance documents.²⁹

13. Protesters argue that FPA section 205³⁰ restricts the Commission's rate review authority of wholesale sales of electric energy to those sales made "by any public utility."³¹ Protesters note that JEA concedes in its Petition that neither JEA nor MEAG is a "public utility" as defined in the FPA.³² Protesters further contend that the Commission's general jurisdiction over wholesale sales found in FPA section 201(b) does not override the specific exclusions for public power entities from such jurisdiction as specified in FPA section 201(f), 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."³³ Protesters allege that JEA's only answer to section 201(f) is to read it out of the statute, which violates the fundamental notion that a statute is to be read as a whole, where the specific prevails over the general.³⁴ Protesters argue that there are numerous instances in which the Commission has declined to assert jurisdiction over section 201(f) entities.³⁵

²⁹ Nebraska Public Power District Motion to Intervene and Request for Expedited Action at 5.

³⁰ 16 U.S.C. § 824d.

³¹ *See, e.g.*, Public Power Associations Protest at 6 (citing 16 U.S.C. § 824d(a)).

³² *See, e.g., id.* (citing JEA Petition at 11 and 16 U.S.C. § 824(e) (the definition of a "public utility" under the FPA)).

³³ *See, e.g., id.* (quoting 16 U.S.C. § 824(f)).

³⁴ *See, e.g., id.* at 8.

³⁵ *See, e.g.*, MEAG Protest at 4 (quoting *New West Energy Corp.*, 83 FERC ¶ 61,004, at 61,015 (1998) ("The statute is thus clear that Part II of the FPA, which contains sections 205 and 206, shall not apply to any political subdivision of a state or any corporation wholly owned by a political subdivision of a state")); Public Power Associations Protest at 10-11 (citing *Delta-Montrose Elec. Assoc.*, 151 FERC ¶ 61,238, at P 26 (denying request for the Commission to declare jurisdiction over a wholesale requirements contract between two section 201(f) non-jurisdictional entities and finding that the contract 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]"), *order on reh'g*, 153 FERC ¶ 61,028 (2015)).

14. Protesters argue that three circuit court decisions directly address and rebut JEA's arguments. First, in *Bonneville Pwr. Admin. v. FERC*,³⁶ the court addressed whether the Commission could use its authority in section 201(b) of the FPA to order Bonneville Power Administration (BPA), a non-public utility, to pay refunds related to sales of electric energy that occurred during the California energy crisis of 2000-2001. Protesters state that the *Bonneville* court found that "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)." ³⁷

15. Second, Protesters state that the D.C. Circuit applied similar logic in *Trans. Agency of N. Cal. v. FERC*.³⁸ Protesters state that, in *TANC*, the court considered whether the Commission could require the City of Vernon, California, a municipal electric utility, to make refunds of transmission rates collected through the California Independent System Operator Corporation's (CAISO) tariff.³⁹ Protesters explain that, in *TANC*, the Commission argued that, even though City of Vernon was a municipal electric utility exempt from its jurisdiction under FPA section 201(f), it could require City of Vernon to make refunds based on its authority to ensure that the CAISO rates remained just and reasonable.⁴⁰ Protesters state that, following the reasoning in *Bonneville*, the court 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.'" ⁴¹

16. Third, Protesters argue that, in *City of Clarksville v. FERC*,⁴² the court addressed a nearly identical case concerning FPA section 201(b)'s parallel provision of the Natural

³⁶ 422 F.3d 908 (9th Cir. 2005) (*Bonneville*).

³⁷ *See, e.g.,* Public Power Associations Protest at 10 (quoting *Bonneville*, 422 F.3d at 920 (emphasis in original)).

³⁸ 495 F.3d 663 (D.C. Cir. 2007) (*TANC*).

³⁹ *See, e.g.,* Public Power Associations Protest at 10.

⁴⁰ *Id.*

⁴¹ *Id.* (quoting *TANC*, 495 F.3d at 674 (quoting *Bonneville*, 422 F.3d at 911)).

⁴² 888 F.3d 477 (D.C. Cir. 2018) (*Clarksville*).

Gas Act (NGA), section 1(b).⁴³ Protesters explain that, in the underlying case, the Commission asserted jurisdiction over the City of Clarksville's interstate natural gas sales to an out-of-state municipality, after finding that the city's identity as a municipality was irrelevant.⁴⁴ Protesters assert that the court disagreed, stating that NGA section 1(b) "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."⁴⁵

17. Protesters also dispute JEA's "*Attleboro* gap" arguments. They argue that section 201(f) entities are not unregulated, because they are governed by their consumer-owners through locally elected or appointed public officials serving on utility boards or city councils.⁴⁶ Protesters state that Congress was aware that public power entities were making wholesale interstate sales when drafting Part II of the FPA, and, if it was concerned that such sales would go unregulated, Congress would not have provided express exemptions for such entities in the statute.⁴⁷

B. Comments

18. APGA argues that *Clarksville* is fully controlling and dispositive of the question presented by the Petition. APGA states that JEA emphasizes that: (1) the transaction involves a wholesale sale; (2) the buyer and seller are located in different states; (3) the output from the contract is destined for ultimate use in the buyer's state; and (4) no state commission is regulating the arrangement.⁴⁸ APGA points out that all four of these same factors were present in *Clarksville*, and the court nonetheless rejected the Commission's attempt to assert jurisdiction over the city as a natural gas company under the NGA.

19. APGA states that, in essence, JEA asserts that even though MEAG is not a public utility under the FPA, the Commission must assert jurisdiction over the transaction in

⁴³ See, e.g., Public Power Associations Protest at 10-11; Public Power Entities Protest at 4-5.

⁴⁴ See, e.g., Public Power Associations Protest at 11.

⁴⁵ See, e.g., *id.* (quoting *Clarksville*, 888 F.3d at 485).

⁴⁶ See, e.g., *id.* at 16.

⁴⁷ See, e.g., Public Power Entities Protest at 12.

⁴⁸ APGA Comments at 3 (citing JEA Petition at 3, 11-13).

order to prevent a “regulatory gap.”⁴⁹ APGA states that, in *Clarksville*, the court squarely rejected this line of reasoning with respect to the NGA and explained that “even if there were a regulatory gap, it would not be of the sort Congress was worried about in enacting the NGA.”⁵⁰ APGA explains that the court went on to cite case law and legislative history demonstrating that the intent of the NGA was to prevent abusive and exploitive practices of private companies.⁵¹ APGA therefore asserts that municipalities and other governmental entities were not the concern of Congress under the NGA, and JEA has pointed to nothing that would indicate that the intent of Congress in enacting the FPA was any different. APGA argues that, given that the NGA and FPA “are in all material respects substantially identical, and constructions of one are authoritative for the other,” JEA’s argument and Petition must be rejected.⁵²

20. DOE likewise asserts that JEA’s Petition must be denied. DOE argues that JEA’s contentions were rejected by the Ninth Circuit in *Bonneville*.⁵³ DOE asserts that there is no regulatory gap that must be filled by the Commission, both because sales by municipals are operated by and accountable to state political subdivisions, and because there are two federal district court cases addressing the contract claims JEA is attempting to raise at the Commission.⁵⁴ DOE further asserts that granting JEA’s Petition would call into question the “the long-established jurisdictional structures of the federal Power Marketing Administrations,”⁵⁵ and would “creat[e] unwarranted and unnecessary interagency conflict and regulatory confusion.”⁵⁶

C. JEA Answer to Protests

21. JEA asserts that its Petition would not affect all power sales agreements involving other section 201(f) entities, but is limited to the unique facts and circumstances that lead

⁴⁹ *Id.* (citing JEA Petition at 12-13).

⁵⁰ *Id.* (quoting *Clarksville*, 888 F.3d at 485).

⁵¹ *Id.*

⁵² *Id.* at 4 (quoting *Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (internal citation and quotation omitted)).

⁵³ DOE Comments at 4-6.

⁵⁴ *Id.* at 7-9.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 10.

to this specific agreement - namely, an agreement that, unless the Commission steps in, is subject to no regulatory review.⁵⁷ JEA argues that the Protesters appear to champion an exemption for governmental entities and rural electric cooperatives in the FPA that would know no bounds.⁵⁸ JEA asserts that there must be some rational limit to the section 201(f) exemptions contained within the FPA in order to respect Congress's desire to close the *Attleboro* gap.⁵⁹

22. JEA distinguishes the facts of its Petition from *Clarksville*, where the D.C. Circuit found that the Commission has no jurisdiction over a municipality's interstate natural gas sales. JEA argues that *Clarksville* actually supports its Petition because the D.C. Circuit found no evidence that there would be a regulatory gap if the Commission failed to exercise jurisdiction under the NGA and further held that, unlike the FPA, there was no indication that Congress was concerned about closing a regulatory gap when it enacted the NGA.⁶⁰ JEA asserts that, as the court in *Clarksville* recognized, the Supreme Court decision in *CPUC* remains settled law and, under the fact pattern presented in its Petition, public power entities are subject to the Commission's jurisdiction under the FPA.⁶¹

23. Finally, JEA argues that the *Bonneville* and *TANC* cases are not applicable to its Petition. JEA asserts that these cases addressed only the narrow issue of the Commission's authority under FPA section 206 to order a public power entity to issue refunds.⁶² JEA argues that neither decision addressed the specific question presented here – whether a PPA that involves interstate sales of electricity is subject to the Commission's jurisdiction under section 205 of the FPA, especially where a regulatory oversight gap exists.⁶³ JEA argues that *Bonneville* and *TANC* have been superseded by the Supreme Court's *EPSA* decision, and that neither decision addresses *EPSA*'s “fundamental underpinning,” which is that Congress passed the FPA “precisely to

⁵⁷ JEA Answer at 2.

⁵⁸ *Id.* at 3.

⁵⁹ *Id.*

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 5 (citing *CPUC*, 345 U.S. at 313).

⁶² *Id.* at 6.

⁶³ *Id.*

eliminate vacuums of authority over the electricity markets,” to “prevent[] the creation of any regulatory no man's land,” and to ensure that “some entity must have jurisdiction.”⁶⁴

IV. Discussion

A. Procedural Matters

24. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We grant the motion to intervene out-of-time of Municipal Electric Utilities Association of New York and the out-of-time comments of DOE, given their interests, the early stage of this proceeding, and the absence of undue prejudice or delay.

25. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2018), prohibits an answer unless otherwise ordered by the decisional authority. We accept JEA’s Answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

26. The Commission’s jurisdiction to review the rates, terms and conditions in wholesale power purchase agreements is derived from FPA sections 205⁶⁵ and 206.⁶⁶ With one limited exception not applicable here, these statutory provisions give the Commission jurisdiction only over wholesale sales in interstate commerce by “public utilities.”⁶⁷ As the Ninth Circuit held in *Bonneville* when rejecting the Commission’s attempts to impose a refund obligation on public power entities:

⁶⁴ *Id.* (quoting *EPSA*, 136 S. Ct. at 780) (internal citations and quotations omitted)).

⁶⁵ 16 U.S.C. § 824d.

⁶⁶ *Id.* § 824e.

⁶⁷ Section 205(a) of the FPA provides that “[a]ll rates and charges made . . . by any public utility for . . . sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.” 16 U.S.C. § 824d(a) (emphasis added). Section 206(a) provides that “[w]henever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate . . . charged, or collected by any public utility for any . . . sale subject to the jurisdiction of the Commission. . . is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the

The FPA’s requirement that all rates for wholesale sales of electric energy must be “just and reasonable” — the basis of the refund orders — *applies only to “public utilities”* and makes no reference, specific or otherwise, to non-public utilities. FPA § 205 (16 U.S.C. § 824d). Similarly, FERC’s authority to investigate rates and to order refunds *is limited to any rate collected by “any public utility”*; the statute carries no reference to non-public utilities. FPA § 206 (16 U.S.C. § 824e).⁶⁸

The one limited exception not applicable here, FPA section 206(e)(2), authorizes the Commission to require section 201(f) entities to make refunds of short-term sales made in organized markets.⁶⁹ This reference to the Commission’s limited authority over sales by section 201(f) entities in this single subsection reinforces the conclusion that the Commission otherwise lacks authority over sales by section 201(f) entities under FPA sections 205 and 206.

27. MEAG, the seller under the PPA, is a public corporation of the state of Georgia and a municipal entity that, under FPA section 201(f), is exempt from most provisions of the FPA, “unless such provision makes specific reference thereto.”⁷⁰ MEAG does not meet the definition of a “public utility” under the FPA.⁷¹ Because MEAG is not a public

just and reasonable rate . . . to be thereafter observed and in force, and shall fix the same by order” 16 U.S.C. § 825e(a) (emphasis added).

⁶⁸ *Bonneville*, 422 F.3d at 911 (emphasis added). JEA argues that the Ninth Circuit limited its analysis to the Commission’s refund authority under section 206 of the FPA. JEA Answer at 4. However, as this quote makes clear, the court did not limit its analysis to section 206, but instead based its decision on the scope and structure of both sections 205 and 206.

⁶⁹ 16 U.S.C. 824e(e)(2).

⁷⁰ 16 U.S.C. 824(f). FPA section 201(b)(2) provides that section 201(f) entities are subject to FPA sections 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 215A, 216, 217, 218, 219, 220, 221, and 222. *Id.* § 824(b)(2).

⁷¹ Under the FPA, a “public utility” is defined as “any *person* who owns or operates facilities subject to the jurisdiction of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of section 206(e), 206(f), 210, 211, 211A, 212, 215, 215A, 216, 217, 218, 219, 220, 221, or 222).” 16 U.S.C. 824(e) (emphasis added). The FPA defines a “person” as “an individual or a corporation[.]” *Id.* § 796(4). The FPA’s definition of a “corporation” specifically excludes “municipalities.” *Id.* § 796(3). The FPA defines a “municipality” to include “a city . . . or other political

utility, the Commission has no authority to review MEAG's sales to JEA under the PPA under either FPA sections 205 or 206.

28. JEA concedes that "public entities like MEAG are generally exempt from regulation under the FPA as a 'public utility.'" ⁷² JEA goes on, however, to advance a number of arguments as to why the Commission nevertheless has jurisdiction over MEAG's sales under the PPA. None of these arguments are persuasive.

1. Scope of FPA Section 201(f)

29. First, JEA asserts, without referencing any specific statutory language, that the FPA section 201(f) exemption applies "only as to those activities that are subject to state regulation or matters that are wholly intrastate." ⁷³ JEA's assertion is not supported by the language of section 201(f). To the contrary, as the Ninth Circuit held in *Bonneville*, "[t]he sweep of this exemption is huge. Nothing in subchapter II applies to the United States or any state, including any political subdivision, unless the statute makes specific reference to any of these entities." ⁷⁴

2. The Commission's Jurisdiction Under FPA Section 201(b)(1)

30. Next, JEA points to FPA section 201(b)(1), which gives the Commission exclusive jurisdiction over wholesale sales of electricity in interstate commerce. JEA asserts that, under FPA section 201(b)(1), the Commission has jurisdiction over wholesale sales of electricity in interstate commerce that are made pursuant to the PPA. Citing to the *CPUC* and *Arkansas P&L* decisions, JEA claims that "[o]nce electricity or

subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." *Id.* § 796(7). Because MEAG meets the definition of a "municipality" and does not meet the definition of a "person," it does not meet the definition of a "public utility" under the FPA. *See also Bonneville*, 422 F.3d at 915 ("Even though governmental and municipal utilities are public in normal parlance, they are not 'public utilities' under the FPA."); *TANC*, 495 F.3d at 674 ("a municipality is not a public utility").

⁷² JEA Petition at 11.

⁷³ *Id.*

⁷⁴ *Bonneville*, 422 F.3d at 915.

natural gas is placed in interstate commerce, the Commission has jurisdiction over that sale – regardless of the parties involved.”⁷⁵

31. However, FPA section 201(b)(1) does not provide the Commission with an independent grant of authority to review the rates for all wholesale sales of electricity in interstate commerce. Instead, as explained above, the Commission’s authority over the rates for wholesale sales is derived from FPA sections 205 and 206, and these statutory provisions do not give the Commission authority over wholesale sales by MEAG because MEAG is not a “public utility” under the FPA.

32. Neither *CPUC* nor *Arkansas P&L*—the cases cited by JEA—holds otherwise. In each case, the sale of electricity was made by an entity that indisputably was a “public utility” under the FPA. In *CPUC*, the Supreme Court ruled that interstate wholesale sales made by a public utility to a section 201(f) exempt entity are subject to the Commission’s jurisdiction,⁷⁶ and, in *Arkansas P&L*, the Eighth Circuit held that the Commission has jurisdiction over a public utility’s wholesale sales in interstate commerce even if such sales are made over local distribution facilities not subject to the Commission’s jurisdiction.⁷⁷ Neither case addressed the Commission’s jurisdiction over wholesale sales of power by section 201(f) entities and, consequently, neither case supports JEA’s contention that the Commission has authority to review wholesale sales of power by MEAG.

33. Although the *CPUC* and *Arkansas P&L* cases did not address the issue of the Commission’s authority over wholesale sales by section 201(f) exempt entities, other cases have considered the question, and in those cases, the courts uniformly have rejected the argument made here by JEA—that FPA section 201(b)(1) gives the Commission authority over wholesale sales in interstate commerce regardless of the identity of the seller. For example, in *Bonneville*, the Ninth Circuit found that such an argument

⁷⁵ JEA Petition at 11.

⁷⁶ *CPUC*, 345 U.S. at 313 (exempting wholesale sales by public utilities to section 201(f) entities from the Commission’s jurisdiction would frustrate the intent of the FPA “that such political subdivisions of the states can be aggrieved by the failure of a *public utility selling power to them* to satisfy the requirements of Part II”) (emphasis added).

⁷⁷ *Arkansas P&L*, 368 F.2d at 383 (“the Section 201(b) exemption [i.e., the local distribution facilities exemption] applies to a company’s status as a public utility and not to the Commission’s jurisdiction over sales in interstate commerce for resale”). JEA appears to have mistaken this reference to a “Section 201(b) exemption,” which, among other things, exempts local distribution facilities from the Commission’s jurisdiction, with the section 201(f) exemption, which exempts certain governmental entities from the Commission’s jurisdiction.

“ignores a basic principle of statutory construction, namely that the specific prevails over the general,”⁷⁸ and that the general language of FPA section 201(b)(1) does not give the Commission authority over wholesale sales by section 201(f) entities when section 201(f) specifically exempts such sales from the Commission’s jurisdiction. The Ninth Circuit found that such a holding would “render a nullity multiple provisions of the FPA If 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.”⁷⁹ The D.C. Circuit agreed, holding in *TANC* that “FERC’s authority is based on the identities of the sellers, rather than the nature of the transactions.”⁸⁰

34. JEA also makes the claim 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.”⁸¹ However, JEA provides no supporting citation to any decision in which the Commission made such a finding.

3. Congressional Intent to Close a Regulatory Gap

35. JEA’s third argument relies on the legislative history of the FPA, and the *CPUC* and *EPSA* cases interpreting that history, to the effect that Congress enacted the FPA in large part to close the *Attleboro* gap that left the states unable to regulate wholesale sales in interstate commerce. According to JEA:

[I]f this Commission does not 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, then 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*.⁸²

36. This argument suffers from a number of defects. First, and foremost, as the Ninth Circuit held in *Bonneville* in rejecting a nearly identical argument based on the FPA’s

⁷⁸ *Bonneville*, 422 F.3d at 916.

⁷⁹ *Id.*

⁸⁰ *TANC*, 495 F.3d at 674-75 (citing *Bonneville*, 422 F.3d at 916)).

⁸¹ JEA Petition at 11.

⁸² *Id.* at 15.

legislative history, “[l]egislative history cannot trump the statute.”⁸³ The court went on to hold, in considering whether the FPA gave the Commission authority over sales by section 201(f) entities, that “the text and structure of the FPA are unambiguous.”⁸⁴ The court further held “FERC’s authority to order refunds under § 206(b) is specifically limited to ‘public utilities’ and no explicit reference to governmental entities is made in § 206(b), as required by § 201(f).”⁸⁵

37. Second, the FPA’s legislative history does not support JEA’s contention that Congress intended for the Commission to regulate wholesale sales in interstate commerce by section 201(f) entities. Although the legislative history indicates a Congressional intent to fill the *Attleboro* gap, the legislative history also makes clear that Congress did not intend, in doing so, to regulate wholesale sales in interstate commerce by section 201(f) entities. In *Bonneville*, the Ninth Circuit noted with approval the Commission’s 1998 evaluation of the legislative history regarding section 201(f) entities, concluding that:

The 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 lines. The Senate Report on the bill, for example, stated, “The revision has also removed every encroachment upon the authority of the States,” and noted that a new subsection 201(e) [which later became 201(f)] “has been added to remove all doubt that the act is not to apply to public projects, Federal, State, or municipal.”⁸⁶

⁸³ *Bonneville*, 422 F.3d at 920 (citing *Am. Rivers v. FERC*, 201 F.3d 1186, 1204 (9th Cir. 1999) (“[W]e are mindful that this Court steadfastly abides by the principle that ‘legislative history — no matter how clear — can’t override statutory text.’”) (quoting *Hearn v. W. Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995) (citations omitted); *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 461 (D.C. Cir. 2005) (noting that we “‘must give effect to the unambiguously expressed intent of Congress,’ regardless of the interpretation pressed by the Commission”) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984))).

⁸⁴ *Bonneville*, 422 F.3d at 520.

⁸⁵ *Id.*

⁸⁶ *Bonneville*, 422 F.3d at 520 (quoting *New West Energy Corp.*, 83 FERC ¶ 61,004 at 61,018) (internal citations omitted) (emphasis added).

38. JEA cites to the D.C. Circuit's recent *Clarksville* decision as supporting its argument that the Commission must assert jurisdiction to fill a regulatory gap here. In *Clarksville*, the court found that NGA section 1(b) did not confer jurisdiction on the Commission to review the City of Clarksville's interstate natural gas sales to an out-of-state municipality, holding that section 1(b) of the NGA "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." JEA nonetheless asserts that "Clarksville supports, rather than disproves, JEA's argument regarding the PPA's jurisdictional status under the FPA,"⁸⁷ because the *Clarksville* decision was based on a finding that the NGA was not intended to close a regulatory gap, whereas the legislative history of the FPA evidences Congress' intent to close the regulatory gap and grant the Commission the authority to regulate interstate wholesale sales, such as those contemplated by the PPA between MEAG and JEA.⁸⁸

39. JEA's argument is based on a mischaracterization of the holding in *Clarksville*. Contrary to JEA's assertion that *Clarksville* was premised on the court's conclusion that Congress was not concerned with closing a regulatory gap when it enacted the NGA, the D.C. Circuit in *Clarksville* observed that, as a general matter, "[t]he NGA was intended to fill the regulatory gap left by a series of Supreme Court decisions that interpreted the dormant Commerce Clause to preclude state regulation of interstate transportation and of wholesale gas sales."⁸⁹ Moreover, the D.C. Circuit went on to quote extensively from the NGA's legislative history to conclude that "even if there were a regulatory gap [precluding state regulation of sales by Clarksville], *it would not be of the sort Congress was worried about in enacting the NGA.*" Thus the court's interpretation of the legislative history of the NGA is consistent, not at odds, with the Commission's conclusion, above, that of the legislative history of the FPA makes clear that Congress did not intend to regulate wholesale sales in interstate commerce by section 201(f) entities.

40. In addition to the legislative history, the fact that Congress explicitly exempted section 201(f) entities from most provisions of FPA Title II further indicates that Congress intentionally decided not to subject section 201(f) entities to the same regulation as public utilities, including the regulation of wholesale interstate sales.

41. In sum, none of JEA's arguments overcome the fact that, because MEAG is not a public utility, the Commission has no authority under FPA sections 205 and 206 to

⁸⁷ JEA Answer at 3.

⁸⁸ *Id.* at 3-6.

⁸⁹ *Clarksville*, 888 F.3d at 484-85 (quoting *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996)).

review or approve (or alternatively disapprove) the wholesale sales of electricity in interstate commerce from MEAG to JEA pursuant to the PPA.

The Commission orders:

JEA's Petition is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A

Intervenors**Protesters:**

Municipal Electric Authority of Georgia (MEAG) filed a protest.

A joint protest was filed by Nebraska Public Power District, ElectriCities of North Carolina, Inc., Lakeland Electric, New York Power Authority, North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency No. 1, Omaha Public Power District, Orlando Utilities Commission, Public Utility District No. 1 of Chelan County, Sacramento Municipal Utility District, and Salt River Project Agricultural Improvement and Power District (collectively, **Public Power Entities**).

A joint protest also was filed by American Public Power Association, Large Public Power Council, National Rural Electric Cooperative Association, and Transmission Access Policy Study Group (collectively, **Public Power Associations**).

The following entities individually filed protests adopting the position of the Public Power Associations, and generally reiterating its arguments:

City of Alexandria (Louisiana)
City of Duncan (Oklahoma)
City of Jonesboro (Arkansas)
Dairyland Power Cooperative
Delaware Municipal Electric Corp., Inc.
Eugene Water & Electric Board
Florida Municipal Power Agency
Identified Joint Action Agencies (including American Municipal Power, Inc., Grand River Dam Authority, Indiana Municipal Power Agency, Municipal Electric Agency of Nebraska, Southern California Public Power Authority, Utah Associated Municipal Power Systems)
Missouri Joint Municipal Electric Utilities Commission
Missouri River Energy Services
New York Association of Public Power
North Carolina Electric Membership Corporation
Kansas Electric Power Cooperative, Inc.
Kissimmee Utility Authority
Oklahoma Municipal Power Authority
Paragould Light and Water Commission
Public Generating Pool (Membership: Chelan County Public Utility District; Clark Public Utilities, Grant County Public Utility District; Klickitat County Public Utility District; Pend Oreille County Public Utility District; Public Utility District No. 1 of Cowlitz

County; Public Utility District No. 1 of Douglas County; Public Utility District No. 1 of Snohomish County; and Tacoma Power)
Southeastern Federal Power Customers
Southwest Public Power Agency
Southwest Transmission Dependent Utility Group
Southwestern Power Resources Association
Texas G&T Cooperatives (including East Texas Electric Cooperative, Inc., Golden Spread Electric Cooperative, Inc., Rayburn Country Electric Cooperative, Inc., and Northeast Texas Electric Cooperative, Inc.)
Utah Municipal Power Agency
WPPI Energy

Commenter:

American Public Gas Association (APGA)

Motion to Intervene Only:

Basin Electric Power Cooperative
Bonneville Power Administration
Cities of Anaheim, Azusa, Banning, Colton, Pasadena and Riverside (California)
City of Santa Clara (California) and the M-S-R Public Power Agency
Cooperative Energy
Colorado River Commission of Nevada
Colorado River Energy Distributors Association, Inc.
Lincoln Electric System
Mid-West Electric Consumers Association
Mississippi Delta Energy Agency and the Clarksdale Public Utilities Commission of the City of Clarksdale (Mississippi)
Piedmont Municipal Power Agency
PUBLIC CITIZEN, INC.
Public Power Generating Pool
Sam Rayburn Municipal Power Agency
Southeastern Power Administration
Southern Company Services, Inc.
Southwestern Power Administration
Tennessee Valley Authority
United States Department of Energy – Headquarters
Western Area Power Administration