No. 00-160

In the Supreme Court of the United States

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND TENASKA IV TEXAS PARTNERS, LTD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission may presume that the thermal output of a cogeneration facility is "useful," thus permitting the cogeneration facility to meet the requirements of Section 3(18)(A) of the Federal Power Act, 16 U.S.C. 796(18)(A), where the thermal output is used in a common industrial or commercial process that produces a product sold to an independent third party.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 205 F.3d 235. The orders of the Federal Energy Regulatory Commission (Pet. App. 41a-52a, 53a-65a) are reported at 83 F.E.R.C. ¶ 61,176 and 85 F.E.R.C. ¶ 61,097.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2000. A petition for rehearing was denied on April 28, 2000. The petition for a writ of certiorari was filed on July 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA), Pub. L. No. 95-617, 92 Stat. 3117, which amended the Federal Power Act, in response to a nationwide energy crisis during the late 1970s. *FERC* v. *Mississippi*, 456 U.S. 742, 745 (1982). Section 210 of PURPA encourages the construction of cogeneration and small power-production facilities. 16 U.S.C. 824a-3; 456 U.S. at 750. As defined by PURPA, a "cogeneration facility" produces both "electric energy" and "steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. 796(18)(A). Cogeneration facilities put the excess energy produced as a by-product of electricity generation to use for other purposes, thus increasing energy efficiency. See Pet. App. 3a.

Through PURPA, Congress sought to overcome two obstacles to investment in cogeneration and small power-production facilities: (1) traditional electric utilities' reluctance to enter into power purchases and sales with nontraditional generating facilities, and (2) financial burdens imposed by federal and state regulation. *FERC* v. *Mississippi*, 456 U.S. at 750-751. Section 210(a) of PURPA therefore directs the Federal Energy Regulatory Commission (Commission) to prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration facilities and small power producers. PURPA § 210(a), 16 U.S.C. 824a-3(a). Section 210(e) of PURPA, 16 U.S.C. 824a-3(e), directs the Commission to promulgate rules exempting qualifying cogeneration facilities and

small power producers from certain state and federal laws governing electric utilities. See generally *FERC* v. *Mississippi*, 456 U.S. at 751. Cogeneration facilities eligible to receive those benefits are known as "qualifying cogeneration facilities" or "QFs." Qualifying cogeneration facilities must meet standards for minimum size, fuel use, and fuel efficiency. 16 U.S.C. 796(18)(B)(i).

2. The Commission promulgated regulations implementing PURPA's provisions. Closely tracking the statute, the regulations define a cogeneration facility as "equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy." 18 C.F.R. 292.202(c). Applying this definition, the Commission has held that "for a thermal output to be 'useful,'" the thermal output "must have an independent business purpose with some economic justification." *Electrodyne Research Corp.*, 32 F.E.R.C. ¶ 61,102, at 61,278 (1985). This policy protects against the extension of QF status to facilities that generate thermal energy solely in an effort to receive the regulatory benefits of QF status, without any independent business purpose or economic justification.

In *Electrodyne*, the Commission provided "additional guidance" regarding its application of the "independent business purpose" test. 32 F.E.R.C. at 61,279. First, and most important for purposes of this case, the Commission stated that it would presume that thermal output is useful whenever the output is utilized in a "common industrial or commercial application[]." *Ibid.* In this situation, the fact that the thermal application is commercially proven establishes its usefulness, and the agency performs no further analysis regarding the

economics of the particular application. *Bayside Cogeneration, L.P.*, 67 F.E.R.C. ¶ 61,290, at 62,006 (1994); *Brooklyn Navy Yard Cogeneration Partners, L.P.*, 74 F.E.R.C. ¶ 61,015, at 61,046 (1996) ("[O]nce the Commission is satisfied that the proposed use of cogenerated thermal output in a particular manner is common, it will not inquire further into how the product is being used; *e.g.*, into the economics of the application."); *EcoEléctrica, L.P.*, 77 F.E.R.C. ¶ 61,117, at 61,451-61,452 (1996) (same). The Commission has recognized common applications of thermal output such as space heating, crop drying, and distilling water. *Electrodyne*, 32 F.E.R.C. at 61,278 (space heating and crop drying); *Kamine/Besicorp Allegany L.P.*, 63 F.E.R.C. ¶ 61,320, at 63,158 (1993) (distilling water).

The Commission also makes allowance for novel uses of a cogeneration facility's thermal output. If the cogenerator proposes an application that involves a new technology, or that has not previously been found to be economically justified, the Commission requires the cogenerator to prove that its particular application of thermal energy is economically justified. *Electrodyne*, 32 F.E.R.C. at 61,279. The cogenerator can make a prima facie showing of economic justification by providing evidence of an arms-length market for its thermal energy output, or for the end product of the cogenerator's own application of its thermal energy. *Ibid.* In those situations, the Commission assumes there would not be a market for the cogenerator's thermal output, or the end product that is produced using the thermal output, if the thermal output served no legitimate economic purpose. See *Liquid Carbonic Indus. Corp.* v. *FERC*, 29 F.3d 697, 700 (D.C. Cir. 1994). If the cogenerator's use of the thermal energy is not common and the cogenerator is not selling its

thermal output or the end product of its thermal process to a third party, the cogenerator cannot rely on an arms-length transaction and "quantitative evidence of economic justification will ordinarily be necessary." *Electrodyne*, 32 F.E.R.C. at 61,279.

3. On November 1, 1993, petitioner Brazos Electric Power Cooperative, Inc. (Brazos) entered into a 23-year, fixed-price power purchase agreement with Tenaska IV Texas Partners, Ltd. (Tenaska), under which petitioner agreed to purchase electric power produced by Tenaska's cogeneration facility in Cleburne, Texas. The Cleburne facility had not yet attained QF status, and petitioner was not under any requirement to purchase electricity from the plant.[1] Pet. App. 6a. Rather, petitioner chose to purchase power from the Cleburne plant based on its own business judgment. *Id.* at 6a-7a.

On October 24, 1994, Tenaska applied to the Commission for certification of the Cleburne plant as a QF under PURPA. Tenaska represented, in relevant part, that it would use the thermal output of the facility to produce distilled water for sale to a third party. Pet. App. 7a. The Commission had previously recognized distillation of water as a common application of thermal output. *Kamine/Besicorp*, 63 F.E.R.C. at 63,158. The Commission approved Tenaska's unopposed application, holding that Tenaska's use of the "thermal output for this purpose is common and, thus, is presumptively

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[1] Cogenerators typically obtain certification from the Commission before constructing a cogeneration facility. The Commission, however, may revoke the QF status of a previously certified facility if the facility fails to operate in conformance with the representations in its application for certification. 18 C.F.R. 292.207(d)(1).

useful." *Tenaska IV Tex. Partners, Ltd.*, 70 F.E.R.C. ¶ 62,026, at 64,081 (1995).

Following certification of the Cleburne cogeneration facility, Tenaska entered into a series of agreements with the City of Cleburne. Those agreements provided, among other things, that Tenaska would purchase water from the City's potable water supply for use at Tenaska's cogeneration facility, and sell distilled water produced by the facility back to the City. In addition to tax abatements, the City gave Tenaska a credit of ten dollars per month on its water bill for the production of distilled water. Pet. App. 8a, 18a. The City also agreed to finance and construct the facilities necessary to carry potable water to the cogeneration plant and distilled water from the plant. The City intended to use Tenaska's distilled water as an inducement to attract businesses to a nearby industrial park. Water that was not sold was to be used to augment the flow of a stream that had become stagnant. *Id.* at 8a.

Tenaska's plant became operational in January 1997. During the first eight months of operation, the City of Cleburne did not have an industrial purchaser for the distilled water. The City also lacked the environmental permits it needed to use the distilled water to augment stream flow. The City therefore released the distilled water into the City sewer system. In September 1997, however, an occupant of the industrial park began purchasing distilled water from the City. Pet. App. 8a-9a.

4. On August 22, 1997, Brazos petitioned the Commission to revoke the QF status of Tenaska's Cleburne cogeneration facility. Under the terms of petitioner's agreement with Tenaska, decertification would release petitioner from its obligation to purchase power from the plant. See Pet. App. 7a. Petitioner relied primarily

on the City's payment of only ten dollars per month for the distilled water produced by Tenaska, as well as the City's disposal of the distilled water in the sewer. Those facts, petitioner argued, showed that "Tenaska's distillation of water has not proven to be 'useful,' thus rebutting the presumption of usefulness on which Tenaska's QF status was certified." [2] *Id.* at 55a.

The Commission denied petitioner's request to revoke Tenaska's certification. Pet. App. 53a-65a. The Commission explained that under its precedents, the fact "that the proposed use of cogenerated thermal output in a particular manner is common" forecloses inquiry "into how the product produced by the thermal output is being used, *e.g.*, into the economics of the application." *Id.* at 61a-62a (citing *Brooklyn Navy Yard*, *supra*). Instead, the Commission "'assumes' that energy is useful within the meaning of the statute when it is used in a common process or used to produce a common product." Pet. App. 62a. Although there may be cases in which a particular qualified cogeneration facility, employing its thermal output for a common use, is not economic, the application of thermal energy nevertheless is useful. *Ibid.* The Commission therefore stated that because "Tenaska produces a product, distilled water, which has been found to be presumptively useful," the Commission would "not look into the economics of its sale of the product, or into how the

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[2] Petitioner made two other arguments, which the Commission rejected. Pet. App. 63a-65a. Petitioner sought judicial review of one of those issues (regarding ownership of the Tenaska facility), and the court of appeals affirmed the Commission. *Id.* at 26a-28a. Petitioner does not seek further review of that aspect of the court of appeals' decision.

product is being used by the unaffiliated purchaser of the product." *Ibid.*

The Commission denied petitioner's request for rehearing. Pet. App. 41a-52a. The Commission stated that although it would not scrutinize the economics of the contract between Tenaska and the City, it was convinced that Tenaska had made an actual sale of the distilled water to the City as a third-party purchaser. *Id.* at 47a-48a. The Commission also explained that reviewing the particular business arrangements surrounding a common application of thermal output would be inconsistent with Congress's intent in adopting PURPA. Providing an opportunity for evidentiary hearings every time an opponent challenges a cogeneration facility's compliance with the independent business purpose test "would seriously impede the very development of cogeneration and small power production the Congress sought to facilitate." *Id.* at 48a n.13 (quoting *American Paper Inst., Inc.* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 420 (1983)).

5. The court of appeals rejected Brazos's petition for review. Pet. App. 1a-40a. The court concluded that the Commission has consistently refused to inquire into the economics of particular transactions when it finds that the thermal output of a facility is being put to a common use. *Id.* at 12a-17a. The court found that approach consistent with PURPA and the Commission's own regulations. "PURPA and its implementing regulations require only that the thermal energy be useful," the court explained. "[T]hey do not demand that the sale of every end-product be profitable. * * * Said differently, the issue is not whether the cogenerator makes money from its common application, but that, because there is a market for the application, it is capable of doing so." *Id.* at 17a.

The court of appeals went on to say that even if it "look[ed] behind" the Commission's presumption of usefulness, it would find that Tenaska entered into a legitimate arrangement for sale of its distilled water. Pet. App. 17a-18a. Moreover, petitioner's complaint that the distilled water produced at the Cleburne facility was not put to good use missed the point. Because distillation of water is a common application of thermal energy, the thermal output used in a commercial distillation process is "useful" for purposes of PURPA and the Commission's implementing regulations. What the purchaser of the distilled water does with the water it purchases is irrelevant. *Id.* at 19a-21a.

The court of appeals also identified policy reasons for refusing "to release Brazos from its contractual obligations" to buy power from Tenaska at prices that Brazos no longer finds attractive. Pet. App. 22a. The court expressed concern that if the Commission did review the economic justification for common applications of thermal energy, utilities that buy energy from cogeneration facilities might abuse that process in an effort to escape their long-term, fixed-price contracts with cogenerators. The resulting uncertainty, plus the burden of repeated evidentiary hearings before the Commission, would be contrary to Congress's intent to encourage investment in cogeneration facilities. *Id.* at 22a-26a.

Judge Emilio Garza concurred in the result. Pet. App. 29a-40a. Judge Garza agreed with the majority that the Commission's presumption of usefulness is a permissible interpretation of the statutory term "useful" in the context of initial certification of a cogeneration facility. *Id.* at 33a-35a. In his view, however, the majority placed too much weight on the burdens associated with evidentiary hearings after initial

certification. In the context of petitions to decertify a QF, he would have required the Commission to look beyond the commonness of the process in which the facility's thermal energy is being used, and consider whether the thermal energy is in fact useful on the facts of each case. *Id.* at 37a-40a. Judge Garza concurred in the result in this case, however, on the basis that Tenaska's thermal output was "'useful' in any sense of the word" because it was used to produce distilled water that Tenaska sold to the City. *Id.* at 36a-37a, 39a.

ARGUMENT

The Commission's determination that common commercial applications of thermal energy are "useful" for purposes of the definition of a cogeneration facility is consistent with the text of PURPA and with Congress's intent to encourage development of cogeneration facilities. The decision below, upholding the Commission's approach, does not conflict with any decision of this Court or any decision of another court of appeals. The court of appeals also cited alternative grounds for upholding the Commission. Accordingly, further review is not warranted.

1. Petitioner argues that the Commission has employed an irrebuttable evidentiary presumption to avoid the statutory requirements for QF status. Pet. 14-16. That is incorrect. The Commission's determination—that thermal energy used in a common commercial distillation process is useful—is itself an interpretation of PURPA. That administrative interpretation is consistent with the text of the statute and with congressional intent, as the court of appeals held.

As noted above, PURPA defines a "cogeneration facility" as a facility that produces "(i) electric energy, and (ii) steam or forms of useful energy (such as heat)

which are used for industrial, commercial, heating, or cooling purposes." 16 U.S.C. 796(18)(A). Applying the second prong of that definition, Commission rules provide that a cogeneration facility must produce, in addition to electric energy, "forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes." 18 C.F.R. 292.202(c). The line of agency decisions challenged by petitioner holds that a cogeneration facility produces "useful thermal energy * * * used for industrial, commercial, heating, or cooling purposes" when the plant's thermal output is employed in a common industrial or commercial application. See, *e.g.*, *Electrodyne*, 32 F.E.R.C. at 61,279.

The Commission's approach accords with the ordinary meaning of the term "useful." If a process is "[c]apable of being used advantageously or beneficially," then the process is "useful," even if it is not always put to good use. *The American Heritage Dictionary of the English Language* 1410 (1980 ed.); see also *Webster's Third New International Dictionary* 2524 (1993 ed.) (defining "useful" as "capable of being put to use"). Moreover, even if the statutory language were ambiguous, the Commission's interpretation, under which common thermal applications are useful, is reasonable because it fulfills Congress's intent to "encourage cogeneration." PURPA § 210(a), 16 U.S.C. 824a-3(a); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."). The Commission's interpretation avoids the administrative burden and uncertainty that would be associated with case-by-case

challenges to the usefulness of common thermal processes. The Commission's approach also promotes the stability and predictability of cogenerators' contractual relations with their customers, which further encourages investment in cogeneration facilities. See Pet. App. 22a-26a. As the court of appeals noted, "[o]wners of QFs would have little incentive to sell electric energy if they had to go through an evidentiary hearing before FERC in Washington, D.C., every time a utility claimed someone else was behaving inefficiently with a common application." *Id.* at 24a.

Petitioner puts great weight upon the court of appeals' observation that "[p]resumptions are overinclusive by definition." Pet. App. 24a; see Pet. 14. Petitioner ignores the very next sentence of the court's decision, which explains that regardless of this general feature of presumptions, "[the Commission]'s decision to apply one strictly in this case neither contravenes PURPA's mandates nor supercedes the discretion afforded agencies in interpreting their own regulations." Pet. App. 24a. That conclusion is correct. And it is dispositive of petitioner's argument that the Commission erred by adopting an irrebuttable evidentiary presumption, for such presumptions are subject to judicial review only "for their reasonableness and their compatibility with the [governing] Act." *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 378 (1998); see also *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 37-38 (1987) (recognizing validity of an irrebuttable presumption of a union's majority status during the year following its certification as a bargaining representative).

2. Petitioner maintains that the Commission's interpretation of PURPA could lead to "ludicrous results." Pet. 16. In particular, petitioner suggests that a plant's

thermal output could be deemed useful, and thus the plant could receive or maintain QF status, even though the end product of the thermal application is worthless. *Ibid.* Again, the court of appeals properly rejected petitioner's argument. It explained that the fact that a thermal process is common shows that "the technology is established and there is a market for the product." Accordingly, there is no need for the Commission to inquire further whether the thermal output has economic value. Pet. App. 20a-21a.

Similarly, there is no basis for petitioner's assertion that the Commission's decision in this case will open the door to "PURPA abuse." Pet. 18 n.7. Under the *Electrodyne* line of cases, the Commission investigates the actual transactions supporting a claim of usefulness whenever a plant's thermal output is not put to a common, commercially proven use. In this case, moreover, the Commission found not only that Tenaska's production of distilled water is a common commercial process, Pet. App. 48a n.13, but also that Tenaska made an "actual sale" of the distilled water to the City of Cleburne, *id.* at 47a. Such a finding—that the end product of the plant's thermal process is sold to an independent third party—provides specific protection against sham cogeneration arrangements. No third party would buy the product of a thermal process if the thermal process were not useful. Judge Emilio Garza concurred on precisely this basis, finding that Tenaska's sale of distilled water to the City "shows that the thermal energy produced by the Tenaska facility * * * is 'useful' in any sense of the word." *Id.* at 36a-37a.[3]

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[3] Petitioner speculates, without any record support, that the distilled water produced by Tenaska may not be useful for any purpose. Pet. 18-19. But as the court of appeals stressed, the

3. Petitioner further claims that it was denied an opportunity to disprove the usefulness of Tenaska's thermal output and that it was denied due process as a result. Pet. 19-21. Insofar as the Commission's interpretation of PURPA's "usefulness" requirement limited the factual questions before the Commission, petitioner could (and did) challenge that interpretation. Insofar as there were legitimate factual issues, moreover, petitioner had an opportunity to submit its evidence, including any evidence that Tenaska was not operating in accordance with the representations it had made to obtain initial certification. Pet. App. 51a. Petitioner failed to establish any such inconsistency, and particularly failed to disprove Tenaska's representation that it would sell the distilled water to a third party. See *id.* at 42a, 47a-48a.

In any event, petitioner's due process argument was not presented to the Commission or considered by the court of appeals. This is an additional reason why petitioner's due process claim does not merit review. See *Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) ("Since, however, that argument was inadequately preserved in the prior proceedings, we will not consider it here."); *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) ("Applying our analysis * * * to the facts of a particular case without the benefit of a full record or

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question under PURPA and the Commission's rules is whether the thermal output of the Cleburne plant is "useful," *not* whether the distilled water produced by the plant ultimately is put to good use. Pet. App. 20a-21a. Furthermore, the City did find an industrial purchaser for the distilled water shortly after petitioner filed for decertification of the Cleburne plant. *Id.* at 9a.

lower court determinations is not a sensible exercise of this Court's discretion.").[4]

4. Petitioner asserts (Pet. 23-24) that the decision below conflicts with *Southern California Edison Co.* v. *FERC*, 195 F.3d 17 (D.C. Cir. 1999). In *Southern California Edison*, the District of Columbia Circuit held that FERC had misapplied a statutory provision not at issue here—the definition of a "small power production facility" in Section 3(17)(A) of PURPA, 16 U.S.C. 796(17)(A). Specifically, the court of appeals held that the Commission had ignored the word "solely" in the statutory language "solely by the use, as a primary energy source, of." See 195 F.3d at 23. That narrow decision under a different statutory provision has no relevance to this case.

Nor is there any conflict with Commission precedent. Petitioner asserts an inconsistency with *LaJet Energy Co.*, 44 F.E.R.C. ¶ 61,070 (1988), in which the Commission refused to certify a cogeneration plant where the proposed use of thermal energy (distillation of water, as in this case) was not economically justified. Pet. 25. *LaJet* was decided before the Commission found distillation of water to be a common commercial application of thermal energy. See Pet. App. 14a-15a. Following the analytic approach set out in *Electrodyne*, *supra*, the Commission determined that the then-novel technology of water distillation was not economically justified on the facts presented. 44 F.E.R.C. at 61,194-61,195. The Commission also stated in the alternative that "if the use of a project's thermal output may be

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[4] Petitioner also claims that the Commission violated its own procedures for summary disposition. Pet. 17 & n.6. That claim likewise was not addressed below, nor does it raise any question of sufficient importance to warrant review by this Court.

considered [common and therefore] presumptively useful" under *Electrodyne*, then the Commission would consider evidence, *submitted by the applicant itself*, that suggested the production of thermal energy was not economically justified. *Id.* at 61,195.

Assuming, *arguendo*, that *LaJet*'s alternative holding established an exception to *Electrodyne*, the exception would not help petitioner. Far from casting doubt on the economic justification for thermal output, as in *LaJet*, Tenaska's submission to the Commission suggested that Tenaska and the City of Cleburne entered into a legitimate transaction for the sale of distilled water. Pet. App. 47a-48a; see also *id.* at 17a ("Tenaska correctly points out that it received much more than ten dollars in its transactions with the City"). In short, if there were an inconsistency in the Commission's own precedent, which there is not, that inconsistency would not affect the outcome of this case. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (courts should not "decide questions that cannot affect the rights of litigants in the case before them") (citation omitted). Nor would such inconsistency at the agency level raise a question appropriate for review under this Court's Rule 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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