No. 02-468

In the Supreme Court of the United States

CITIZEN POWER, INC. AND
AMERICAN PUBLIC POWER ASSOCIATION, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

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

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530
(202) 514–2217

CYNTHIA A. MARLETTE
General Counsel

DENNIS LANE
Solicitor

LONA T. PERRY
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

Section 203(a) of the Federal Power Act (FPA), 16 U.S.C. 824b(a), requires public utilities to obtain approval from the Federal Energy Regulatory Commission (FERC) for the disposition of facilities that are subject to FERC's jurisdiction. Section 201(b)(1) of the FPA, 16 U.S.C. 824(b)(1), denies FERC jurisdiction over facilities used for the generation of electric energy, "except as specifically provided" in other provisions of the FPA. The question in this case is whether FERC should have asserted jurisdiction over public utilities' disposition of facilities used only for the generation of electric energy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

No. 02-468

CITIZEN POWER, INC. AND
AMERICAN PUBLIC POWER ASSOCIATION, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

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

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. A1-A3) is not published in the *Federal Reporter*, but is reprinted at 38 Fed. Appx. 18. The orders of the Federal Energy Regulatory Commission (Pet. App. B1-B7, B8-B9) are reported at 94 F.E.R.C. ¶ 61,104 and 95 F.E.R.C. ¶ 61,023.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 2002. Petitions for rehearing were denied on June 21, 2002 (Pet. App. C1-C3). The petition for a writ

of certiorari was filed on September 19, 2002, and docketed on September 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 203(a) of the Federal Power Act (FPA), 16 U.S.C. 824b(a), prohibits a public utility from selling, leasing, or otherwise disposing of facilities subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC), unless the public utility first secures an order from FERC authorizing the disposition. Section 201(b)(1) of the FPA, 16 U.S.C. 824(b)(1), provides in pertinent part that FERC "shall have jurisdiction over all facilities" for the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce, "but shall not have jurisdiction, except as specifically provided in [16 U.S.C. 824-825u], over facilities used for the generation of electric energy."[1] See *New York* v. *FERC*, 122 S. Ct. 1012, 1022-1023 (2002) (discussing Section 201(b)(1)).

2. In February 1999, petitioner American Public Power Association filed a request that FERC issue a declaratory order asserting jurisdiction under Section 203 of the FPA over certain dispositions of generation facilities by public utilities. In February 1999 and July 2000, petitioner Citizen Power, Inc. filed administrative complaints in which it asked FERC to assert jurisdiction over transactions involving generation facilities. See Pet. App. B2.

---

[1] Section 201(b)(1) further denies FERC jurisdiction "over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter." 16 U.S.C. 824(b)(1).

On February 7, 2001, after notice and comment in the declaratory order proceeding and briefing in the complaint proceedings (see Pet. App. B3-B4), FERC declined to assert jurisdiction over the generation-facility transactions and denied petitioners' requests. FERC reasoned that Section 201(b)(1) of the FPA expressly exempts from its jurisdiction "facilities used for the generation of electric energy," and, therefore, such facilities are not facilities subject to FERC's jurisdiction for purposes of Section 203(a). *Id.* at B5. FERC noted that it "has held repeatedly that Section 203 does not apply to dispositions of only generation facilities." *Ibid.* (citing *Duquesne Light Co.*, 84 F.E.R.C. ¶ 61,309, at 62,406 (1998); *Entergy Servs., Inc.*, 51 F.E.R.C. ¶ 61,376, at 62,285-62,286 n.27 (1990); and *United Illuminating Co.*, 29 F.E.R.C. ¶ 61,270, at 61,558 (1984)).

FERC rejected petitioners' argument that, because Section 201(b)(1) grants FERC jurisdiction over "all facilities for [interstate] transmission or sale of electric energy," 16 U.S.C. 824(b)(1), the generation-only facilities are within FERC's jurisdiction for purposes of Section 203. FERC explained that "[t]here is no necessary nexus between the interstate transmission or sale of electric energy," which gives rise to FERC jurisdiction, "and the disposition of a generation facility by itself." Pet. App. B6-B7.

Petitioners requested rehearing. On April 6, 2001, FERC provided notice that it had decided to take no action on petitioners' request, and denied the request by operation of law. Pet. App. B8.

3. On April 25, 2002, the United States Court of Appeals for the District of Columbia Circuit denied a petition for review in an unpublished per curiam decision. Pet. App. A1-A3. The court of appeals determined that FERC's longstanding position declining to

assert jurisdiction over the disposition of generation-only facilities is consistent with the plain language of Sections 201(b) and 203(a), and that FERC "properly found" that its determination not to exercise jurisdiction over the disposition of generation-only facilities is consistent with FERC's statutory jurisdiction over facilities for the interstate transmission or sale of electric energy. *Id.* at A2-A3.

The court of appeals rejected petitioners' argument that FERC must exercise jurisdiction over the disposition of generation-only facilities because of FPA Sections 205 and 206 (16 U.S.C. 824d, 824e), which allow FERC to regulate rates and charges for transmissions and sales of electric energy that are within FERC's jurisdiction. The court explained that although rate regulation under Sections 205 and 206 entails "limited authority to regulate generation facilities under certain circumstances enumerated in [those provisions]," it does not follow that generation facilities are necessarily within FERC's jurisdiction for purposes of Section 203(a) as well. Pet. App. A3. Finally, the court stated that even if the text of the FPA did not foreclose petitioners' arguments, FERC's "longstanding, reasonable interpretation [of the FPA] would be entitled to deference under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984)." *Ibid.*

ARGUMENT

Section 203(a) of the Federal Power Act, 16 U.S.C. 824b(a), does not specifically address the Federal Energy Regulatory Commission's jurisdiction over the disposition of electric-generation facilities. Rather, Section 203(a) incorporates the jurisdictional limitations of Section 201(b), 16 U.S.C. 824(b). Pursuant to Section 201(b), FERC has for decades declined to exercise

jurisdiction over public utilities' disposition of generation-only facilities. See, *e.g.*, cases cited at Pet. App. B5. The unpublished decision of the court of appeals in this case, which upholds FERC's settled practice, is correct and does not conflict with any decision of this Court or of another court of appeals. Further review therefore is not warranted.

1. Petitioners contend (Pet. 19) that the language in Section 201(b)(1) that grants the Commission jurisdiction over facilities used for wholesale sales of electric energy "plainly includes the generators that create the product being sold." The court of appeals, however, correctly identified a "clear bifurcation" (Pet. App. A2-A3) in Section 201(b)(1) between regulation of facilities for the "transmission or [wholesale] sale of electric energy" in interstate commerce, and regulation of "facilities used for the generation of electric energy." 16 U.S.C. 824(b)(1). As FERC stated in the order under review, and as the court of appeals agreed, the disposition of an electric-generation facility does not necessarily involve a wholesale sale of electric energy. See Pet. App. A3, B6-B7. Thus, the FPA does not require that dispositions of generation facilities, which are expressly excepted from Commission jurisdiction, be regulated as part of FERC's regulation of wholesale sales.[2]

Petitioners also argue (Pet. 20-23) that, because the FPA establishes limited federal authority with respect

---

[2] Petitioners assert (Pet. 24) that "[p]ublic utilities that dispose of their interstate generators have, by definition, been engaged in interstate wholesale sales using those facilities." But petitioners do not dispute FERC's determination that "[t]here is no necessary nexus" (Pet. App. A3 (quoting *id.* at B6)) between the disposition itself and a wholesale sale of electric energy in interstate commerce.

to generation facilities for rate-setting purposes, generation facilities also must be subject to FERC's jurisdiction for purposes of Section 203(a). The court of appeals determined (Pet. App. A3) that petitioners' argument is inconsistent with the default rule stated in Section 201(b)(1), which is that FERC lacks jurisdiction over generation facilities unless federal jurisdiction is "specifically provided" in other provisions of the FPA. 16 U.S.C. 824(b)(1). In light of that default rule, the court of appeals concluded that FERC's limited authority to consider generation facilities as part of its regulation of rates for interstate transmission and sales of electric energy under FPA Sections 205 and 206 (16 U.S.C. 824d, 824e) does not render generation facilities themselves broadly "subject to the jurisdiction of the Commission" within the meaning of FPA Section 203 (a), 16 U.S.C. 824b(a). Pet. App. A3. As the court of appeals correctly stated (*id.* at A2-A3), FERC has long interpreted the FPA in this way, and FERC's interpretation, if not actually compelled by the plain language of the FPA, is a reasonable construction of the FPA and therefore is entitled to judicial deference.

2. Petitioners suggest (Pet. 3-7, 12-13) that the court of appeals' decision upholding FERC's settled interpretation of the FPA conflicts with a 1942 decision of the Second Circuit and a decision of the D.C. Circuit itself, which, according to petitioners, this Court has "commended" and "relied upon" (Pet. 12). That argument lacks merit.

The question in *Hartford Electric Light Co.* v. *FPC*, 131 F.2d 953 (2d Cir. 1942), cert. denied, 319 U.S. 741 (1943), was whether a utility that engaged in "the sale of electric energy at wholesale in interstate commerce" within the meaning of Section 201(b)(1), was nevertheless exempt from federal accounting rules because

the company used only its generation facilities (and not any transmission facilities) in interstate commerce. See 131 F.2d at 954-956, 960. The Second Circuit held that the Federal Power Commission had jurisdiction over the utility's accounting under Section 201(b) because the utility's corporate organization, contracts, accounts, and records were "facilities" for interstate wholesale sales and thus subject to federal regulation. *Id.* at 961. Then the court of appeals offered an "alternative ground" (*ibid.*) for its holding: that "the Commission, under § 201(b), has jurisdiction of generation facilities when used in connection with wholesale interstate sales, because jurisdiction of facilities for such sales is 'specifically provided' in [Section 201(b)]." *Id.* at 962. The court of appeals reasoned that Section 201(b)'s provision disclaiming federal jurisdiction over generation facilities operates as a "negatively worded confirmation of the Commission's jurisdiction," and should "be construed as if it read: 'Wherever it is so specifically provided in [the referenced provisions of the FPA], the Commission shall have jurisdiction over the facilities used for generation.'" *Ibid.*

The Second Circuit's alternative holding—that federal jurisdiction extends for certain purposes to generation facilities actually being used in the provision of electricity for a federally regulated transaction—does not answer the question whether FERC's jurisdiction under Section 203 extends to the *disposition* of generation-only facilities. Furthermore, this Court expressly *rejected* the Second Circuit's construction of Section 201(b) in *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 527-529 (1945), a case on which petitioners also rely (Pet. 4, 12). In *Connecticut Light & Power* the Court considered Section 201(b)'s provision preserving state jurisdiction over local

distribution facilities, which is part of the same sentence as the provision preserving state jurisdiction over generation facilities. See 16 U.S.C. 824(b)(1). The Court found it "hard * * * to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.'" 324 U.S. at 528-529. The Court further noted that the terms of Section 201(b) "seem plainly to state circumstances under which the Commission shall not have jurisdiction." *Id.* at 529. Thus, neither *Hartford Electric Light* nor *Connecticut Light & Power* provides any support for petitioners' assertion of a conflict.

There similarly is no intra-circuit conflict between the D.C. Circuit's decision in this case and its decision in *Mississippi Industries* v. *FERC*, 808 F.2d 1525, vacated in part, 822 F.2d 1104 (D.C. Cir. 1987). In *Mississippi Industries*, the court of appeals affirmed FERC's allocation of the investment costs of a "catastrophically uneconomical" nuclear generation facility among affiliated utilities that used power from the nuclear plant, for purposes of setting their interstate wholesale rates. 808 F.2d at 1528. The court of appeals determined that FERC's allocation of the costs of the nuclear plant did not constitute regulation of the generation facility itself, but rather regulation of "the wholesale rates of interstate sales within [the affiliated utilities'] system" (*id.* at 1544), a matter within FERC's rate-setting jurisdiction under Sections 205 and 206 of the FPA (16 U.S.C. 824d, 824e). *Mississippi Industries* is entirely consistent with the D.C. Circuit's holding in this case (Pet. App. A3) that FERC's rate-setting authority under Sections 205 and 206 constitutes a "limited" jurisdictional grant that does not in itself establish federal jurisdiction over the disposition of generation-only facilities. Accord *Mississippi Power*

& Light Co. v. *Mississippi*, 487 U.S. 354, 383 (1988) (Scalia, J., concurring in the judgment) ("[I]t is reasonable to say that [when FERC sets wholesale rates under Section 206(a), 16 U.S.C. 824e(a),] FERC is not exercising jurisdiction over the electrical generating facility but merely over the sale of the power created by that facility.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

CYNTHIA A. MARLETTE
General Counsel

DENNIS LANE
Solicitor

LONA T. PERRY
Attorney
Federal Energy Regulatory Commission

OCTOBER 2002