UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

New York Transco, LLC **Docket No. EC15-45-000**

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

REQUEST OF THE NEW YORK ASSOCIATION OF PUBLIC POWER, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AMERICAN PUBLIC POWER ASSOCIATION AND THE AMERICAN ANTITRUST INSTITUTE FOR REHEARING

Pursuant to Rule 713, the New York Association of Public Power, National Rural Electric Cooperative Association, American Public Power Association and the American Antitrust Institute[1] request rehearing of the Commission's April 2, 2014 order in the above captioned proceeding, *New York Transco, LLC, et al*., 151 FERC ¶ 61,005 (2015) (April 2 order). For the reasons stated below, the Commission erred in concluding that it lacks jurisdiction to review the section 203 filing made by the applicants in this proceeding.

SPECIFICATION OF ERRORS AND STATEMENT OF ISSUES

1. The Commission's April 2 order rules that transfer of transmission facilities by one or more public utilities to another person is outside the scope of the Commission's jurisdiction under section 203 of the FPA where, at the moment of transfer the facilities to be transferred will not have been energized. In ruling that such a transaction involves the transfer of non-jurisdictional facilities, the Commission acted arbitrarily in several ways. (1) It departed without

[1] The New York Association of Public Power is an intervenor herein. The remaining signatories to this rehearing have filed motions to intervene out-of-time.

explanation from Commission policy to interpret section 203 broadly. (2) The Commission departed without explanation from its longstanding interpretation of the term "facilities subject to the jurisdiction of the Commission" to include those facilities, including books, papers and records, used to facilitate interstate transmission and interstate wholesale sales. (3) And the Commission departed without explanation from its precedent applying section 203 to public utility disposition or acquisition of physical facilities that can, in the future, be used to transmit or resell power in interstate commerce.

Relevant precedent: *Enova Corporation and Pacific Enterprises*, 79 FERC ¶61,107 (1997); *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. [¶31,253 (2007); *Hartford Electric Light Company v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942); *Pacific Power and Light Company v. FPC*, 111 F.2d 1014 (9th Cir. 1940); *Applications for Sale, Lease or Other Disposition, Merger or Consolidation of Facilities or for Purchase or Acquisition of Securities of a Public Utility*, Order No. 266, 29 FPC 551 (1963); *Kansas City Power & Light Co*., 30 FPC 515 (1963); *Florida Power and Light Co*., 55 FPC 733 (1976); *Transactions Subject to FPA Section 203*, Order No. 669,113 FERC ¶ 61,315 (2005); *Florida Power & Light Co*., 145 ¶ 61,018 at P 1 (2013) (acquiring transmission facilities owned by a "non-jurisdictional municipal electric utility"); *FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009).

2. In disclaiming jurisdiction over the sale of transmission assets to NY Transco, the Commission has improperly applied as precedent inherently unreliable dicta from non-section 203 cases, while arbitrarily disregarding its own policies favoring a broad interpretation of section 203's jurisdictional reach.

Relevant precedent: *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. [¶31,253 (2007); *Hartford Electric Light Company v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942); *Pacific Power and Light Company v. FPC*, 111 F.2d 1014 (9th Cir. 1940)*Norman Barker, Jr*., 53 FERC ¶61,223 (1990); *Cohens v. Virginia*, 19 US 264, 399-400 (1821); *United States v. Bell*, 524 F.2d 202, 206 n. 4 (2d Cir. 1975); *Enova Corporation and Pacific Enterprises*, 79 FERC ¶61,107 (1997); *Public Service Company of Colorado*, 149 FERC ¶ 61,228 (2014).

3. Assuming ambiguity in the term "facilities subject to the jurisdiction of the Commission," the Commission's interpretation is nonetheless unreasonable under *Chevron* because it fails to apply the rules of construction it has previously applied to interpreting section

203 and cedes jurisdiction over the very types of potentially anticompetitive transactions the Act was enacted to review and police.

Relevant precedent: *United States v. Penn-Olin Chemical Co*., 378 U.S. 158 (1964): *Gulf States Util. Co. v. FPC*, 411 US 747, 760 (1973); *Rusello v. United States*, 464 U.S. 16 (1983); *Reiter v. Sonitone Corp*., 442 U.S. 330 (1979); Order No. 669, 113 FERC ¶ 61,315 (2005).

ARGUMENT

I. The Commission's Disclaimer of Jurisdiction Constitutes An Arbitrary Departure from Its Policy to Interpret Section 203 Broadly and its Assertion of Jurisdiction over the Acquisition of Facilities That Aid in, or will be Used to Provide Jurisdictional Services.

In disclaiming jurisdiction over the transfer of "certain transmission facilities, and related books, records and accounts" from several New York public utilities to New York Transco, another New York-based public utility,[2] the Commission disposes of the jurisdiction issue in three brief sentences:

> Under Commission precedent, transmission facilities that are not in service are not subject to the Commission's jurisdiction. Based on the information provided in the Application, the facilities that Applicants propose to transfer pursuant to the Proposed Transactions are not and will not be in service at the time of closing and therefore are not subject to the Commission's jurisdiction under FPA section 203. Accordingly, we will dismiss the Application for lack of jurisdiction.

New York Transco, LLC at P 16 (internal citations omitted). This ruling departs, without acknowledgment, much less explanation, from several Commission policies: (1) to interpret section 203 broadly so as to effectuate its purposes, (2) to treat transmission facilities that *will* be used in interstate commerce after acquisition as "facilities subject to the jurisdiction of the Commission" (hereinafter also "jurisdictional facilities") and (3) to treat as "jurisdictional facilities" the books, records and papers used to aid in the provision of jurisdictional services.[3]

[2] *See New York Transco, LLC, et al*., 151 FERC ¶ 61,005 at n. 8 (2015); *New York Independent System Operator, Inc., et al*., 151 FERC ¶ 61,004 (2015).

[3] Footnote 20 of the Commission's April 2, 2015 order cites several cases to support its holding. But these cases, as discussed in detail in Section II, *infra*, do not constitute precedents. The case passages upon which the Commission

The applicants in this case sought authorization for their proposed transactions under sections 203(a)(1)(A) and 203(a)(1)(B) of the Act.[4] As the Commission has stated, the purpose of these provisions "was to provide a mechanism for maintaining oversight of the facilities of public utilities, and preventing transfers of control over those facilities that would be detrimental to consumers and/or investors or that would inhibit the Commission's ability to 'secure the maintenance of adequate service and the coordination in the public interest of [jurisdictional] facilities.'" *Enova Corporation and Pacific Enterprises*, 79 FERC ¶61,107 at 61,489 (1997). *See also, FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 46 (2007).

The provisions of section 203 are not models of clarity; indeed many of the key terms are undefined. For this very reason, the Commission has concluded that section 203 should not be "read narrowly," lest important transactions "escape Commission oversight":

> Neither section 203 nor any other provision of the FPA defines the terms "dispose," "facilities subject to the jurisdiction of the Commission," "merge," "consolidate," and "control." However, we do not believe these terms should be read narrowly. To do so would result in a jurisdictional void in which certain types of power sales facilities and corporate transactions could escape Commission oversight.

Enova, supra at 61,489.[5]

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relies are non-precedential dicta. Indeed, none of the cited cases involved section 203 applications or even petitions for disclaimer of section 203 jurisdiction.

[4] "Amended Sections 203(a)(1)(A) and (B) state, respectively, that "no public utility shall, without first having secured an order of the Commission authorizing it to do so": "(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10 million" or "(B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever."

[5] The D.C. Circuit noted the ambiguities in the text of section 203 more than forty years ago:

> By our estimate, we face a constructional problem of which the bare statutory words admit confidently of no single solution. They do not inexorably preclude Commission supervision of proposed combinations of interstate and intrastate facilities, but neither do they unambiguously endow the Commission with authority to do so. We feel that, without crystallization extrinsically, they can be read either way, with the result that we cannot safely confine the scope of our inquiry to their grammatical potentialities.

Acquisition of Non-Public Utility Transmission Assets

Consistent with its policy of broadly interpreting its authority under section 203, for decades the Commission has reviewed public utility acquisitions of transmission facilities owned by governmental, i.e., non-jurisdictional utilities.[6] This is so, even though the facilities acquired from non-jurisdictional utilities, are, by definition, non-jurisdictional facilities until after they are transferred. The Commission has stated that when a public utility merges its jurisdictional facilities with "*those* of any other person," "those" refers to "jurisdictional facilities."[7] But to reconcile that statement with its assertion of jurisdiction over public utility acquisition of transmission facilities owned by non-jurisdictional utilities it must be interpreting "those" to include facilities that will *become* jurisdictional facilities.[8]

The Commission's argument to the court in *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969) illustrates this point. *Allegan County* involved a section 203 application by Consumers Power Company, a public utility in Michigan, to acquire the electric system, including transmission facilities, owned by Allegan City Light Department, a non-jurisdictional municipal utility. The Commission defended its decision to approve the acquisition over the objections of a local citizens group. But Consumers, intervening in support of the

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Duke Power Co. v. FPC, 401 F.2d 930, 933-34 (D. C. Cir. 1969). There, the Commission found as its limiting principle, the express provision in section 201 barring the Commission from exercising jurisdiction over distribution facilities except as otherwise permitted under Part II of the Act. *Id*.

[6] *Applications for Sale, Lease or Other Disposition, Merger or Consolidation of Facilities or for Purchase or Acquisition of Securities of a Public Utility*, Order No. 266, 29 FPC 551 (1963); *Kansas City Power & Light Co*., 30 FPC 515 (1963); *Florida Power and Light Co*., 55 FPC 733 (1976); *Florida Power & Light Co*., 145 ¶ 61,018 at P 1 (2013) (acquiring transmission facilities owned by a "non-jurisdictional municipal electric utility").

[7] *See Long Island Lighting Co*., 82 FERC ¶ 61,129 at 61,462 (1998) ("Section 203 requires Commission authorization before a public utility may: (1) sell, lease, or otherwise dispose of its jurisdictional facilities; (2) directly or indirectly, merge or consolidate any part of its jurisdictional facilities with the jurisdictional facilities of any other person"); *Enova, supra*, 79 FERC ¶ 61,107 at 61,489 (1997) (same).

[8] Or, as the D.C. Circuit put it, "what would normally be a jurisdictional facility." *Duke Power Co. v. FPC*, 404 F. 2d 930, 940-41 (D. C. Cir. 1969).

Commission, argued that the citizen group's appeal should be dismissed on jurisdictional grounds because the distribution facilities to be acquired were non-jurisdictional. The Commission, however, urged the court to reach the merits, arguing that the City also owned a transmission line and that, while the City's transmission line was not yet connected to the grid, "the acquisition by Consumers *might* result in a situation where these transmission lines were subject to use for interstate transmission of energy." *Id*. at 1134-35 and n. 15 (emphasis added).[9]

The Commission's interpretation of its jurisdiction over public utility acquisitions of municipal utility transmission facilities is consonant with the Commission's interpretation of the scope of its authority under section 305, governing interlocking directorates. Section 305, like section 203, was part of the 1935 Federal Power Act aimed at curbing economic abuses. *Edwin I. Hatch*, Opinion No. 67, 9 FERC ¶61,132 (1979), *aff'd in part and rev'd and remanded in part sub nom.*, *Edwin I. Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981). Section 305(b) requires prior Commission approval before an individual can hold interlocking positions with a public utility and entities that underwrite utility securities. *Id*.

Norman Barker, Jr., 53 FERC ¶ 61,223 (1990) involved the section 305 application of Mr. Barker to sit on the boards of both Southern California Edison Company and Interstate Capital, a securities underwriter. Mr. Baker argued that he did not require Commission approval to hold the interlocking positions because the underwriter's corporate charter barred it from underwriting public utility securities. *Id*. at 61,932-33. The Commission rejected this argument, finding that the underwriter's *potential* ability to underwrite public utility securities in the future was enough to give it jurisdiction:

[9] The Court did not address Consumer's objection or the Commission's response, finding alternate grounds to reach the merits. *Id*. But the passage quoted above highlights the *Commission's* interpretation of its section 203 authority, an interpretation from which it has departed in its April 2 order.

> First Interstate Capital's present inability to underwrite public utility securities can be changed at any time by a subsequent vote by the Board, Thus, we find that the voluntary action of an entity to restrict its own ability to underwrite public utility securities does not divest the Commission of jurisdiction over interlocks which would *otherwise be jurisdictional under section 305(b).*

Id.

If, as the Commission says, its concern is with transfers of control of jurisdictional facilities that might harm consumers or impede coordination, it is difficult to see how the potential harm to consumers would be any less where the transfer involves facilities that will be energized, as compared to transfers involving transmission facilities that have already been energized. And it is even more difficult to understand why, given the Commission's broad flexibility to interpret the statute to cover both circumstances, it has chosen an interpretation that limits its ability to protect consumers.

The Commission's disclaimer of jurisdiction is also difficult to square with its own past practice in delegated orders. Under Part 375 of its rules, the Commission delegates to staff officials a number of "ministerial regulatory functions" in uncontested matters, including applications under section 203 of the Act.[10] *See* 18 C.F.R. § 375.307. Invoking this authority, office directors have approved section 203 applications by owners of transmission facilities still under construction to sell those facilities to third parties.[11] While the applicant in at least one of

[10] Order No. 112, FERC Stats. & Regs. ¶ 31,211 at 31,421 (1980).

[11] *See, e.g., AEP Texas Central Co. and American Electric Power Service Corp*., 125 FERC ¶62,240 (2008) (approving the transfer of certain transmission facilities then under construction, from AEP Texas Central Co. to Electric Transmission Texas, LLC). *Bangor Hydro Electric Co*., 141 FERC ¶ 62,138 at 64,444 (2012 (approving transfer from Central Maine Power Company to Bangor Hydro of 4.87 miles of 345 kV transmission facilities that were under construction at the time the application was filed). *Id*. at 64,445. The application, moreover, contemplated that the transfer would occur on or before the facilities would be placed into service. *See also The Connecticut Light and Power Co. and The United Illuminating Co*., 134 FERC ¶ 62,118 at 62,206 (2011) (approving United Illuminating's acquisition of transmission upgrades Connecticut Light and Power was "developing and building in the State of Connecticut." United Illuminating's investments were to be applied toward the purchase of the project facilities "immediately prior to the date on which they are placed into service.")

these cases, operating wholly within ERCOT, asked the Commission to approve the transaction "without making any determination of jurisdiction,"[12] that plainly would not have been permissible. "[J]urisdiction cannot arise from the absence of objection, or even from affirmative agreement."[13] The Commission, applying this principle, has properly rejected requests from exempt entities that it nonetheless exercise jurisdiction over their transactions. *See, e.g., New West Energy Corp.*, 83 FERC ¶ 61,004 at 61,015 (1998). In the *AEP Texas* case, in fact, the Commission's delegation order expressly states that it "retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate."[14]

Acquisition of Jurisdictional Facilities in the form of Books, Papers and Records

As noted earlier, the applicants themselves characterize the jurisdictional facilities involved in their transaction to include the "books, records and accounts" related to the facilities they intend to transfer to New York Transco. April 2 order at P 1. Almost since its predecessor's establishment in 1935, the Commission has treated as jurisdictional facilities the books, papers and records utilized in connection with transmission in interstate commerce and sales for resale in interstate commerce. *Hartford Electric Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942). Indeed, as the Commission noted in *Enova*, *supra*:

> Without such an interpretation, a large class of entities (power marketers) could engage in sales for resale in interstate commerce with no regulation, even if they were affiliated with, or wholly owned by, traditional public utilities owning physical facilities, since such interstate wholesale sales may not be regulated by the states.

Enova, at 61,489.

[12] *AEP Texas*, *supra* at 64,701.

[13] *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 463; (D. C. Cir. 2005); *Bonneville Power Administration v. FERC*, 422 F.3d 908, 924 (9th Cir. 2005).

[14] *Id*. at 64,702, Ordering Paragraph (4).

That the Commission has interpreted "jurisdictional facilities" to include facilities that will be used *in the future* to provide or facilitate interstate transmission or wholesale sales is highlighted both in the case of power marketers and NY Transco itself. Take first the situation of the new power marketer. When it files an initial rate schedule to govern its wholesale sales, by definition it has not yet made any wholesale sales. So, in exercising authority to regulate its "jurisdictional facilities," i.e., its wholesale sales contracts, the Commission is treating as jurisdictional facilities, contracts for sales that have yet to occur.[15]

New York Transco itself highlights this point. On December 4, 2014, before it had transmitted a kilowatt of energy, together with five New York transmission owners, New York Transco filed a formula transmission rate, embodied in NY Transco tariff sheets, that it asked the Commission to accept. *New York Independent System Operator Corp., et al*., 151 FERC ¶ 61,004 at PP 1-2 (2015). In accepting and suspending that rate filing, the Commission indisputably exercised jurisdiction over NY Transco as a public utility. Since New York Transco has no energized transmission facilities, the only basis for the Commission's exercise of jurisdiction must be the same books, papers and records New York Transco acquired in the transfer that was the subject of the parties' section 203 application. This begs the following question: How is it that the same Transaction Assets that the New York transmission owners transferred to New York Transco are "jurisdictional facilities" giving the Commission authority to regulate New York Transco as a public utility under section 205 but are not "jurisdictional facilities" for purposes of section 203?

[15] *See, e.g., Ocean State Power*, 38 FERC ¶61,140 at 61,378 (1987) (accepting for filing agreements for the sale of energy and capacity from a generating unit not expected to commence operations for two years, noting that by filing Ocean State "recognizes the existence of the Commission's jurisdiction" and describing the rate filing as "jurisdictional facilities within the meaning of section 201").

Conclusion

Contrary to its precedent, the Commission's April 2 order reads section 203 "narrowly." Indeed, not only has it disclaimed jurisdiction over the disposition of transmission assets whose *only* purpose will be to provide transmission service in interstate commerce, it has engaged in no analysis whatsoever of whether the books, records and papers the applicants themselves describe as "Transaction Assets" constitute "jurisdictional facilities" as that term has been used by the Commission and its predecessor for more than seventy years. *See, e.g., Hartford Electric Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942).

While the Commission is free to modify its interpretation of an ambiguous statute or to change its policies generally, it must both "display awareness that it *is* changing position" and "must show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) (emphasis in original). Assuming the "energization" test articulated by the Commission in its April 2 order would otherwise constitute a *permissible* interpretation of "jurisdictional facilities," it is unquestionably a *narrow* one. The Commission, therefore, was bound to acknowledge its policy favoring broad interpretations of section 203 and explain why it had chosen a narrow interpretation, i.e., why it had chosen to depart from a policy eschewing narrow interpretations of its section 203 authority. Similarly, the Commission's "electrification test" leaves wholly unexplained why it was not asserting jurisdiction over the Transaction Assets identified by the applicants, i.e., the books, papers and records the Commission has historically recognized as jurisdictional facilities.

II. Because It Erroneously Treated Dicta in Earlier Decisions as Binding Precedent, the Commission Arbitrarily Ignored the Ramifications of Its Jurisdictional Disclaimer.

FERC applies by rote passages in three decisions,[16] none of which even involved applications under section 203, stating that section 203 does not apply to disposition or acquisition of transmission facilities that will not have been "energized" at the time they change hands. The first two cases, *PacifiCorp* and *Idaho Power*, companion cases decided the same day, involved public utility rate filings under FPA section 205. That the Commission's pronouncement on the scope of section 203 constituted dicta in these cases is obvious.

In *PacifiCorp*, the filing utility had submitted to the Commission a joint ownership and operating agreement setting out the terms under which PacifiCorp and Idaho Power would complete the construction and interconnection of certain transmission facilities as well as the terms under which Idaho Power would pay PacifiCorp for the operating and maintenance costs it would incur to run the facilities. *PacifiCorp*., 132 FERC ¶ 61,018 at PP 1-4 (2010). Bonneville Power had intervened, not protesting the terms of the filing, but arguing that "PacifiCorp *may* be required to make a filing under section 203 of the FPA" for one of the transactions between PacifiCorp and Idaho Power. *Id*. at P 12 (emphasis added).

PacifiCorp responded that Bonneville's concern was "beyond the scope of the proceeding" and that "the only issue before the Commission in this docket is the justness and reasonableness of the terms, conditions and rates in the proposed Agreement." *Id*. at P 13. *The Commission agreed*. *Id*. at P 19. Then, having declared the irrelevance of Bonneville's concern, the Commission went on to address the merits anyway. *Id*. at P 20. A law school professor would be hard-pressed to find a clearer example of dicta.

[16] *PacifiCorp*, 132 FERC ¶ 61,018, at P 20 (2010) (*PacifiCorp*); *Idaho Power Company*, 132 FERC ¶ 61,019, at P 20 (2010) (*Idaho Power*) and *Gamma Mariah, Inc.*, 44 FERC ¶ 61,442 (1988) (*Gamma Maria*). The first two cases, companion cases decided the same day, involved public utility rate filings under FPA section 205. The *Gamma Maria* case, cited in *PacifiCorp*, was an application by wind generators seeking certification as qualifying facilities under PURPA.

The *PacifiCorp* and *Idaho Power* cases[17] themselves were cases of dicta invoking dicta. Each case relied on a brief passage in *Gamma Maria*. That case, issued more than twenty years earlier, wasn't a section 203 case either. It was a case applying *PURPA*. More specifically, the only issue posed in that case was "whether qualifying facilities can collectively own undivided interests in a single transmission line." *Gamma Maria, supra* at 62,399. Having answered that question in the affirmative, *Id*., the Commission then went on to say that it did not have to "decide the jurisdictional issue at this time." *Id*. But it then inexplicably chose in a single sentence – not referencing section 203 – to say that the allocation of shares in the jointly-owned transmission line would not be subject to Commission jurisdiction because the transfer would take place before the line would be placed in service. *Id*. Again, this was an *observation*, not a ruling required to dispose of the case.

The passages discussed above are classic dicta, that is, they were unnecessary to disposition of the cases in which they appear.[18] Nearly two centuries ago the Supreme Court warned of the dangers in applying dicta as binding precedent:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

[17] *Idaho Power* was the companion case to the PacifiCorp filing and involved no separate issues that would have rendered the Commission's 203 pronouncements non-dicta.

[18] Bryan A. Garner, *Garner's Dictionary of Legal Usage*, p. 275 (3d. ed. 2011). *See also Sarnoff v. American Home Prods. Corp*., 798 F.2d 1075, 1084 (7th Cir. 1986).

Cohens v. Virginia, 19 US 264, 399-400 (1821). *See also United States v. Bell*, 524 F.2d 202, 206 n. 4 (2d Cir. 1975) (same); Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953 (2005). As Professor Stinson has explained in her 2006 law review article:

> [A] court is simply more likely to be right when all the arguments relevant to a particular point are articulated, when a judge thoroughly considers all of those arguments, and when the point is essential to the outcome or decision. Statements without full consideration of the merits are more likely to be wrong for obvious reasons: counsel may not have argued the issue or fleshed out the range of options, and the court may not have devoted much time or effort to resolving the problem.

Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 Brooklyn L. Rev. 219, 224-26 (2006). The three cases relied upon by the Commission to disclaim jurisdiction did not present circumstances in which "all the arguments relevant to a particular point are articulated." *Id*. Indeed, by applying those cases as precedent the Commission has compounded its error by sidestepping any detailed analysis that a de novo review of the issue would have entailed. The applicants in this very case never asked the Commission to disclaim jurisdiction, so it had no occasion to examine the potential ramifications of its ruling or the soundness of its earlier, untested dicta. Had it done so, the Commission would have understood how much jurisdiction it was giving up and why ceding that jurisdiction was not only statutorily unnecessary, but why doing so would run contrary to the stated goals of the Commission's section 203 enforcement policy. These points are discussed below.

III. The Commission's Narrow Interpretation of Its Authority Under Section 203 Unnecessarily Limits Its Ability to Protect the Public Interest.

Even where the Commission has discretion, because of statutory ambiguity, to adopt varying interpretations of the statutes it administers, its interpretations must nonetheless be reasonable. As the D.C. Circuit has held, agency interpretations of ambiguous statutes that depart without explanation from earlier interpretations are arbitrary and, therefore unreasonable

under *Chevron*.[19] *Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006).[20] The reasonableness of the agency's interpretation will also depend on whether it is consonant with giving the agency authority to address the problems Congress sought to resolve with the legislation. *Id*. The Commission's narrow interpretation of its section 203 authority fails these tests.

With respect to adherence to agency policy, as noted above, the Commission's April 2 order departs without acknowledgment from several agency policies.

Unduly narrow interpretations. By adopting an exceedingly limited definition of "jurisdictional facilities" the Commission has ignored its own prior determinations that to ensure that transactions detrimental to the public interest do not escape review it should not interpret its section 203 jurisdiction narrowly. *Enova, supra*. That problem is illustrated by the interpretation the Commission has adopted in this case.

Multiple Intervenors, one of the parties to this case, had argued that the Applicants had failed to show that the project would have no adverse impact on horizontal or vertical market power. Multiple Intervenor Protest at 12. Their concern was that, even though the NY Transco's facilities would be under the New York ISO's operational control, the company's owners -- the New York public utility transmission owners -- might still have incentives to favor projects in which they shared joint ownership over individual transmission projects owned by others. *Id*. Whatever the merits of that argument, the Commission's jurisdictional disclaimer bars it from reaching the merits.

The ramifications, of course, are broader than that. Under the Commission's statutory interpretation, a group of transmission owners, wary of competing with one another, might reach

[19] *Chevron* refers to the Supreme Court's decision in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[20] *See also, Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005) ("[a] statutory interpretation ... that results from an unexplained departure from prior [agency] policy and practice is not a reasonable one.")

agreement that they would jointly own any and all future transmission projects in their combined geographic areas of operation. Or a group of merchant transmission owners might decide that it is in their interest no longer to offer competing proposals in regional planning processes and that they will only bid jointly. Their agreements to transfer the transmission assets they plan to build to the joint venture would be immune from Commission scrutiny.

To be sure, joint ventures of the type postulated above might well be subject to antitrust review. In fact, it seems clear that the competitive implications of joint ventures like the NY Transco proposal would be subject to review under the antitrust laws, *United States v. Penn-Olin Chemical Co*., 378 U.S. 158 (1964). But *Commission* "consideration of antitrust and competitive issues" is supposed to serve as "a *first* line of defense against those competitive practices that might *later* be the subject of antitrust proceedings." *Gulf States Util. Co. v. FPC*, 411 US 747, 760 (1973) (emphasis added).

The Commission's decision to disclaim jurisdiction in this case is made all the more mystifying in light of its decision, only months ago, in *Public Service Company of Colorado*, 149 FERC ¶ 61,228 (2014). There, the Commission stretched mightily to find that "transfers" under section 203 include a public utility's involuntary relinquishment of transmission assets to a newly formed municipal electric utility in a condemnation proceeding. It is far from clear what actual beneficial public purpose will be served by this new interpretation. On the contrary, notwithstanding that one of the Commission's primary objectives in section 203 cases is to ensure that mergers or asset transfers do not unreasonably diminish competition,[21] its *Public Service Co. of Colorado* case is likely to have the opposite effect.

The Commission has long recognized that franchise competition between public utilities and governmentally-owned utilities is something to be fostered and protected. *Florida Power &*

[21] Order No. 669 at P 7.

Light Co., 8 FERC ¶ 61,121 (1979); *Connecticut Light & Power Co.*, 8 FERC ¶ 61,187 at 61,654-56 nn. 25-27 (1979). Involuntary "transfers" of public utility facilities to a newly formed municipal utility stemming from a condemnation proceeding *create*, rather than diminish franchise competition. The Commission, however, now requires the public utility to seek Commission permission under section 203 before it can obey a court's condemnation order to turn control of jurisdictional facilities over to a new competitor. This requirement creates a perverse incentive -- the applicant will be an "applicant" in name only. It will devoutly wish the agency to *deny* the application, or at least take its sweet time before approving it. The result is that the Commission's statutory interpretation erects a new barrier to the formation of municipal competitors to public utilities. So, the Commission seems to have gone out of its way to construe "transfer" under section 203 to reach facilities relinquished involuntarily in condemnation proceedings. Yet, it has inexplicably gone in the opposite direction in this case when its policy against narrow interpretations literally screams for the Commission to find jurisdiction.

The Commission's insistence that it will only assert jurisdiction over the transfer, merger or consolidation of transmission facilities that are already in operation is also at odds with its construction of the features of section 203 amended under the Energy Policy Act of 2005. The amended Act only uses the word "existing" to qualify its authority over the disposition of generation facilities. But the Commission has improperly read "existing" to precede the term "facilities subject to the jurisdiction of the Commission."

Except for the monetary thresholds, the provisions of 203 governing (a) the sale or transfer of jurisdictional facilities by a public utility and (b) the full or partial merger or consolidation of a public utility's jurisdictional facilities with those of "any other person" are

substantively unchanged. Order No. 669, *supra*, 113 FERC¶ 61,315. But EPAct 2005 amended 203 in several respects. One is pertinent here: the expansion of 203 giving the Commission authority to review a public utility acquisition of "an *existing* generation facility."[22] Order No. 669 explains the relevance of the fact that the word "existing" only precedes the statutory term "generation facility" and not the term "facilities subject to the Commission's jurisdiction."

Amended section 203 establishes a $10 million threshold "for amended subsections 203(a)(1)A, (C) (E) and 203(a)(2)." Order No. 669 at P 32. The Commission rejected arguments that this threshold should also be interpreted to apply to mergers and consolidations under section 203(a)(1)(B). The specific language of the provision, it said, "does not impose a dollar threshold on mergers or consolidations," and reading one into the statute would violate the rules of statutory construction. *Id*. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id*. (quoting *Rusello v. United States*, 464 U.S. 16, 23 (1983)).

This principle applies with full force to distinguish between the Commission's jurisdiction over the transfer of "facilities subject to the jurisdiction of the Commission" and disposition of an "existing generation facility." When Congress amended section 203, it expanded the Act to encompass the disposition of generation facilities for the first time, but limited the expanded authority to cover only the disposition of "existing" generation facilities. Had Congress intended to limit Commission oversight of the disposition of transmission facilities to those already in existence and energized, it could easily have added "existing" before "facilities subject to the jurisdiction of the Commission." The presumption, under *Rusello*, is

[22] *See* section 203(a)(1)(D).

that the addition of "existing" to precede "generating facilities" was intentional.[23] And, because "canons of construction require that effect be given to every term used in a statute," Order No. 669 at P 48,[24] the Commission was required to explain why it would read "existing" as if it preceded both "generation facility" and "facilities subject to the jurisdiction of the Commission." As the Commission stated in Order No. 669, interpreting section 203 in that fashion "would require us to write into the statute words that are not there." *Id*. at P 52.

Finally, reading "facilities subject to the jurisdiction of the Commission" to refer solely to existing, energized transmission facilities" gives companies a giant escape hatch to avoid Commission scrutiny of their major consolidations and asset transfers. Companies can do everything short of energization as long as their transaction takes effect an instant before energization. If they take this path, the same transaction that, had it taken effect a moment later, would be subject to prior Commission review, escapes regulatory scrutiny altogether. Even assuming this is a statutorily permissible outcome, why would the Commission adopt such a construction if the Act gave it latitude to exercise jurisdiction?

Books, Papers and Records as Jurisdictional Facilities. It was, as stated above, unreasonable for the Commission to adopt an unnecessarily narrow interpretation of section 203 in contravention of its own policy governing interpretation of that provision. Its position also amounts to a *sub silencio* abandonment of Commission policy interpreting "facilities subject the jurisdiction of the Commission" to include books, papers and records used to facilitate jurisdictional services. In properly treating New York Transco's rate filing and related documents as jurisdictional facilities in its section 205 suspension order, while simultaneously

[23] *See* Order No. 669 at PP 34-52 (rejecting argument that amended section 203 terms "electric utility company" and "electric utility" should be read interchangeably).

[24] *Citing Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) (requiring that court to give "effect, if possible, to every word Congress used").

declaring in *this* case that these same Transaction Assets were not jurisdictional facilities for purposes of section 203, the Commission acted arbitrarily and unreasonably.

CONCLUSION

For the reasons stated above, the Commission should reverse its holding that the transactions for which Applicants sought approval are outside the Commission's jurisdiction. Rehearing Petitioners take no position at this time on the merits of the Application, but urge the Commission to assert jurisdiction and conduct the review required by section 203.

Respectfully submitted,

/s/ Harvey L. Reiter

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document, via electronic mail or first class mail, upon each party on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington, DC, this 1st day of May, 2015.

/s/ Harvey L. Reiter
Harvey L. Reiter