IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 93-1372

INDUSTRIAL COGENERATORS,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review the Commission's orders in this case, which were issued solely under the authority of Section 210(h)(2)(A) of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3(h)(2)(A), and not in a "proceeding under the Federal Power Act," within the meaning of Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 8251.

2. Whether, even if the Court were to have statutory jurisdiction to review this case, the orders of the Commission provide any basis for judicial review.

STATUTES AND REGULATIONS

The applicable statutes and regulations appear in the Statutory Addendum appended to this brief.

STATEMENT OF JURISDICTION

This Court lacks statutory jurisdiction under Section 313(b) of the Federal Power Act in this case because the orders here sought to be appealed were issued under Section 210(h)(2)(A) of PURPA, and not under any provision of the Federal Power Act. In any event, the case fails to meet any of the various preconditions -- e.g., the justiciability, finality, and aggrievement requirements of Section 313(b) -- which must be present to warrant judicial review.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

The instant case involves the reviewability of two orders issued by the Federal Energy Regulatory Commission ("Commission" or "FERC"), which vacated an earlier declaratory order issued under the Commission's enforcement authority in Section 210(h)(2)(A) of PURPA.

The earlier declaratory order, Industrial Cogenerators v. Florida Public Serv. Comm'n, 43 FERC ¶ 61,545 (1988), R. 821; J.A. , took the view that regulations issued by the Florida Public Service Commission ("FPSC") potentially failed to implement Commission Regulation 292.305(b), 18 C.F.R. § 292.305, concerning the sales services that public utilities must offer to

qualifying cogenerators 1/ and small power producers 2/ ("QFs") under PURPA. The Commission orders here under review vacated the declaratory order as moot.

These orders are: (1) Industrial Cogenerators v. Florida Public Serv. Comm'n, Docket No. EL88-10-001, 61 FERC ¶ 61,202 (November 5, 1992), "Order Clarifying Prior Order, Dismissing Request For Rehearing And Vacating Prior Order In Part" (R. 997 - 1005; J.A. 237-245); and (2) Industrial Cogenerators v. Florida Public Serv. Comm'n, Docket No. EL88-10-002, 63 FERC ¶ 61,168 (May 6, 1993), "Order Denying Rehearing" (R. 1012 - 1019; J.A. 252-259).

II. STATEMENT OF THE FACTS

A. Statutory and Regulatory Background

1. In 1978, Congress enacted Section 210 of PURPA, inter alia, to require the Commission to issue rules that would encourage the development of cogeneration and small power production facilities. Section 210(a) of PURPA required the Commission, within one year after PURPA's enactment, to adopt rules ("QF rules") requiring electric utilities to purchase energy from, and sell energy to, QFs. 16 U.S.C. § 824a-3(a). Section 210(c) of PURPA requires that the Commission's QF rules

---

1/ A "cogeneration facility" is one that produces both electric energy and steam or some other form of useful energy, such as heat. 16 U.S.C. § 796(18)(A).

2/ A "small power production facility" is one that has a production of no more than 80 megawatts and uses biomass, waste, or renewable resources (such as wind, water, or solar energy) to produce electric power. 16 U.S.C § 796(17)(A).

ensure that the rates for sales to QFs are "just and reasonable and in the public interest," and not discriminatory against QFs. 16 U.S.C. § 824a-3(c). Section 210(f)(1) of PURPA requires state commissions, within one year after the Commission adopts QF rules, to "implement" those rules "for each electric utility for which it has ratemaking authority." 16 U.S.C. § 824a-3(f)(1).

Section 210(g)(1) of PURPA provides that judicial review may be obtained "respecting any proceeding conducted by a State regulatory commission for purposes of implementing any requirement of," inter alia, the Commission's QF rules, and provides for such review in state courts pursuant to Section 123(c)(1). PURPA § 210(h) provides that the Commission may enforce the implementation requirement against any state commission. 16 U.S.C. § 824a-3(h)(2)(A). PURPA also authorizes QFs to petition the Commission to enforce the implementation requirement, and:

> [i]f the Commission does not initiate an enforcement action . . . against a State regulatory authority within 60 days following the date on which a petition is filed . . . , the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority . . . to comply with such requirements.

16 U.S.C. § 824a-3(h)(2)(B).

2. In Order No. 69, 3/ the Commission adopted regulations to encourage cogeneration and small power production,

---

3/ Docket No. RM79-55, Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, FERC Stats. & Regs. [1977-1981 Regulations Preambles] ¶ 30,128 (1980).

as PURPA § 210(a) requires. 4/ As relevant here, Order No. 69 promulgated Section 292.305 of the Commission's regulations providing that the rates charged for the sale of electricity "[s]hall not discriminate against any [QF] in comparison to rates for sales to other customers served by the electric utility," 18 C.F.R. § 292.305(a)(ii), and requiring electric utilities to offer QFs a variety of electric power services. 5/

4/ Order No. 69 stated that the implementation requirement of PURPA § 210(f)(1) did not require state commissions to adopt verbatim the Commission's QFs rules. Rather, it afforded those commissions wide latitude in determining how best to implement the Commission's rules, which could be through rulemaking procedures at the state level, case-by-case adjudications, or any other reasonable method of implementation. FERC Stats. & Regs. [1977-1981 Regulations Preambles] ¶ 30,128, at pp. 30,891-92.

5/ These additional power services include: supplementary power; back-up power, maintenance power, and interruptible power.

Section 292.101(8) of the Commission's PURPA regulations, 18 C.F.R. § 292.101(8), defines "supplementary power," as "electric energy or capacity, supplied by an electric utility, regularly used by a qualifying facility in addition to that which the facility generates itself."

"Back-up power" means "electric energy or capacity supplied by an electric utility to replace energy ordinarily generated by a facility's own generating equipment during an unscheduled outage of the facility." 18 C.F.R. § 292.201(9).

"Maintenance power" means "electric energy or capacity supplied by an electric utility during scheduled outages of the qualifying facility." 18 C.F.R. § 292.101(11).

"Interruptible power" means "electric energy or capacity supplied by an electric utility subject to interruption by the electric utility under specified conditions." 18 C.F.R. § 292.101(10).

(continued...)

B. The Facts Relevant To This Case

1. Florida Public Service Commission's Order No. 17159

In February 1987, the Florida Public Service Commission (FPSC) issued an order (No. 17159) which, inter alia, made a series of factual determinations regarding the proper treatment of costs incurred by Florida utilities in providing various kinds of electric service to Florida QFs, as well as the rates to be provided for such service.

In March 1987, Petitioners, industrial QFs operating in Florida, filed an appeal with the Florida Supreme Court invoking that court's state law appellate jurisdiction under Fla. Const. Art. V, § 3(b)(2) to review orders of the FPSC. In briefs to that court, Petitioners stated that they intended to raise only state law issues and wished to litigate the PURPA claims arising from the FPSC rulings outside of that appeal. R. 279-80; J.A. 115-116. Accordingly, while the state appeal was being briefed, Petitioners filed a complaint with FERC against the FPSC under Section 210(h)(2)(B) of PURPA, 16 U.S.C. § 824A-3(h)(2)(B), alleging that FPSC Order No. 17159 failed to comply with FERC rules (18 C.F.R. § 292.305) requiring just and reasonable rates for various types of sales of electric power to QFs. Petitioners requested that the Commission "utilize its section 210(h) review and enforcement authority to require the FPSC to modify the Order

---

5/(...continued)
"Standby power," as used by the FPSC, was an umbrella term that referred collectively to back-up service and maintenance service, without any distinction between the two services.

so that it is consistent with the requirements of Section 292.305 . . . . [or alternatively,] to issue a declaratory order." R. 13; J.A. 13.

2. The Commission's Order of June 27, 1988 and Related Events

a. On June 27, 1988, the Commission issued an order specifically denying Petitioners's request for initiation of enforcement action under section 210(h)(2)(A). R. 843; J.A. 154. The Commission first observed that the issues presented by Petitioners' complaint were "primarily factual and result from evidentiary proceedings conducted by the Florida PSC," R. 826; J.A. 137, and that it was not the Commission's "intention to sit as an appellate court in cases where legitimate factual disagreements are presented by the parties as to whether a violation has occurred." R. 826; J.A. 137. 6/ In light of these circumstances, the Commission concluded, "[i]t is appropriate in this case that any enforcement action under PURPA proceed in the appropriate judicial forum." R. 826; J.A. 137.

The Commission went on, however, to express its views on some of the legal issues that might potentially arise in

---

6/ The Commission stressed (R. 829; J.A. 140) that its order would not address certain potentially dispositive matters, such as whether Petitioners had properly raised certain issues in the FPSC proceeding to preserve them for judicial review, and/or had asserted positions before the FPSC inconsistent with claims made in their FERC complaint. These, the Commission found, "would require us to examine the factual record developed by the [FPSC], and we have already stated we do not need to do so given our decision to defer the factual issues to the state court." R. 829; J.A. 140.

connection with Petitioners' subsequent efforts to pursue its objections to FPSC Order No. 17159 in federal or state court. The Commission expressly stated that the purpose of presenting its views was simply to "supply the relevant state or federal court with guidance as to the legal requirements of our regulations, and thus aid the court's review of the Florida PSC's action." R. 827; J.A. 138.

With this purpose in mind, the Commission determined that, contrary to the view of the FPSC, the Florida utilities were required to offer nonfirm (i.e., interruptible) service to QFs, absent a FERC waiver. The Commission also stated that the FPSC may have applied incorrect legal standards in concluding: 1) that there were differences in the cost of providing standby service and full-requirements service so as to justify a separate (higher) rate for standby service to QFs; 2) that there were no differences in the costs of providing maintenance service and back-up service to QFs that would justify a single "standby" rate for both services; 3) that QFs may be assessed minimum reservation charges as a distinct customer class; and 4) that QFs may be subjected to a "ratchet," a rate mechanism that adjusts their demand charges upward for two years, whenever their actual usage exceeds a specifically contracted-for level of the utility's generating capacity. Noting, however, that the FPSC had relied on evidence of the Florida QFs' load characteristics, derived from its rulemaking record which the FERC was not privy to, to justify its position on each of the above issues, the

Commission declined to find that the FPSC had actually violated FERC Regulation, 292.305. 7/ Instead, FERC deferred the resolution of these fact-intensive questions to the state court.

Commissioner Trabandt dissented. He criticized Petitioners for engaging in "barely concealed forum shopping," R. 846; J.A. 157, stating that where complainants have come to the Commission only to solicit an advisory opinion for use in state proceedings, the Commission should dismiss the complaint outright. R. 846; J.A. 157.

b. In July 1988, the FPSC and two Florida utilities filed requests for rehearing of the Commission's declaratory order. Petitioners, did not, however, seek rehearing of the Commission's decision not to initiate an enforcement action under PURPA § 210(h)(2)(A), did not exercise their right under PURPA § 210(h)(2)(B) to petition a U.S. district court to enforce the implementation requirement of PURPA § 210(f) against the FPSC, and did not seek judicial review of FPSC Order No. 17159 in state court under PURPA § 210(g). 8/

7/ One possible exception was the requirement that Florida utilities offer QFs interruptible service, absent a FERC waiver. But even as to this conclusion, the Commission stated, "[t]he Commission reaches no decision, however, regarding whether the Florida PSC, based on the record before it, can make the requisite findings under section 292.305(b)(2) for waiver of the requirement that interruptible service must be provided." R. 833, J.A. 144.

8/ Petitioners' rehearing request sought only a clarification from the Commission that its June 1988 declaratory order that the state commission, not the state courts, is the most appropriate forum for the resolution of the factual issues left unresolved by the declaratory order. See R. 894-899. J.A. 200-206.

c. In December 1988, six months after the Commission issued its declaratory order, the Florida Supreme Court rendered its decision in C.F. Industries, Inc. v. Nichols, 536 So.2d 234 (Fla. 1988), Petitioners' appeal of FPSC Order No. 17159, ruling in favor of the FPSC on all issues.

3. FPSC's Order No. 24924

In the meantime, while the requests for rehearing of the Commission's declaratory order were still pending at FERC, the FPSC ordered all Florida utilities to file tariffs for interruptible service to QFs. Thereafter, in September 1991, the FPSC issued Order No. 24924, see R. 986-996, J.A. 227-236, which amended Florida's QF rules to require that "[t]he provision of nonfirm service for standby and supplemental purposes . . . be consistent with the Federal Energy Regulatory Commission rule, 18 C.F.R. § 292.305." R. 991; J.A. 232. In a notice accompanying Order No. 24924, see R. 986; J.A. 227, the FPSC announced its intent to address the criteria under FERC Regulation 292.305(b)(2) for nonfirm standby and supplementary service in each utility's next rate case.

C. The Commission Orders Here Under Review

1. On November 5, 1992, the Commission issued an order on rehearing of its declaratory order, finding that the Florida Supreme Court's intervening decision in C.F. Industries upholding Order No. 17159, the FPSC's subsequent issuance of Order No. 24924, and the intervening FPSC requirement that Florida utilities file interruptible rates, had "effectively mooted the

parties' disputes." R. 1003; J.A. 243. 9/ Accordingly, the Commission vacated that portion of its June 1988 order:

> that interpret[ed] or explain[ed] PURPA and our QF regulations, and what they do or do not require (i.e., what we characterized in the June 27 order as 'the legal issues' or 'the legal requirements of our regulations).

R. 1004; J.A. 244. The Commission emphasized that any party remained free "to file a new complaint with the Commission should it find that given present circumstances there are yet matters not overtaken by events that it believes merit Commission consideration and action." R. 1004; J.A. 244.

2. On May 6, 1993, the Commission issued a second order on rehearing. The Commission found first that its prior declaration that the FPSC had not complied with FERC's QF regulations by failing to offer interruptible service to QFs was mooted by the FPSC's subsequent order directing all Florida utilities to file rates for interruptible service, and requiring that such rates be consistent with the FERC's regulations. R. 1015; J.A. 255. Next, the Commission rejected Petitioners' claim that the matters decided by the Florida Supreme Court concerning their state law claims did not moot their factually related PURPA claims. R. 1017-18; J.A. 257-258.

The Commission also observed that the issue of whether the FPSC had justified a single "standby" rate for both back-up and

---

9/ The Commission granted Petitioners' request for clarification of its June 1988 declaratory order, by stating that in most instances the most appropriate state forum to resolve factual issues in the first instance would be the state commission rather than state courts. R. 1003; J.A. 243.

maintenance power had become moot because the FPSC itself had admitted that a single rate for standby service was only an "interim determination" that could be modified after the collection and evaluation of additional data. R. 1017; J.A. 257. Moreover, the Commission found the issue of a single rate for standby service had been overtaken by events because the FPSC had subsequently ordered cost-based rates for back-up and maintenance power, and the FPSC "expressly recognized that a future cost-of-service evidentiary determination could lead to a different, rather than the same, rates for these services." R. 1017 n.27; J.A. 257, n.27.

Finally, the Commission found the Florida court's factual determinations that QFs were sufficiently distinctive from non-generating customers as to justify a separate standby rate, and that the presence of ratchets did not unlawfully discriminate against QFs, effectively mooted the Commission's earlier finding that these issues deserved further review in a judicial forum. R. 1017-18; J.A. 257-258.

The instant petition for review followed. 10/

10/ On August 6, 1993, the FERC filed a motion to dismiss the petition for review arguing that the Commission's orders were unreviewable because Petitioners were not aggrieved by those orders, and because there is no live "case or controversy" for this Court to resolve. By order issued October 26, 1993, this Court directed that the Commission's motion to dismiss be referred to the merits panel, and also directed the parties "to include in their briefs the arguments raised in their motion to dismiss rather than incorporate those arguments by reference."

SUMMARY OF ARGUMENT

I.

This Court is not empowered to review the Commission's orders in this case by virtue of Section 313(b) of the FPA. FPA § 313(b) provides for review in this Court of FERC orders issued only in a "proceeding under . . . [the Federal Power] Act." Jurisdiction under FPA § 313(b) cannot lie because the Commission orders under review here were not issued in a "proceeding under the FPA;" rather, they were entered in proceedings commenced under Section 210(h)(2)(A) of PURPA.

Although many provisions of Title II of PURPA expressly amend the FPA, Section 210 is one of the few that does not. Moreover, while PURPA § 210 appears in the same chapter of the United States Code as does the Federal Power Act, this is insufficient to confer upon this Court subject matter jurisdiction over Commission orders issued under PURPA § 210. Rather, the review provisions of § 210(h)(2) of PURPA control the judicial forum in which FERC § 210(h) orders may be reviewed, and these provisions vest exclusive jurisdiction in the U.S. district courts to review Commission orders issued pursuant to PURPA § 210(h). Thus, judicial review of the present orders, if available at all, would lie in a United States district court.

II.

Even if this Court should determine that Section 313(b) of the Federal Power Act applies to grant it statutory authorization

to review the Commission's orders in this case, there is no basis for review.

A.

Viewed in their totality, the orders under review, which vacate the advisory aspects of the June 1988 order, amount to nothing more than a Commission exercise of its unreviewable discretion not to take any enforcement action on Petitioners's complaint -- declaratory or otherwise. Although Congress may rebut the presumption of unreviewability attaching to agency decisions not to undertake enforcement action, e.g., by withdrawing discretion from the agency and/or establishing guidelines for the exercise of its enforcement power, it has not done so in PURPA § 210(h). Likewise, the Commission's 1983 policy statement regarding the Commission's enforcement role under section 210 of PURPA does not restrict or establish any standards confining the Commission's enforcement discretion in any manner that would permit judicial review here.

Simply put, there is "no law to apply" governing this Court's review of the Commission's determination not to grant Petitioners any enforcement-related relief on their complaint. Thus, upon finding that the need for the declaratory order had been overtaken by events, the Commission was free to vacate that order as an unreviewable determination not to exercise its enforcement authority under PURPA § 210(h).

B.

The Commission's orders are not reviewable as "final" within the meaning of Section 313(b) of the Federal Power Act. No finality attached here because no legal consequences flowed from either the June 1988 declaratory order, or the orders (under review here) vacating that order. The declaratory order did not definitively decide any rights that could be enforced without further need for an adjudication of the merits of Petitioners' PURPA claims by a state or federal court. Similarly, no legal consequences flowed from the orders here under review. In these orders, the Commission simply vacated the declaratory aspects of the June 1988 order because its failure to do so might otherwise transform into a "precedent" an order that had not been tested substantively on rehearing, to the possible prejudice of other parties to this proceeding.

In any event, nothing in the orders under review purports to vacate any portion of Order No. 69, i.e., the preamble to its QF rules, and/or the FERC's case precedent thereunder, which the declaratory order relied on to a very significant extent as authority for the legal views expressed therein. Indeed, as the Commission made clear, it remains free, if it so inclined, to apply the same legal standards in any future Commission review of the FPSC's implementation of the FERC's QF regulations.

C.

Petitioners are not "aggrieved" by the orders under challenge here, within the meaning of Section 313(b) of the

Federal Power Act. The Commission's orders vacating the declaratory order do not aggrieve Petitioners because that order did not adjudicate any claim affecting Petitioners. Moreover, Petitioners cannot claim prejudice from the Commission's vacatur because they never sought judicial review of their PURPA-based claims concerning FPSC's Order No. 17159 in state court or in U.S. district court, and thus never sought to rely on the advisory views expressed in that order against the FPSC.

There is no merit to Petitioners' claim that, as a result of the Commission's vacatur of the declaratory order, they have been denied a remand to the FPSC. The June 1988 declaratory order did not grant Petitioners any right to a reversal of FPSC Order No. 17159, or otherwise remand that order to the FPSC. Any attempt to read the Commission's declaratory order as remanding or requiring the FPSC to reconsider Order No. 17159 would fly in the face of the Commission's statement in its declaratory order that it was not the Commission's intention to act as an appellate court in this case. Finally, Petitioners are not aggrieved by the Commission's orders challenged here because these orders specifically acknowledge Petitioners' right to file a complaint as to future FPSC action or inaction.

D.

Even if the Commission's orders were reviewable, the Commission reasonably determined that any purported "case or controversy" surrounding FPSC Order No. 17159 had been mooted by events postdating its declaratory order. Subsequent to the

FERC's issuance of its June 1988 declaratory order, the Florida Supreme Court issued its decision in C.F. Industries v. Nichols, on review of FSPC Order No. 17159, effectively mooting the parties' disputes. Contrary to Petitioners' claim, the factual issues decided by the Florida Supreme Court on state law issues were not unrelated to facts underlying Petitioners' PURPA claims.

At all events, the mootness resulting from the Florida Supreme Court's decision did not depend on an analysis of the issues that were resolved under state law as opposed to PURPA. Rather, the Florida court's decision also mooted the controversy over FPSC Order No. 17159 simply because it ultimately proved to be the one and only case in which Petitioners sought judicial review of Order No. 17159. The express purpose of the Commission's declaratory order was to provide the relevant state or federal court with guidance as to how to interpret FERC's QF rules -- based on the Commission's expectation that Petitioners would seek judicial review of FPSC Order No. 17159 pursuant to PURPA § 210(g) or § 210(h)(2)(B). However, when Petitioners, following FERC's issuance of its declaratory order, failed to pursue their PURPA claims in state or federal court, the C.F. Industries decision effectively terminated the case or controversy involving FPSC Order No. 17159 -- as there was no longer any judicial forum in which that order would be reviewed.

Finally, the Commission's vacatur of its declaratory order was consistent with a long line of precedent in which this Court

has vacated FERC orders where an appeal has become moot before this Court reaches its decision on judicial review.

ARGUMENT

I. UNDER THE PURPA JUDICIAL REVIEW SCHEME, THIS COURT LACKS JURISDICTION OVER THE COMMISSION'S ORDERS VACATING ITS DECLARATORY ORDER.

Petitioners have not availed themselves of the private rights of action created by PURPA §§ 210(g)(1) or 210(h)(2)(B) against the FPSC. Therefore, judicial review of the Commission orders in this case may be obtained, if at all, only pursuant to PURPA § 210(h)(2)(A) or (2)(B). See R. 821; J.A. . As we will explain, PURPA's judicial review scheme authorizes direct review in the appropriate district court, not a U.S. Court of Appeals.

A. Congress Determines Which Court Should Review Orders of Administrative Agencies

It is settled doctrine that "Congress 'may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had.'" Rochester v. Bond, 603 F.2d 927, 934 (D.C. Cir. 1979), quoting, City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958). See also 5 U.S.C. § 703 ("[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . . ."); FCC v. ITT World Communications Inc., 466 U.S. 463, 468 (1984); Internat'l Brotherhood of Teamsters v. Pena, 17 F.3d 1478, 1481 (D.C. Cir. 1994).

Accordingly, when Congress does specify that exclusive judicial review shall lie in a federal district court, it cuts off the jurisdiction of all other courts, including U.S. courts of appeals. See Telecommunications Research & Action Center v.

FCC, 750 F.2d 70 (D.C. Cir. 1984)("TRAC"); see also Whitney National Bank v. Bank of New Orleans, 379 U.S. 411, 419-422 (1965); Investment Company Institute v. Bd. of Governors, Federal Reserve System, 551 F.2d 1270, 1279 (D.C. Cir. 1977). Although the statutes in the foregoing cases provided for review directly in the U.S. courts of appeals, the reasoning of these cases is equally applicable here where a statute expressly provides for exclusive review in the U.S. district courts.

As we next show, Congress in PURPA established a complex review scheme which grants to U.S. district courts exclusive jurisdiction over Commission proceedings to enforce violations of PURPA's implementation requirements.

B. Congress Has Determined That In An Enforcement Case Under PURPA, Review Lies Only In An Appropriate U.S. District Court, Not A U.S. Court of Appeals

Petitioners assert (Pet. Br. at xi) that this Court possesses jurisdiction to review the Commission's orders in this case by virtue of Section 313(b) of the FPA, which provides that any party to a "proceeding under this [the Federal Power] Act," aggrieved by an order issued by the Commission in such proceeding, may obtain a review of such order in, inter alia, the United States Court of Appeals for the District of Columbia Circuit. 16 U.S.C. § 8251(b). This claim of jurisdiction fails, however, because the orders under review here were not issued in a proceeding under the FPA; rather, they were entered in proceedings commenced under Section 210(h)(2)(A) of PURPA. See R. 821 n.2; J.A. 132 n.2. It is that statutory provision and the

closely related provisions of PURPA § 210(h)(2)(B) which also govern the issue of jurisdiction to review the Commission's orders in this case.

1. Although many provisions of Title II of PURPA expressly amend the FPA, see PURPA §§ 201-05, 206-08, 211-13, Section 210 of PURPA is one of the few that does not. Thus, even though Section 210 of PURPA has been codified along with the Federal Power Act's provisions in the same chapter of Title 16 of the United States Code, see 16 U.S.C. § 824a-3, the "Historical Note" to 16 U.S.C. § 824a-3 makes clear that PURPA § 210 "was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter." (Emphasis added.) In short, this Court's jurisdiction cannot rest on a view that the orders under review were issued in a "proceeding under the Federal Power Act," based simply on PURPA § 210's appearance in Title 16 of the U.S. Code. 11/ Rather, one must turn to the review provisions of

---

11/ For this reason, 16 U.S.C § 8251(b), which purports to represent the codified language of FPA § 313(b), cannot be applied literally. Thus, while FPA § 313(b), as it appears in the Statutes At Large (see 49 Stat. 860), vests jurisdiction in this Court over Commission orders issued in a proceeding "under this Act," there is a conflict between the scope of FPA § 313(b) in the Statutes At Large, and the scope of 16 U.S.C. § 8251(b), the codified version of FPA § 313, which extends this Court' review authority to orders issued in a "proceeding under this chapter." (Emphasis added.) Where such conflict in language arises, the Statutes At Large provisions of the statute are considered to be "legal evidence of laws," i.e., the official enactment, see 1 U.S.C. § 112, and must prevail over inconsistent language in the United States Code, which is considered unofficial, and only prima facie evidence of the enactment. See 1 U.S.C. § 204(a).

§ 210 of PURPA to determine to which court Congress has given review authority. As already demonstrated (see supra p. 4), nothing in those review provisions establishes a private right of action against the Commission that is reviewable directly by a U.S. court of appeals. 12/

To be sure, when the Commission chooses to exercise its enforcement powers under PURPA § 210(h)(2)(A), that statute requires the Commission to "treat" the implementation requirement of PURPA § 210(f)(1) against state commissions as though it a were a "rule enforceable under the Federal Power Act."

12/ This case involves no issues that arise under the Federal Power Act. In Order No. 550-A, 58 Fed. Reg. 21,250 (Apr. 20, 1993), FERC Stats. & Regs. [Regulations Preambles] ¶ 30,969 (Apr. 14, 1993), the Commission distinguished two cases, see American Electric Power Serv. Corp. v. FERC, 675 F.2d 1226, 1232 & n.26 (D.C. Cir. 1982), rev'd on other grounds, 461 U.S. 402 (1983), and Puerto Rico Electric Power Authority v. FERC, 848 F.2d 243 (D.C. Cir. 1988), in which this Court reviewed Commission orders issued under § 210 of PURPA pursuant to Section 313(b) of the Federal Power Act. The Commission noted that in both cases (which did not involve the enforcement provisions of PURPA § 210(h)) at least one issue arose under the Federal Power Act.

At all events, any other case in which this Court has reviewed the Commission's PURPA § 210 orders under FPA § 313(b), without ever addressing the question of the applicability of FPA § 313(b) to PURPA § 210(h), see, e.g., Greensboro Lumber Co. v. FERC, 825 F.2d 518 (D.C. Cir. 1987), cannot be considered precedent for establishing this Court's jurisdiction under FPA § 313(b) over FERC orders issued pursuant to PURPA § 210. See Brecht v. Abrahamson, 113 S. Ct. 1710, 1717 (1993)(if a court does not squarely address an issue in previous cases, it remains "free to address [it] on the merits" in the case at bar.); see also KVOS, Inc. v. Associated Press, 299 U.S. 269, 279-80 (1936)(jurisdictional "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents") (quoting Webster v. Fall, 266 U.S. 507, 511 (1926).

(Similarly, PURPA § 210(h)(2) treats a state commission as a "person" within the meaning of the Federal Power Act for purposes of such enforcement action under PURPA.) But the effect of treating state commission violations of PURPA's QF rule implementation-requirement as a violation of a rule "enforceable under the Federal Power Act," does not transform an ensuing Commission enforcement proceeding against a state commission under PURPA § 210(h)(2)(A) into a "proceeding under the Federal Power Act" reviewable by this Court pursuant to FPA § 313(b). Rather, it simply makes available to the Commission the full panoply of FPA enforcement powers, and thus incorporates by reference those powers into PURPA § 210.

Thus, by treating the implementation requirement as a rule enforceable under the FPA, Congress has subjected state commissions to the Commission's broad investigatorial powers set forth in Section 307 of the Federal Power Act, 16 U.S.C. § 825f, which authorizes the Commission, inter alia, to subpoena state commission records and take oral depositions from witnesses.

Moreover, any Commission action undertaken to actually enforce PURPA's implementation requirement, as though it were an FPA rule, is subject to the particular judicial review provisions of Section 314(a) of the FPA, which provide, in pertinent part:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, or the United States

> courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this Act or any rule, regulation or order thereunder . . . .

49 Stat. 861 (1935), see also 16 U.S.C. § 825m(a) (emphasis added). 13/

In turn, Section 317 of the FPA provides that:

> [t]he District Courts of the United States, and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this Act or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin such acts or practices and to enforce compliance with this Act or any rule, regulation, or order thereunder, ...

16 U.S.C. § 825p. (Emphasis added.) Accordingly, as the Supreme Court observed in FERC v. Mississippi, 456 U.S. 742, 751 (1982):

> Section 210(f)[of PURPA], 16 U.S.C. § 824a-3(f), requires each state regulatory authority . . . to implement FERC's rules. And § 210(h), 16 U.S.C. § 824a-3(h), authorizes FERC to enforce this requirement in federal court against any state authority . . . ; if FERC fails to act after request, any qualifying utility may bring suit.

This reference in Mississippi to "federal court," as the court in which the Commission may enforce the implementation requirement, plainly means U.S. district court, because the reference suggests

---

13/ As originally enacted in 1935, Section 314 of the Federal Power Act included "the Supreme Court of the District of Columbia," the predecessor of the United States Court of Appeals for the District of Columbia Circuit, among the courts in which the Commission might initiate enforcement action. This reference was eliminated the following year, see 49 Stat. 1921 (1936).

that both the Commission and the QF would bring suit in the same court, and § 210(h)(2)(B) specifies U.S. district court as the court in which QFs must petition for enforcement. See also Mississippi, 456 U.S. at 773 n.3 (Powell, J., concurring) (FERC and QFs "may bring judicial actions against state regulatory commissions to require the implementation of rules prescribed by PURPA.")

2. Nor does it matter, for present purposes, that the order which Petitioners seek to have reinstated here was one in which the Commission declined to initiate an enforcement action in U.S. district court, see R.843; J.A. 154, but went on to provide "additional guidance" finding potential legal infirmities with various aspects of the FPSC's regulations implementing the QF rules. See R. 827, J.A. 138. The declaratory order, and the orders vacating it, nevertheless constituted an exercise of the Commission's enforcement authority under PURPA. 14/

14/ Thus, in the declaratory order, the Commission emphasized that it was not sitting as an "appellate court," R. 826; J.A. 137, and specifically rejected an argument by Florida Power & Light that the order went beyond its PURPA enforcement jurisdiction. R. 827; J.A. 138.

Moreover, the Commission's avowed purpose in issuing the declaratory order, see R. 827; J.A. 138, was to provide guidance to a state court or federal district court as to the requirements of the Commission's QF rules, in the event Petitioners availed themselves of their private rights of action under Sections 210(g)(1) or 210(h)(2)(B) of PURPA to enforce the implementation requirement against the FPSC. Finally, as noted, the Commission specifically invoked PURPA § 210(h)(2)(A) as the statutory basis for issuing its declaratory order. R. 821 n.2; J.A. 132 n.2.

Hence, judicial review of the present orders, if available at all, would lie in a United States district court, under the All Writs Act, 28 U.S.C. § 1651(a), to review agency action not presently before it, if necessary to protect the district court's future jurisdiction over a PURPA § 210 enforcement matter. See, e.g., TRAC, 750 F.2d at 76-77; Ayuda, Inc. v. Thornburgh, 948 F.2d 742, 771 (D.C. Cir. 1991) (Wald, J., dissenting), remanded on other grounds, 113 S.Ct. 3026 (1993). 15/

In sum, by assigning exclusive jurisdiction over Commission proceedings to enforce violations of PURPA's implementation requirement to the U.S. district courts, Congress has, through the interrelationship of PURPA § 210(h)(2)(A)(B) and FPA §§ 307, 314, and 317, effectively precluded proceedings under PURPA §§ 210(h)(2)(A) and (B) from being treated as "proceedings under the Federal Power Act" within the meaning of Section 313(b) of the FPA.

15/ Petitioners also assert (Pet. Br. at xi) that this Court has jurisdiction under "Section 702 [sic] of the Administrative Procedure Act, 5 U.S.C. ¶ 702." But the Supreme Court has specifically rejected this argument, ruling that section 10(a) of the APA, 5 U.S.C. § 702, does not contain an implied, independent grant of subject matter jurisdiction of Art. III courts to review agency orders. Califano v. Sanders, 430 U.S. 99, 104-07 (1977).

In any event, where (as here) a federal statute does not place exclusive jurisdiction in a court of appeals, U.S. district courts, not courts of appeals, have original jurisdiction over generic challenges to agency action under 5 U.S.C. § 702 and 28 U.S.C. § 1331. See Robbins v. Reagan, 780 F.2d 37, 42-43 (D.C. Cir. 1985); see also Internat'l Brotherhood of Teamsters v. Pena, 17 F.3d 1478, 1481 (D.C. Cir. 1994).

II. EVEN IF SECTION 313(b) OF THE FEDERAL POWER ACT APPLIES TO GRANT THIS COURT STATUTORY JURISDICTION TO REVIEW THE COMMISSION ORDERS IN THIS CASE, THERE IS NO BASIS FOR REVIEW.

A. The Orders Represent An Agency's Unreviewable Discretion Not To Undertake Enforcement Action.

As previously discussed (see p. 24, n.15, supra), the Commission issued its June 1988 order solely pursuant to its enforcement jurisdiction under Section 210(h)(2)(A) of PURPA. The Commission, however, specifically declined to initiate enforcement action, see R. 843, J.A. 154, and went on to set forth only advisory views as to potential violations by the FPSC of its duty under PURPA § 210(f)(1) to implement the Commission's QF rules. Viewed in their totality, the orders under review, which vacate the advisory aspects of the June 1988 order, amount to nothing more than a Commission exercise of its unreviewable discretion not to take any enforcement action on Petitioners's complaint -- declaratory or otherwise. 16/

1. In Heckler v. Chaney, 470 U.S. 821, 831 (1985), the Supreme Court ruled that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's discretion." The Court added that such determinations are "presumptively unreviewable" under Section 10(2) of the Administrative Procedure Act, 5 U.S.C. § 701(a)(2). Id.; see also Coker v. Sullivan, 902 F.2d 84, 88-89 (D.C. Cir. 1990). Although Congress may rebut

---

16/ Petitioners have never challenged -- on rehearing or otherwise -- the Commission's denial (R. 843, J.A. 154) of their request to initiate an enforcement action.

this presumption of unreviewability by adopting statutory language withdrawing discretion from the agency and/or establishing guidelines for the exercise of its enforcement power, see Dunlop v. Bachowski, 421 U.S. 560, 567 (1975), it has not done so in PURPA § 210(h).

To the contrary, as previously discussed (see p. 24 n.15, p.26, supra), the Commission's orders in this case were issued under Section 210(h)(2)(A) of PURPA, which provides that "[t]he Commission may enforce the requirements of [PURPA § 210(f)] against any state regulatory authority . . . . " 16 U.S.C. § 824a-3(h)(2)(A). Thus, this statute sets no limits on, or standards confining, the Commission's discretion over whether to review and/or initiate an action to enforce PURPA § 210(f); rather, it commits complete discretion to the Commission to decide how and when its enforcement powers should be exercised.

Likewise, the Commission's "Policy Statement Regarding The Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978," Docket No. PL83-4-000, 23 FERC ¶ 61,304 (May 31, 1983), does not restrict or establish any standards confining the Commission's enforcement discretion in any manner that would permit judicial review of a Commission decision not to grant enforcement relief in a particular case. Rather, the 1983 policy statement reserves to the Commission absolute discretion whether to review and/or initiate enforcement action on complaints filed by QFs. As, the Commission declared in its Enforcement Policy Statement:

> The Commission may undertake an enforcement action either on its own motion or upon petition by [a QF] . . . . The Commission is not required to undertake an enforcement action described above. If the Commission does not initiate an enforcement action by notice within 60 days after receipt of a petition from a [QF], the petitioner may bring an action in the appropriate United States district court. We anticipate that such [Commission] enforcement action would be an investigation to determine whether there are grounds for the Commission to seek court enforcement.

Id. at 61,645. (Emphasis added.) In short, there is no law to apply governing this Court's review of the Commission's determination not to grant Petitioners any enforcement-related relief on their complaint. See Heckler v. Chaney, 470 U.S. at 831-35, distinguishing Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). Accord, Webster v. Doe, 486 U.S. 592, 594-601 (1988).

2. While Petitioners concede (Pet. Br. 28), as they must, that "FERC retains the discretion to exercise a review and enforcement function under Section 210(h) of PURPA," they maintain that the Commission already exercised its enforcement discretion when it issued the June 1988 declaratory order, and that the Commission was "not then free to retract that exercise of its discretion". Id. at 28-29. This claim is flawed at the outset because that earlier order had never become final (as it was always subject to modification on rehearing). See FPC v. Metropolitan Edison Co., 304 U.S. 375, 388-385 (1938). More importantly, Petitioners' argument must be rejected because it ignores the fundamental nature and effect of the Commission's

vacatur in the two orders here sought to be reviewed -- namely that the Commission's order on rehearing had determined not to take any action on Petitioners' complaint. 17/ Thus, upon finding that the need for the declaratory order had been overtaken by events, the Commission was free to vacate that order as an unreviewable, discretionary determination not to exercise its enforcement authority under PURPA § 210(h).

B. The Commission's Orders Are Not Reviewable as Final Within The Meaning Of Section 313(b) of the Federal Power Act.

Section 313(b) provides for judicial review only of Commission orders that are "orders of definitive impact, where judicial abstention would result in irreparable injury to a party." Papago Tribal Utility Authority v. FERC, 628 F.2d 235, 238 (D.C. Cir. 1980), cert. denied, 449 U.S. 1061 (1980). In Papago, this Court made clear that FERC orders are "final" for purposes of judicial review only when they "impose[] an obligation, den[y] a right, or fix[] some legal relationship as a consummation of the administrative process." 628 F.2d at 239-40; see also Port of Boston Marine Terminal Ass'n v. Rederiak-tiebolaget Transatlantic, 400 U.S. 62, 71 (1970); Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 425 (1942); American Trucking Ass'n v. United States, 755 F.2d 1292,

---

17/ For this reason, Petitioners' comparison (see Pet. Br. 18) of the orders under review to an agency order terminating an "inchoate rulemaking proceeding" is inapposite, and their reliance (see Pet. Br. 26) on Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983) is misplaced.

1297 (7th Cir. 1985); Intercity Transp. Co. v. United States, 737 F.2d 103, 106 (D.C. Cir. 1984); Florida Pub. Serv. Comm'n v. ICC, 724 F.2d 1460, 1462 (11th Cir. 1984); Miami v. ICC, 669 F.2d 219, 221-22 (5th Cir. 1982).

No finality attached here because no legal consequences flowed from either the June 1988 declaratory order, or the orders (under review here) vacating that order. See FPC v. Metropolitan Edison, 304 U.S. at 384-386. As an initial matter, the June 1988 declaratory order did not fix any right in favor of Petitioners that would be binding on any other forum or the FPSC. In its own words, the Commission was merely providing "the relevant state of federal court with additional guidance as to the legal requirements of . . . [its] regulations, and thus aid[ing] the court's review of the Florida PSC's action." R. 827; J.A. 138.

The declaratory order, moreover, did not definitively decide any rights that could be enforced without further need for an adjudication of the merits of Petitioners' PURPA claims by a state or federal court. That order did not purport to resolve any of the factual issues underlying each of Petitioners' claims. See R. 836, 838, 840-42; J.A. 147, 150, 151-153. Specifically, the Commission issued the declaratory order without ever receiving, much less reviewing, the factual record developed by the FPSC. See R. 829; J.A. 140. As to the factual allegations raised in Petitioners' complaint, the Commission declined to make any finding that the FPSC rules promulgated through Order No. 17159 actually violated PURPA's requirement that the FPSC implement the

FERC's QF rules. 18/ Rather, as to all such issues raised by Petitioners' complaint, the Commission declared that their resolution turned on factual questions which must be reserved to the state courts. See R. 836, 838, 840-842; J.A. 147, 150, 151-153.

Similarly, no legal consequences flowed from the Commission's orders vacating the June 1988 declaratory order. The Commission simply vacated the June 1988 order because a failure to do so "would leave on the books precedent that has not been tested substantively on rehearing (and thus a failure to vacate may prejudice the parties who sought rehearing)." R. 1004; J.A. 244. Additionally, the Commission stated that if it were to address the same issues in another proceeding, "we might or might not reach the same conclusions on the merits as we did in the June order." R. 1018, J.A. 258.

Finally, we stress in this regard that nothing in the orders under review purports to vacate any portion of Order No. 69 (see

---

18/ As noted (see note 7, p.9, supra) one possible exception to this was the Commission's declaration, see R. 833, J.A. 144, that Order No. 17159's failure to require Florida utilities to provide interruptible service to QFs violated Section 292.305(b)(2) of the Commission's QF regulations, because the FPSC had not sought a Commission waiver under Section 292.403 (now Section 292.402) of those regulations. But even as to this finding, the Commission emphasized that it "reaches no decision . . . regarding whether the Florida PSC, based on the record before it, can make the requisite findings under section 292.305(b)(2) for waiver of the requirement that interruptible service must be provided. R. 833, J.A. 144 (emphasis added).

And, in any event, the Commission did not initiate any enforcement action, or direct the FPSC to amend its interruptible service rule. Thus, the Commission's declaration here was advisory only, and fixed no concrete rights to interruptible service in favor of Petitioners.

discussion, supra pp. 4-5), the preamble to its QF rules, or case precedent thereunder, see Oglethorpe Power Corp., 35 FERC ¶ 61,069 (1986) ("Oglethorpe"), which the declaratory order relied on to a very significant extent as authority for the legal views expressed therein. See R. 830 n.23, 832 and n.25, and 835-838, J.A. 141 n.23, 143 and n.25, 146-149. Accordingly, the Commission remains free, if it so inclined, to apply the same legal standards of Order No. 69 and Oglethorpe in any future Commission review of the FPSC's implementation of the FERC's QF regulations.

C. Judicial Review Of The Commission's Orders Does Not Lie Because Petitioners Are Not "Aggrieved" Within The Meaning Of Section 313(b) Of The Federal Power Act.

1. Section 313(b) of the Federal Power Act (FPA), 16 U.S.C. § 825l(b), further provides that "[a]ny party to a proceeding under this Act aggrieved by an order issued by [FERC] in such proceeding" may obtain judicial review by filing a petition for review in an appropriate court of appeals. (Emphasis added.) "To show aggrievement, a plaintiff must allege facts sufficient to prove the existence of a 'concrete, perceptible harm of a real, non-speculative nature.'" North Carolina Utilities Commission v. FERC, 653 F.2d 655, 662 (D.C. Cir. 1981) ("NCUC") (quoting Public Citizen v. Lockheed Aircraft, 565 F.2d 708, 716 (D.C. Cir. 1977).

Petitioners have not suffered any aggrievement as a result of the Commission's vacatur of the declaratory order because that order did not adjudicate any claim affecting Petitioners. As

already explained (see pp. 7-9, supra), no rights were fixed by the Commission's June 1988 declaratory order as to any of the issues raised by Petitioners in their FERC complaint -- virtually all such issues were left to the state court for resolution of factual issues. Moreover, Petitioners cannot claim prejudice from the Commission's vacatur because they never sought judicial review of the FPSC's Order No. 17159 in state court (see PURPA § 210(g)(1)), or in U.S. district court (see PURPA § 210(h)(2)(A) & (B), and thus never sought to rely on the advisory views expressed in that order against the FPSC. In short, in no meaningful sense can the Commission orders vacating the declaratory order be said to have caused Petitioners any "concrete, perceptible harm of a real, non-speculative nature." NCUC, 653 F.2d at 662.

2. Petitioners nevertheless claim that they are aggrieved by the orders vacating the June 1988 declaratory order on the theory -- an erroneous one, we submit -- that the declaratory order granted them all the relief they requested, and that "[h]ad the order not been vacated, the FPSC would have been required to reassess its holdings in light of FERC's pronouncements. In effect, [Petitioners] have been denied a remand to the FPSC." Pet. Br. 20. These arguments are flawed in that they actually mischaracterize the import and effect of the Commission's declaratory order.

First, the Commission's declaratory order cannot be read, explicitly or implicitly, as granting Petitioners any right to a

reversal of the FPSC decision. Simply stated, the June 1988 order did not direct the FPSC to do anything. See R. 843, J.A. 154. It did not remand Order No. 17159 to the FPSC, or order the state commission to reconsider any aspect of Order No. 17159. See R. 843; J.A. 154. 19/ And any attempt to read the Commission's declaratory order as remanding or requiring the FPSC to reconsider Order No. 17159 would fly in the face of the Commission's statement in the declaratory order, R. 826; J.A. 137, that it was not the Commission's "intention to act as an appellate court" in this case.

Second, the Commission's clarification (see R. 1003, 1017 n.26, J.A. 243, 257 n.26) -- made at Petitioners' request -- that the FPSC is the proper forum in which to resolve factual issues does not suggest a remand of FERC Order No. 17159. On the contrary, it simply reflects the Commission's recognition that, by 1992, Petitioners had never sought judicial review of its PURPA objections to FPSC Order No. 17159 in state or federal court, despite the Commission's original expectation that it would do so. See R. 827, J.A. 138. Thus, the Commission's clarification was granted simply to ensure that its declaratory order could not be misinterpreted to suggest that in any future FPSC proceedings involving the implementation of the Commission's QF rules (i.e., proceedings to review FPSC orders other than Order No. 17159)

19/ Thus, Petitioners' claim (Pet Br. 22) that "[a]bsent FERC's declaratory order, there is no requirement imposed on the [FPSC] to reconsider whether its rulings are inconsistent with PURPA" must be rejected.

that a court, and not the FPSC, should be considered the tribunal with initial factfinding responsibility. See R. 1017 n.26; J.A. 257 n.26.

Finally, Petitioners are not aggrieved by the Commission's orders challenged here because these orders specifically acknowledge Petitioners' right to file a complaint with the Commission "should [they] find that given present circumstances there are yet matters not overtaken by events that [they] believe[] merit Commission consideration and action." R. 1004; J.A. 244.

D. In Any Event, Any Purported "Case Or Controversy" Was, As The Commission Held on Rehearing, Mooted By Subsequent Events

As previously explained (see p. 9, supra), the Commission's issuance of the June 1988 declaratory order did not end the controversy at the Commission level between Petitioners and the FPSC, because the FPSC and several Florida utilities filed requests for Commission rehearing of that order. Upon examination of these rehearing requests, the Commission reasonably determined not to expend any more resources on the alleged legal infirmities of its declaratory order because a number of events had mooted any further need to review FPSC Order No. 17159.

1. As the Commission found, subsequent to its June 1988 Order, the Florida Supreme Court's decision in C.F. Industries v. Nichols, on review of FSPC Order No. 17159, "effectively mooted

the parties' disputes" R. 1003; J.A. 243. 20/ Petitioners claim (see Pet. Br. 29), however, that the Florida Supreme Court's decision did not moot this case because FERC was aware, when it issued the June 1988 declaratory order, that the pending Florida Supreme Court appeal would involve only state law claims, and not PURPA issues. But the Florida Supreme Court in the C.F. Industries opinion observed that "Florida law is consistent with, and supports, the provisions of PURPA and FERC regulations concerning QFs," R. 952, J.A. 211, and that Order No. 17159 was adopted "largely to satisfy companion provisions of both state and federal law and cannot be understood without the inter-relationship of state and federal law." R. 950-51, J.A. 209-210. Indeed, the Florida court specifically found its interpretation of the antidiscrimination provisions of Florida's QF statutes to be "reinforced by the provisions of section 210 of PURPA and FERC section 292.305." R. 959; J.A. 218.

Likewise, the Commission recognized factual parallels between Petitioners' Florida law claims and their PURPA-based claims. Thus, while the Commission did not find the Florida

---

20/ Thus, as the Commission noted, R. 1017; J.A. 257, the Florida Supreme Court held that Order No. 17159 had justified allowing utilities to charge QFs a rate for standby service that differed from the rate for full-requirements service. The court also ruled that the inclusion of minimum reservation fees and ratchets in rates to QFs was not discriminatory. R. 958-959; J.A. 217-218. The court also observed that the FPSC had directed utilities to commence data collection to determine whether there was factual support for charging QFs separate rates for back-up and maintenance power, R. 955; J.A. 214, which Order No. 17159 treated collectively as a single "standby" service.

court's decision on Petitioners' state law claims to be dispositive of their PURPA-based claims, it rejected Petitioners' assertion that there was no relationship between issues addressed by the Florida court and "the issues raised here." R. 1017 n.26; J.A. 257 n.26.

At all events, the mootness resulting from the Florida Supreme Court's decision does not depend on an analysis of the issues that were resolved under state law as opposed to PURPA. Rather, the Florida court's decision also mooted the "case or controversy" involving FPSC Order No. 17159 simply because it ultimately proved to be the one and only case in which Petitioners sought judicial review of Order No. 17159.

It is apparent from the record, see R. 341-344, 450, 700-01, 827; J.A. 118-121, 123, 126-27, 138, that the Commission had expected that, following issuance of its June 1988 Order, Petitioners would seek judicial review of their PURPA challenges to FPSC Order No. 17159 in state court pursuant to PURPA § 210(g), or in the appropriate federal district court pursuant to PURPA § 210(h)(2)(B). When Petitioners subsequently failed to pursue their PURPA-based claims in either forum, and when Petitioners failed to seek further judicial review of the Florida Supreme Court's decision, the Commission correctly decided (R. 1016; J.A. 256) that, following the C.F. Industries decision, its declaratory order addressing FPSC Order No. 17159 became moot --

as there was no longer any judicial forum in which that order would be reviewed. 21/

2. Petitioners nonetheless complain (Pet. Br. 24) that it would be unfair for this Court to treat the declaratory order as moot because, they allege, Florida QFs have been subjected to unjustified ratchets, and have unjustifiably been denied separate rates to backup and maintenance service since Order No. 17159 issued. But FPSC Order No. 17159 is not under review here. Moreover, the Commission's vacatur of its declaratory order is not what has caused Order No. 17159 from being judicially reviewed. As previously explained (see p. 4, supra), Petitioners had two alternative routes to judicial review of Order No. 17159, i.e., state court (PURPA § 210(g)) and federal court (PURPA § 210(h)(2)(B)), and intentionally declined to pursue either avenue. Thus, there is nothing unfair in FPSC Order No. 17159 that Petitioners have not already had an opportunity to challenge.

3. Finally, it should be noted that the Commission's vacatur of its declaratory order was consistent with a long line of precedent in which this Court has vacated FERC orders where an appeal has become moot before this Court reaches its decision on judicial review. See, e.g., Freeport-McMoran Oil & Gas Co. v. FERC, 962 F.2d 45 (D.C. Cir. 1992); National Fuel Gas Supply

---

21/ Other events supporting the Commission's finding of mootness consisted of regulatory actions by the FPSC which significant altered Order No. 17159's position on interruptible service to QFs. See p. 10, supra.

Corp. v. FERC, 909 F.2d 1519 (D.C. Cir. 1990); Northwest Pipeline Corp. v. FERC, 863 F.2d 73, 79 (D.C. Cir. 1988); Hollister Ranch Owners' Ass'n v. FERC, 759 F.2d 898, 901-02 (D.C. Cir. 1985); see also A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 329 (1961); United States v. Munsingwear, Inc., 340 U.S. 36, 40-41 (1950).

* * *

In sum, on a variety of independent grounds -- the statutory review provisions of PURPA, the "no law to apply" doctrine, and established principles of finality, aggrievement and mootness -- this Court either has no statutory jurisdiction over the case or there is no basis for judicial review. In these circumstances, the petition for review should not be entertained.

CONCLUSION

For the foregoing reasons, the petitions for review should be dismissed.

Respectfully submitted,

Susan Tomasky
General Counsel

Jerome M. Feit
Solicitor

Edward S. Geldermann
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Office: (202) 208-0177
FAX: (202) 273-0901

May 19, 1994