ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 16-1244

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CITY OF CLARKSVILLE, TENNESSEE,
PETITIONER,

V.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT,

TODD COUNTY, KENTUCKY,
INTERVENOR.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

JOINT BRIEF FOR *AMICI CURIAE* AMERICAN PUBLIC GAS ASSOCIATION AND AMERICAN PUBLIC POWER ASSOCIATION IN SUPPORT OF PETITIONER

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November 1, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the Federal Energy Regulatory Commission and in this court are listed in the Brief for Petitioner.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Petitioner.

C. Related Cases

This case has not been before this Court or any other court. There are no related cases.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENTS

The American Public Gas Association ("APGA") is a non-profit, non-stock corporation organized and existing under the laws of Commonwealth of Virginia, and has its principal place of business at 201 Massachusetts Avenue, N.E., Suite C-4, Washington, D.C. 20002. APGA is the national, non-profit association of publicly-owned natural gas distribution systems, with over 700 members in 36 states. APGA promotes and advances the interests of publicly owned gas systems, including municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities.

APGA is a trade association within the meaning of Local Rule 26.1(b) and thus is exempt from the requirement to list the names of its members that have issued shares or debt securities to the public.

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The American Public Power Association ("APPA") has no parent corporation or publicly traded stock. APPA is the national service organization representing the interests of not-for-profit, state, municipal, and other locally owned electric utilities in the United States. APPA was created in 1940 as a nonprofit, nonpartisan organization. Its purpose is to advance the public policy interests of its members and their consumers and to provide services to its members to ensure adequate, reliable electric power at a reasonable cost, consistent with good environmental stewardship. APPA is a trade association under Circuit Rule 26.1(b).

Respectfully submitted,

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GLOSSARY

APGA	American Public Gas Association
APPA	American Public Power Association
Commission	Federal Energy Regulatory Commission
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act, 16 U.S.C. §§ 791a-825r
NGA	Natural Gas Act, 15 U.S.C. §§ 717-717z
Rehearing Order	*City of Clarksville, Tennessee*, Order Denying Rehearing, 155 FERC ¶ 61,184 (2016)

IDENTITY OF AMICI CURIAE

The American Public Gas Association ("APGA") is a national, non-profit association of publicly-owned natural gas distribution systems, with more than 700 members in 36 states.[1] APGA promotes and advances the interests of publicly owned natural gas distribution systems, including municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities. APGA is a trade association within the meaning of Circuit Rule 26.1(b).

The American Public Power Association ("APPA") is the national service organization representing the interests of the more than 2,000 not-for-profit, state, municipal, and other locally owned electric utilities in the United States, which operate in every state but Hawaii.[2] APPA was created in 1940 as a nonprofit, nonpartisan organization. Its purpose is to advance the public policy interests of its members and their consumers and to provide services to its members to ensure adequate, reliable electric power at a reasonable cost, consistent with good environmental stewardship. APPA also is a trade association under Circuit Rule 26.1(b).

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1 http://www.apga.org/home

2 https://www.publicpower.org

APGA, APPA, and their members have a strong interest in preserving the statutory exclusion of their members' utility rates and services from regulation by the Respondent Federal Energy Regulatory Commission ("FERC") that Congress established in section 2 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717a (2012), and section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824 (2012), and as both statutes have been interpreted for decades. Specifically, they have an interest in preserving the ability of a "municipality"—defined in the NGA as a "city, county, or other political subdivision or agency of a State," 15 U.S.C. § 717a(3), and in the FPA as "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power," 16 U.S.C. § 796(7)—to provide gas or electric utility services to the public and to establish and charge rates for their services pursuant to state and local law, free from the distorting burdens that would be imposed by an overlay of FERC regulation never intended by Congress. A public gas utility or public power utility should not be placed between the "Scylla" of compliance with its state's utility-service and ratemaking standards and the "Charybdis" of FERC regulation second-guessing or supplanting such state-law standards.

Counsel for the three parties to this appeal have given consent to the participation of these amici, so these amici have authority to file this brief under Fed. R. App. P. 29(a) and Circuit Rule 29(b).[3]

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Petitioner.

SUMMARY OF ARGUMENT

In its orders below, FERC has expanded its jurisdiction under the NGA in contravention of the intent of Congress and decades of precedent. Its ruling is potentially far reaching by exposing the thousands of municipally owned utilities across the Nation to federal regulation of their rates and services. Congress explicitly excluded municipalities from FERC's jurisdiction under the NGA and FPA. The court should uphold the municipal exemption clearly provided for by Congress and should vacate and remand the orders on review.

[3] Counsel for APGA and APPA authored this brief in whole, and its preparation and submission were fully funded by APGA and APPA.

ARGUMENT

I. Congress conferred special status on municipally owned gas and electric distribution systems

When Congress commenced federal regulation of interstate electricity transmission and wholesale sales in the FPA (1935), and of interstate natural gas transportation and wholesale sales in the NGA (1938), it carved out municipal utilities from such regulation. Gas and electric utilities owned by municipal entities have operated on that premise of federalism.

The FPA states the exclusion directly:

> No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing … or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

16 U.S.C. § 824(f). The Act thus provides for plenary regulation of "public utilities" but expressly defines that term to exclude municipalities. See *infra* section IV.A. Courts have consistently enforced this exclusion. As the Ninth Circuit has opined: "Congress was careful to specify which utilities fall within the definition of 'public utility.' Even though governmental and municipal utilities are public in normal parlance, they are not 'public utilities' under the [FPA]." *Bonneville Power Administration. v. FERC*, 422 F.3d 908, 915 (9th Cir. 2005).

The exclusion of municipalities from the FPA was intentional. Congress enacted these provisions of the FPA in order "to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758 (1973). "The Act was passed in the context of, and in response to, great concentrations of economic and even political power vested in power trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies." *Id.* (citing legislative history). At roughly the same time, Congress was enacting other legislation to enable the development of public power, particularly in rural areas. *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 146 (1939) (describing plans of the Tennessee Valley Authority to support new public power utilities with electricity generated from its water projects).

Congress enacted the NGA in 1938 analogously to regulate the transportation of natural gas and the sale for resale of natural gas in interstate commerce by "natural-gas companies," 15 U.S.C. § 717(b). *See ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595–96 (2015). As Clarksville's brief explains, Congress defined "natural-gas companies" to exclude municipalities. *See* Pet. Br. 25–26. Congress endorsed this municipal exemption in section 601(a)(2)(B) of the

Natural Gas Policy Act of 1978, 15 U.S.C. §3431(a)(2)(B) (2012), which explicitly preserved and did not expand the NGA definition of a natural gas company. Congress at other times has seen to fit to amend the NGA and its regulatory reach. For example, to address new technologies of liquefied natural gas that may be exported, Congress updated various definitions in the NGA in 1992 and again in 2005.[4] Yet, since 1938, Congress has left the municipal exclusion untouched.

Again, this was no accident. Municipally owned gas utilities predate the federal regulation of natural gas in interstate commerce by more than a century. For example, in Philadelphia, the proposition to light the city with gas was made to the city council as early as 1803. Ultimately, in 1835 the city passed an ordinance to construct a gas works, and complete municipal ownership was established in 1841. Congress enacted the NGA after lengthy investigations by the Federal Trade Commission of the practices of interstate pipeline companies. *See* 15 U.S.C. § 717(a) (citing investigation). "The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." *FPC v. Hope Gas Co.*, 320 U.S. 591, 610 (1945). The Supreme Court explained that

> the investigations of the Federal Trade Commission had disclosed that the majority of the pipeline mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas

[4] Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, Title IV, § 404(a)(2), 106 Stat. 2879; Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, Title III, Subtitle B, § 311(b), 119 Stat. 685.

> supply for pipe-line transportation, had been acquired by a handful of holding companies. State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations.

Id. (footnotes omitted). Accordingly, FERC itself has concluded that Congress excluded municipalities from the NGA "because they are governmental entities created by a state government and the purpose of the NGA was not to occupy a field in which the states were already acting." *Intermountain Mun. Gas Agency*, 97 FERC ¶ 61,359, P 28 (2001), *reh'g denied*, 98 FERC ¶ 61,216 (2002), *aff'd,* 326 F.3d 1281 (D.C. Cir. 2003). The need for the federal government to regulate municipal utilities was not present at the inception of federal regulation of gas and electricity, and the need is not present now.

Generally, state constitutions or specific statutes authorize municipalities in the state to own and operate a utility.[5] Both the NGA and the FPA recognize this established power of municipalities throughout the nation. As the Supreme Court has "repeatedly stressed, the Natural Gas Act 'was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.'" *ONEOK, Inc. v. Learjet, Inc*., 135 S. Ct. at 1599 (quoting *Panhandle E. Pipe Line*

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[5] *E.g.*, Tenn. Const. Art. IX, § 9 (home rule). *See Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. at 141–42 (describing Tennessee's authorization of public power utilities in 1935). In 1938, Clarksville commenced operating an electric utility. It continues to do so today, and it now also provides internet, digital television, and telephone service. See www.clarksvillede.com (website of the Clarksville Department of Electricity, doing business as CDE Lightband).

Co. v. Pub. Serv. Comm'n of Ind., 332 U.S. 507, 517–18 (1947)). Given the limitations on federal authority written into the NGA and Clarksville's unquestioned authority under state law to operate its municipality gas utility, "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides'" the "usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

This court has twice declined to opine "on whether FERC may regulate the interstate transportation of natural gas by a municipality." *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1286 n.9 (D.C. Cir. 2003) (quoting *United Distribution Cos. v. FERC*, 88 F.3d 1105, at 1153 & n.63 (D.C. Cir. 1996)).[6] In its orders below, FERC itself conceded the NGA's legislative history is wanting on this point.[7] Clarksville points out that what legislative history there is supports Clarksville's reading of the plain language of the NGA. See Pet. Br. 27. The exclusion is plain in the statutory text and established in precedent. Thus, this court

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6 In both of those cases the court disposed of the issues before it by sustaining FERC's jurisdiction over interstate pipelines—the natural-gas companies—providing service to municipal gas distribution utilities, despite the effects of that regulation on the municipalities. *See United Distribution*, 88 F.3d at 1153–54; *Intermountain*, 326 F.3d at 1286.

7 *See* Rehearing Order, P 16; JA 113 ("legislative history of the NGA sheds little light"); *Tenn. Gas Pipeline Co.*, 69 FERC ¶ 61,239 at 61,908 (1994) (legislative history "is of no help"), *order on reh'g*, 70 FERC ¶ 61,329 (1995).

is now called upon to rule conclusively that municipalities are not subject to regulation as natural gas companies under FERC's new-found theory.

II. FERC's decision contravenes principles of *stare decisis*

The Commission made its sweeping jurisdictional decision here in a casual manner, placing its original ruling in a footnote to a routine order. JA 97. *See* Pet. Br. 8. Its order denying rehearing, while considerably longer, downplays its significance as a simple "reconsideration" of precedent. Rehearing Order, P 11; JA 111. For municipalities, however, the Commission's decision is an "avulsive change," *Hanover Shoe, Inc. v. United Shoe Machinery Co.*, 392 U.S. 481, 499 (1968), which undermines the principle of *stare decisis*. In *California v. FERC*, 495 U.S. 490 (1990), the Supreme Court affirmed FERC in a case involving overlapping federal and state regulation of a hydroelectric facility. In so doing, the Court articulated the importance of not disturbing "longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes," *id.* at 499, as follows:

> Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U. S. 164, 172–173 (1989). There has been no sufficient intervening change in the law, or indication that [the relevant precedent] has proved unworkable or has fostered

> confusion and inconsistency in the law, that warrants our departure from established precedent. ...
>
> Petitioner asks this Court fundamentally to restructure a highly complex and long-enduring regulatory regime, implicating considerable reliance interests of licensees and other participants in the regulatory process. That departure would be inconsistent with the measured and considered change that marks appropriate adjudication of such statutory issues.

495 U.S. at 499–500 (alteration original). The same principle should apply when FERC seeks to upset settled understandings of its authority. Here, FERC, itself, should have heeded *stare decisis.*

In the decades since the organic 1930s-era statutes, FERC—in its own words—"has consistently declined to assert jurisdiction over municipalities based on the NGA's exemption of municipalities." *Tenn. Gas Pipeline Co.*, 69 FERC ¶ 61,239, at 61,908 (1994). Clarifications around the edges of jurisdiction have been limited. When FERC administratively restructured the interstate natural gas pipeline industry in 1992, it introduced the notion that shippers on those pipelines could resell contractual rights to transport gas by means of so-called "capacity release" regulations. This court upheld FERC's requirement that municipalities must comply with FERC's capacity release regulations when they purchase transportation capacity on a FERC-jurisdictional interstate pipeline and then seek to release, or resell, any unused capacity. *United Distribution Cos. v. FERC,* 88 F.3d at 1149–50, 1154. The court concluded that FERC could require

municipalities to comply with its capacity release regulations, relying on both the subject matter of the transactions and, more importantly, the central role of a jurisdictional interstate pipeline in the capacity release transactions:

> FERC may, consistent with the [Natural Gas Act], require municipalities to comply with its capacity release regulations. As we explained above, . . . FERC's transportation jurisdiction extends as a separate matter over capacity release given the involvement of interstate gas pipelines. The pipelines' role in capacity release is absolutely central, and the transaction itself controls access to interstate transportation capacity, entirely independent of the jurisdictional nature of the releasing and replacement shippers.

Id. at 1154 (footnotes omitted). *Cf. N.Y. State Elec. & Gas Corp. v. FERC*, 638 F.2d 388, 393–96 & n.35 (2d Cir. 1980) (upholding FERC jurisdiction under FPA to modify contract between FERC-jurisdictional public utility company and state agency, despite exemption of states and their subdivisions from the act's provisions, where modification "d[id] not require [state agency] to take or to refrain from taking action" or "place any limitations on [its] powers or prerogatives"). Thus, the indirect regulation of municipal entities *as customers* receiving FERC-jurisdictional services from FERC-jurisdictional natural-gas companies is countenanced under the NGA.

Yet, there are no interstate pipelines implicated in this case, so the central role of a FERC-jurisdictional interstate pipeline does not translate to the same result here. In this case, FERC does not assert jurisdiction over Clarksville as a

customer of an interstate pipeline company or over its use of any service over the facilities of an interstate pipeline company.

To be sure, some municipalities have obtained a certificate of public convenience and necessity issued by FERC under section 7 of the NGA, 15 U.S.C. § 717f, for defined interstate services, as Clarksville did here. *See* Pet. Br. 6–7; *see also City of Toccoa, Ga.*, 125 FERC ¶ 61,048 (2008). Municipalities have done this because of FERC's 2001 order in the *Intermountain Municipal Gas Agency* case, *see supra* p. 7. There, FERC issued a declaratory order that a pipeline company serving only intrastate customers would lose its statutory exemption from FERC regulation, *see* 15 U.S.C. § 717(c), and would become a regulated natural-gas company if it were to transport natural gas to a municipal agency that in turn transported the gas across a state line for distribution to municipalities in either state. *See Intermountain*, 326 F.3d at 1281. In reaching that conclusion, FERC reasoned that a municipality ceases to be a municipality to the extent that it owns and operates pipeline facilities crossing state boundaries, such that it is subject to FERC's jurisdiction under the NGA concerning those facilities. *See id.* at 1284. In denying review of those orders, this court relied on FERC's jurisdiction over the interstate pipeline company and its service to the municipalities involved in that case. *See id.* at 1286. Noting its earlier reservation of the issue in *United Distribution Companies v. FERC*, the court in *Intermountain* "express[ed] no

opinion on whether FERC may regulate the interstate transportation of natural gas by a municipality." *Id.* at 1286 n.9.

FERC has followed this script until now. Even as recently as 2003, FERC extended the municipal exclusion to a new area concerning export authoritzations, holding that it did not have jurisdiction over municipalities because section 3(a) of the NGA, 15 U.S.C. § 717b(a), applies to "persons," and municipalities are not persons. *Sound Energy Solutions*, 106 FERC ¶ 61,279, *order on rehearing*, 107 FERC ¶ 61,263, P 92 (2004). The Commission's orders in Clarksville's case would overrule these precedents—albeit without citing many of them.

This case presents an easier-to-decide question than the one not decided by this court in *Intermountain*.[8] As Clarksville has explained, the interstate facilities for which it sought a section 7 certificate under FERC's *Intermountain* theory are not used by Clarksville to provide service to Guthrie, Kentucky. And those facilities did not provide the basis for FERC's determination of jurisdiction over Clarksville's service to Guthrie. In this case, FERC claimed jurisdiction over Clarksville's service to Guthrie based solely on the fact that the gas leaves the state

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[8] Amici do not believe that FERC's determination of jurisdiction *over the municipality* in the *Intermountain* case was grounded correctly in the statute. *Cf. W. Minn. Mun. Power Agency v. FERC*, 806 F.3d 588 (D.C. Cir. 2015) (vacating FERC orders for improperly distinguishing among FPA-defined municipalities based on their location relative to hydropower project). But the court can vacate FERC's jurisdictional orders in this case without reaching the question it reserved in *Intermountain*.

of Tennessee. The question in this case is whether FERC can regulate wholesale sale and transportation of natural gas by Clarksville on its Tennessee distribution facilities simply and only because that sale leads to natural gas leaving the state.

III. FERC's orders create legal confusion and hardship on municipalities who have long relied on their statutory exclusion from FERC jurisdiction

There are nearly 1,000 municipal gas distribution operations in the United States, distributing approximately 10% of natural gas sold by utilities. Although there are a few municipal operations in large cities such as Long Beach, Memphis, Omaha, Philadelphia, and San Antonio, generally the municipals are relatively small. Regulatory oversight is provided by a local governing body—a city council or utility board—that establishes terms of service and rates. [9]

It is significant that the municipal exclusion has been enforced since the restructuring of the natural gas pipeline industry by FERC in 1992.[10] In fact, at the outset of this new regulatory paradigm, FERC pronounced again that it "has no

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[9] *See generally* John P. Gregg, "Chapter 42: Rates and Service Obligations of Municipally Owned Gas Distributors," *Regulation of the Gas Industry* § 42.02 (Matthew Bender 2015).

[10] *See Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation*, Order No. 636, 57 Fed. Reg. 13,267, FERC Stats. & Regs. ¶ 30,939 (1992), *order on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128, FERC Stats. & Regs. ¶ 30,950 (1992), *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), o*rder on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

NGA jurisdiction over municipalities as gas sellers or transporters."[11] The industry restructuring, coupled with the deregulation of the price of natural gas by Congress, caused a dramatic shift in the roles of local utilities. No longer captive to a tightly regulated monopoly sales regime, local utilities (including municipally owned utilities) were compelled to address a deregulated sales market with new business models and relationships. Such activities generated the post-restructuring decision on rehearing by FERC in the contested case of *Tennessee Gas Pipeline Company* that Clarksville has reviewed extensively in its brief. *See* Pet. Br. 40–44 & Addendum C. There, FERC exhaustively reviewed the statute and made a clear ruling: "[T]he NGA's exception on its face applies to municipalities as entities, not to municipal distribution," and thus can extend to transportation and facilities that do not qualify as local distribution. *Tenn. Gas Pipeline Co.*, 70 FERC ¶ 61,329 at 62,012 (1995). FERC went so far in this decision to say, "we do not see any basis under the NGA to interpret which municipal activities are and are not under our jurisdiction." *Id.* at 62,012-13. *See also Freebird Gas Storage, LLC*, 111 FERC ¶ 61,054 (2005) (municipality's joint ownership of storage facility with a jurisdictional storage company does not affect its nonjurisdictional status). Therefore, municipally owned gas systems have been completely justified to rely upon their status as municipalities to exempt them from FERC jurisdiction.

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[11] Order No. 636-B, 61 FERC ¶ 61,272 at 62,003.

FERC's *sub silentio* departure from this critical precedent was arbitrary and capricious.

Given the long history of application of the municipal exclusion by FERC, its about-face in this case causes considerable regulatory confusion. Without saying so, the implications of the decision overturn the precedents upon which municipal distributors have long relied and rely today. As a result, municipal governments face the Hobson's choice of seeking to determine whether their reliance on the exclusion is valid or hope that they will not be the subject of an enforcement action. Under powers granted by Congress in 2005, FERC can assess "persons" civil penalties of up to $1 million per day for violations of the NGA or "any rule, regulation, restriction, condition, or order" by FERC thereunder. 15 U.S.C. § 717t-1. Whether FERC can assess a penalty on a local government is a legal question never tested, as such a penalty is unprecedented. [12] Nonetheless, the cost of regulatory compliance for a local government in these circumstances is

[12] In 2011, FERC approved a settlement resolving an enforcement action by its staff under its Anti-Manipulation Rule, 18 C.F.R. § 1c.2, for failure to advise an Independent System Operator of planned outages of generation units that were registered in its capacity market, under which a municipal electric utility disgorged profits with interest but did not pay a civil penalty. *Holyoke Gas & Elec. Dep't*, 137 FERC ¶ 61,159 (2011). This FERC rule implements the prohibition of energy market manipulation added to the FPA in section 222 of the Act in 2005, *see* 16 U.S.C. § 824v.

quite significant. That is why these entities are relying on their trade associations to file this brief with the court.

Beyond a requirement to seek a certificate, as described by Clarksville, *see* Pet. Br. 14–17, municipal utilities if regulated as natural-gas companies by FERC are under an obligation to comply with all existing and future regulations and requirements applicable to holders of certificates. This makes them subject to certain data-retention and price-reporting requirements, and they are expressly obligated to "adhere to any other standards and requirements for price reporting as the Commission may order." 18 C.F.R. § 284.403.

FERC has failed to consider the impact of its ruling on the very municipal entities that have been subject to its prior orders disclaiming jurisdiction—much less those which have relied upon those precedents. The circumstance of Somerset, Kentucky, is perhaps the most glaring precedent. In 1992, this small city *had actually filed rates with FERC* for the transportation of natural gas produced locally to an interstate pipeline under section 311 of the Natural Gas Policy Act, 15 U.S.C. § 3371, on the belief that such activity was jurisdictional. But FERC sent them away like the wizard in Oz, terminating the proceedings because Somerset was a "municipality" under the NGA. It held that the Natural Gas Policy Act did not expand its NGA jurisdiction over municipalities, stating plainly: "a municipality is not subject to our jurisdiction under the NGPA" so that

"Somerset's rates are not subject to regulation under NGPA section 311." *Somerset Gas Serv.*, 59 FERC ¶ 61,012 at 61,027 (1992). The implication of the orders on review is that Somerset's rates indeed have become jurisdictional—some 14 years later.

In 1996, FERC reached the same result under the FPA, rejecting a transmission tariff filing by a political subdivision of a state because the corporation was not a "public utility" regulated under the FPA. *S. Car. Pub. Serv. Auth.*, 75 FERC ¶ 61,209 at 61,696 (1996); *see also New West Energy Corp.*, 81 FERC ¶ 61,416 (1997), *reh'g denied*, 83 FERC ¶ 61,004 (1998) (rejecting wholesale rate filing by corporation wholly owned by a political subdivision of a state). Thus, FERC's reasoning under *both* statutes cannot be squared with its orders in *Clarksville*.

Yet FERC did not say in the orders under review that it was overruling any cases. It obliquely opined that its prior "interpretation of the municipal exemption created by operation of the NGA's definitions was overly expansive, at least to the extent it would allow municipal gas utilities to avoid NGA jurisdiction over the transportation and sale of gas for consumption in *other states*, because such an interpretation would create a regulatory gap." Rehearing Order, P 11; JA 111. The Commission asserted that "a state cannot authorize or regulate a municipal gas utility's sales for resale and deliveries of gas that will be transported to another

state for consumption." *Id.*, P 18; JA 114. But it never explained the source for that limitation on state authority, either under the laws of Tennessee or any other state, or under the NGA, where it appears to have no basis in the federal statutory text or case law. *See Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375 (1983) (upholding, against preemption and dormant Commerce Clause challenges, state authority to regulate wholesale sales by electric cooperative that was not a public utility under the FPA).

FERC's holding that Clarksville's wholesale sales and transportation services are FERC jurisdictional has broad implications for the entire municipal gas community. And the hardship would be amplified by the small size of most municipal gas utilities.[13] These small systems operate far from the regulatory reach of the federal government, with the prime exception of gas safety (where in fact the federal government delegates enforcement to the states). Small communities have no appetite for entanglement with a complex federal regulatory scheme. As evidenced by this appeal, a determination of jurisdiction can be a difficult legal analysis. No smaller local government wants to dedicate limited financial resources to such endeavors.

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[13] Likewise, most municipal electric utilities are quite small. Using 2015 Energy Information Administration data, APPA has determined that the median municipal electric utility serves about 2,000 customers.

IV. FERC's orders contravene well-established law

A. FERC's Rehearing Order contradicts the text, structure, and purpose of the FPA

FERC in its Rehearing Order buttressed its reading of the NGA by arguing that it should be read the same way as the FPA. *See* Rehearing Order, PP 12, 13; JA 111–112. The problem for FERC, however, is that the Rehearing Order misreads the FPA and a 1953 Supreme Court opinion construing the FPA. Were FERC to begin applying this statutory reinterpretation to the FPA, it would upset decades of precedent affecting public power utilities and undermine the overall structure and purpose of the FPA.

The Rehearing Order's analysis cannot be squared with the text or structure of the FPA. Section 201 of the FPA, 16 U.S.C. § 824, defines the services, facilities, and entities subject to FERC's jurisdiction under Part II of the FPA, 16 U.S.C. §§ 824–824w, the utility-regulatory provisions analogous to the NGA. Specifically, the provisions of Part II of the FPA "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce" but, except for specific provisions not relevant here, not to "any other sale of electric energy." *Id*. § 824(b)(1).

Moreover, "the Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy," again with exclusions and exceptions

not relevant here. *Id*. Section 201(d) defines "sale of electric energy at wholesale" to mean "a sale of electric energy to any person for resale." *Id.* § 824(d).

Section 201 also defines the entities subject to such regulation. Section 201(e) states that "[t]he term 'public utility' … means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of [fifteen enumerated provisions of Part II not relevant here])." *Id.* § 824(e). Among other things, a "public utility" is subject to regulation of its rates and services under sections 205 and 206 of the FPA, which require that all such rates be just and reasonable and not unduly discriminatory or preferential. *Id*. §§ 824d, 824e.

Section 201's definitions of "sale of electric energy at wholesale" and "public utility" both use the term "person." Subsection 3(4) of the FPA defines "person" as "an individual or a corporation." *Id*. § 796(4). The FPA defines "corporation" as "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include 'municipalities' as hereinafter defined." *Id.* § 796(3) (emphasis added). The FPA defines "municipality" as "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power."

Id. § 796(7). Thus, a municipality is not a "corporation," and therefore not a "person," and therefore not a "public utility" under the FPA. The definitions of "person," "corporation," "municipality," and "public utility" have remained substantively unchanged since their adoption in 1935.

In accordance with that definition of "public utility," subsection 201(f) of the FPA states that "[n]o provision in [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, … unless such provision makes specific reference thereto." *Id.* § 824(f). Section 201(b)(2) lists fifteen specific provisions of Part II of the FPA that, "[n]otwithstanding subsection (f), … shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions …." *Id.* § 824(b)(2).[14] Subsection 201(e) makes clear that entities subject to FERC regulation solely under these discrete provisions, like municipalities, are not "public utilities."

Despite the clarity and precision of this statutory language, FERC stated in the Rehearing Order below that the Supreme Court held in *United States v. Public Utilities Commission of California*, 345 U.S. 295, 316 (1953), that a municipality "was a 'person' for purposes of the Act." Rehearing Order, P 12; JA 111. "Applying here the same reasoning," FERC concluded "that a municipality can be

[14] None of these provisions is relevant to the issues in this appeal.

a jurisdictional 'person' and, therefore, a 'natural gas company' under the NGA." *Id.*, P 13; JA 112. In fact, the Court's holding was much different and does not support FERC's conclusion.

As Clarksville's brief explains, the question decided in that 1953 case was whether the FPA applied to wholesale power sales by public utilities *to* municipalities. *See* Pet. Br. 30–38. The Court held that when Congress defined the term "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale" in subsection 201(d) of the FPA, it was not using the term "person" as defined in section 3(4) of the FPA, and thus did not exclude wholesale sales to municipalities from coverage under the FPA. 345 U.S. at 312–16. The Court held that using the Act's defined terms "person," "corporation," and "municipality" in section 201(d) "in support of an indirect exception to Part II has no support in the statutory scheme as a whole," because other provisions of the FPA expressly enable municipalities purchasing power from a public utility to seek relief from the Commission and reviewing courts. 345 U.S. at 312.

Moreover, the legislative history of section 201(d) of the FPA showed that "Congress attached no significance of substance to the addition of the word 'person', and in fact did not intend it as a limitation on Commission jurisdiction." 345 U.S. at 313.

FERC's conclusion that the Court "found a municipality to be a 'person' under the FPA," Rehearing Order, P 13; JA 112, gets the case backwards. The Court held that Congress' use of "person" in subsection 201(d) was of "no significance." Thus, even had the Court found the municipality to be a "person" as that term is peculiarly used in section 201(d), that finding has "no significance." The Court did not suggest that the municipality in that case was a "person" under section 3(4) and thus a "public utility" under section 201(e). To the contrary, it was undisputed by the parties and accepted by the Court for purposes of its decision that the municipality was *not* a "person" as defined in section 3(4) of the FPA, because that fact was the predicate for challenging the Commission's jurisdiction over the disputed sales to the municipality. Accordingly, the Supreme Court did not find, or even hint in dicta that—as FERC mistakenly concluded below—"a municipality can be a jurisdictional 'person.'" Rehearing Order, P 13; JA 112.

B. FERC's orders contradict established Commission and judicial precedent

Clarksville's brief shows that FERC and the courts have consistently held that municipalities are not persons and thus not jurisdictional public utilities under the FPA. *See* Pet. Br. 33-36. The Ninth Circuit's decision in *Bonneville Power Administration v. FERC* was premised on that established understanding of the "clear and unambiguous" language of the Act. 422 F.3d at 910; *see id.* at 914–17. So was this Court's recent decision upholding FERC's 2011 transmission-planning

and cost-allocation rules, which FERC applies directly to transmission-owning public utilities but extends to transmission-owning non-public utilities (like public power utilities) by a voluntary "reciprocity" condition. *See S. C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 92–97 (D.C. Cir. 2014) (upholding the reciprocity condition).

Until *Clarksville*, FERC's uniform position was that municipalities and other subdivisions of states are not natural-gas companies under the NGA and that the NGA bars FERC from treating them as such. *See, e.g., Tenn. Gas Pipeline Co.*, 69 FERC ¶ 61,239, *order on reh'g*, 70 FERC ¶ 61,329. It has interpreted its jurisdiction under the FPA in the same way. *See New West Energy Corp.*, 81 FERC ¶ 61,004, *reh'g denied*, 83 FERC ¶ 61,004; *S. Car. Pub. Serv. Auth.*, 75 FERC ¶ 61,209. Amici are not aware of any contrary holding by FERC. Here FERC acknowledged that the FPA and NGA are to be read *in pari materia*. Rehearing Order, P 13; JA 112. Yet FERC made no effort to reconcile its expansive new reading of the NGA with the prior FERC and judicial interpretation of the analogous, unambiguous provisions in the FPA.

CONCLUSION

WHEREFORE, APGA and APPA respectfully request that the Court vacate and remand the jurisdictional determinations of the Rehearing Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 1st day of November 2016 caused the foregoing document to be electronically served through the Court's CM/ECF system. All participants in the case are active registered CM/ECF users and will be served by the CM/ECF system.

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