

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

In the Matter of JEA

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Docket No. EL18-200-000

**COMMENTS OF THE AMERICAN PUBLIC GAS ASSOCIATION  
IN OPPOSITION TO PETITION FOR DECLARATORY ORDER**

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission) and the Commission's September 18, 2018 Notice of Petition for Declaratory Order,<sup>1</sup> the American Public Gas Association (APGA) submits its comments in opposition to the Petition for Declaratory Order filed by JEA on September 17, 2018 (JEA Petition). As discussed below, the jurisdictional declaration that JEA seeks would directly contravene recent judicial precedent preserving the municipal exemption. The petition must therefore be denied.

**I. INTRODUCTION**

APGA is the national, non-profit association of publicly owned natural gas distribution systems, with more 730 members in 36 states. 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.

As relevant to this proceeding, APGA has a strong interest in preserving the statutory exclusion of its members' rates and services from regulation by the Commission that Congress established in Section 2 of the Natural Gas Act (NGA).<sup>2</sup> Specifically, APGA has an interest in

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<sup>1</sup> 18 C.F.R. § 385.211.

<sup>2</sup> 15 U.S.C. § 717a.

preserving the ability of a “municipality” – defined in the NGA as a “city, county, or other political subdivision or agency of a State” – to provide gas services to the public and to establish and charge rates for their services pursuant to state and local law, free from the burdens that would be imposed by an overlay of Commission regulation never intended by Congress.<sup>3</sup>

APGA participated as an amicus curiae in *City of Clarksville, Tenn. v. FERC*, 888 F.3d 477 (D.C. Cir. 2018), the recent case affirming the applicability of the municipal exemption to a natural gas transaction between municipalities in two different states. In its petition, JEA attempts to dismiss the relevance of *Clarksville* in a manner that would, if accepted by the Commission, potentially threaten the municipal exemption for both gas and electric utilities and therefore guarantee another appeal. Accordingly, APGA submits these brief comments to clarify and correct the record with respect to this important issue.

## **II. COMMENTS**

JEA addresses the D.C. Circuit’s decision in *Clarksville* only in a footnote, asserting that the decision is “not relevant” to the Commission’s review and determination in this proceeding.<sup>4</sup> To the contrary, *Clarksville* is fully controlling and dispositive of the question presented by the JEA Petition.

JEA is asking the Commission to declare that a power purchase agreement between JEA and the Municipal Electric Authority of Georgia (MEAG) is subject to Commission jurisdiction, despite the fact that both the seller and purchaser under the agreement are governmental entities and are therefore exempt from Commission regulation as public utilities under the Federal Power Act (FPA).<sup>5</sup>

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<sup>3</sup> 15 U.S.C. § 717a(3).

<sup>4</sup> JEA Petition at 10 n.17.

<sup>5</sup> *Id.* at 2.

In support, JEA emphasizes that (1) the transaction involves a wholesale sale, (2) the buyer and seller are located in different states, (3) the output from the contract is destined for ultimate use in the buyer's state, and (4) no state commission is regulating the arrangement.<sup>6</sup> All four of these same factors were present in *Clarksville* – yet the court nonetheless rejected the Commission's attempt to assert jurisdiction. In fact, the arguments that JEA is making now are materially identical to those that the Commission made unsuccessfully before the court.

In essence, JEA asserts that even though MEAG is not a public utility under the FPA, the Commission must assert jurisdiction over the transaction in order to prevent a “regulatory gap.”<sup>7</sup> In *Clarksville* the Commission similarly claimed that the city should be treated as a natural gas company under the NGA in order to prevent a regulatory gap in contravention of Congress's purpose in enacting that statute.<sup>8</sup> The court, however, squarely rejected this line of reasoning, explaining that “even if there were a regulatory gap, it would not be of the sort Congress was worried about in enacting the NGA.”<sup>9</sup> The court went on to cite case law and legislative history demonstrating that the intent of the NGA was to prevent abusive and exploitive practices of private companies.<sup>10</sup> In other words, municipalities and other governmental entities were clearly not the concern of Congress. JEA has pointed to nothing to indicate that the intent of Congress in enacting the FPA was any different.<sup>11</sup>

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<sup>6</sup> *Id.* at 3, 11-13.

<sup>7</sup> *Id.* at 12-13.

<sup>8</sup> 888 F.3d at 484.

<sup>9</sup> *Id.* at 485.

<sup>10</sup> *Id.*

<sup>11</sup> The American Public Power Association, which joined with APGA as an amicus curiae in *Clarksville*, has filed a protest in this proceeding that demonstrates that, in enacting the FPA, Congress did not intend to regulate interstate sales by municipal utilities. *See* Joint Protest of the American Public Power Association, et al., Docket No. EL18-200-000, at 15-16 (Oct. 15, 2018).

JEA also argues that, in reviewing its jurisdiction under the FPA, the Commission looks to the nature of the underlying transaction, and not to the entities involved.<sup>12</sup> According to JEA, “[o]nce electricity or natural gas is placed in interstate commerce, the Commission has jurisdiction over that sale – regardless of the parties involved.”<sup>13</sup> Again, the court considered and rejected this argument in *Clarksville*:

Second, FERC asserts that even if it were to accept *Clarksville*’s argument that a municipality could not be a natural gas company, *Clarksville*’s interpretation of the NGA is excessively narrow because the NGA provides the Commission jurisdiction over three separate areas: (i) the transportation of natural gas in interstate commerce; (ii) the sale of natural gas in interstate commerce for resale; and (iii) natural gas companies engaged in such transportation or sale. Thus, because the transaction between *Clarksville* and Guthrie constitutes the transportation and sale for resale of natural gas in interstate commerce, *FERC contends that Clarksville’s identity as a municipality is essentially irrelevant where the gas is “dedicated to the interstate market.”*

While FERC is correct that Section 1(b) provides for jurisdiction over those three separate areas, the articulation of the scope of FERC’s jurisdiction does not mean that Congress gave FERC jurisdiction over everything within those three areas. Indeed, Section 1(b) *is not power-conferring or jurisdiction-creating* and should not be read to say that FERC has jurisdiction over anything and everything related to the transportation and sale for resale of natural gas in interstate commerce. . . . Accordingly, FERC’s alternative argument fails as well.<sup>14</sup>

Given that the NGA and FPA “are in all material respects substantially identical, and constructions of one are authoritative for the other,” JEA’s argument must be rejected.<sup>15</sup> The *Clarksville* court saw “no reason to deviate from the clear and unambiguous language of the statute,” and nor should the Commission.<sup>16</sup>

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<sup>12</sup> JEA Petition at 11.

<sup>13</sup> *Id.*

<sup>14</sup> 888 F.3d at 485-86 (emphasis added; internal citations omitted).

<sup>15</sup> *Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (internal citation and quotation omitted).

<sup>16</sup> 888 F.3d at 486.

### III. CONCLUSION

APGA respectfully requests that the Commission deny the JEA Petition as inconsistent with the statutory text and controlling judicial precedent.

Respectfully submitted,

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October 17, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 17th day of October, 2018.

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