

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of JEA

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Docket No. EL18-____-000

PETITION FOR DECLARATORY ORDER OF JEA
REGARDING THE JURISDICTIONAL NATURE
OF A POWER PURCHASE AGREEMENT
UNDER THE FEDERAL POWER ACT

JEA (f/k/a the Jacksonville Electric Authority) (“JEA”), pursuant to Rule 207(a)(2) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”),¹ hereby files this Petition for Declaratory Order (the “Petition”)² requesting the issuance of a declaratory order concerning the jurisdictional status under the Federal Power Act (“FPA”), 16 U.S.C. § 761 *et seq.*, of the “Amended And Restated Power Purchase Agreement” (“PPA”) entered into between JEA and the Municipal Electric Authority of Georgia (“MEAG Power” or “MEAG”) as of December 31, 2014.³ JEA respectfully requests that the Commission expedite its consideration of this Petition in light of the factual circumstances set forth herein.

As detailed below, the transactions contemplated under the PPA involve the sale at wholesale in interstate commerce by MEAG to JEA of electricity, capacity and ancillary services associated with incremental generation that is partially owned by MEAG and is under construction at the Plant Vogtle nuclear generation facility in Georgia. The electricity will be

¹ 18 C.F.R. § 385.207(a)(2) (2017).

² As required by the Commission’s regulations, JEA has attached an affidavit in support of this Petition as Exhibit A hereto, and has separately submitted payment of the required filing fee.

³ As detailed below, MEAG has not filed a copy of the PPA with the Commission for review and approval under the Federal Power Act (“FPA”), 16 U.S.C. § 824a *et seq.*, nor does MEAG have market-based rate authority under the FPA that would preclude the filing of the PPA. A copy of the PPA is attached to this Petition as Exhibit B.

transported in interstate commerce by JEA (a municipal electric company with a service territory located exclusively in the State of Florida) from Georgia into Florida. JEA will then resell that electricity to its customers in Florida.

In this Petition, JEA seeks a determination from the Commission⁴ on the following narrow legal issue:

Does the Commission have jurisdiction over the PPA (and the transactions therein) under Section 201(b)(1) of the FPA, even though MEAG and JEA are each exempt from regulation by the Commission as “public utilities” under Section 201(f) of the FPA?

Based on specific facts presented by the PPA and in this Petition, JEA believes that the answer to this question must be “yes.”

To be clear, at issue in this Petition is the authority of this Commission only to regulate the sale of electric energy at wholesale in interstate commerce pursuant to this specific PPA under Section 201(b)(1) of the FPA, 16 U.S.C. § 824(b), and not the status of JEA and MEAG as entities that are exempt from regulation as “public utilities” under Section 201(f) of the FPA, 16 U.S.C. § 824(f). JEA expressly acknowledges and agrees that the exemption in Section 201(f) applies to both it and MEAG, and does not seek any determination by the Commission on that exemption. But as Commission precedent and case law firmly establish, the existence of that exemption is not relevant to the jurisdictional nature of the PPA as a facility for the sale of energy at wholesale in interstate commerce.

For further clarity, this Petition is expressly tailored to the specific facts and circumstances associated with this specific PPA between MEAG and JEA. JEA is not seeking a blanket declaration of jurisdiction on any other PPA or wholesale transaction between other

⁴ See *Montana-Dakota Utils. Co.*, 81 FERC ¶ 61,298 at 62,407 (1997).

public entities or any other party. The PPA at issue is highly distinctive due to the nature of the parties to the PPA, including that:

- MEAG, an entity in Georgia, is selling electricity at wholesale to JEA, an entity in Florida;
- MEAG is purchasing its underlying energy from an affiliated owner of a portion of the generation unit in Georgia;
- MEAG is then selling that energy to JEA via a back-to-back PPA for ultimate use in Florida;
- MEAG has publicly and expressly stated that the Georgia Public Service Commission has no jurisdiction over MEAG or the PPA;
- The costs associated with the construction of two new nuclear generation units in Burke County, Georgia, known as Plant Vogtle Units 3 and 4 (the “Project”) have far surpassed the initial projections with the parties executed the PPA, including the recent modification of the underlying EPC agreement from a fixed rate structure to a cost-plus premium structure in which all increased costs are passed through from MEAG to JEA without any incentive to curtail costs; and
- The PPA has extremely unique terms and conditions which directly affects JEA’s operations within its footprint in Florida, the rates that JEA can utilize to serve its retail customers in Florida, and how JEA can recover its costs associated with this PPA from its end users.

I. COMMUNICATIONS

Pursuant to Rule 2010 of the Commission’s Rules of Practice and Procedure,⁵ the persons designated to receive service and to whom correspondence and communications should be addressed concerning this petition are as follows:

⁵ 18 C.F.R. § 385.2010 (2017).

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*JEA requests that each of the designated persons be placed on the official service list for this proceeding and, to the extent necessary, respectfully requests waiver of Section 385.203(b)(3)⁶ of the Commission's regulations in order to permit designation of such persons for service in this proceeding.

II. DESCRIPTION OF THE PARTIES AND THE AGREEMENTS

A. Description of the Parties

JEA is a body politic and corporate organized and existing under the laws of the State of Florida and an independent agency of the City of Jacksonville, Florida. JEA serves approximately 458,000 electric end use customers in its 900 square mile service territory in the Jacksonville, Florida area. JEA owns and operates an electric transmission and distribution system in Florida that includes five conventional and renewable generating plants (with 3,330 MW of installed capacity), more than 745 circuit miles of transmission lines, and more than 6,760 miles of distribution lines.

MEAG is a public corporation and an instrumentality of the State of Georgia created under the provisions of Georgia Law, Ga. L. 1975, p. 107 *et seq.*, codified at O.C.G.A. § 46-3-110 *et seq.* MEAG is the wholesale electric power supplier for the forty-nine (49) political

⁶ 18 C.F.R. § 385.203(b)(3) (2017).

subdivisions that are its Participants.⁷ MEAG meets the power supply needs of its Participants from its ownership interests in two nuclear and two coal-fired electric generating plants, as well as from a number of arrangements with other utilities, which allow for the purchase and sale of capacity and energy, and other sources. MEAG owns a 22.7 percent undivided ownership interest in the two nuclear generating units that constitute the Project.⁸ The Plant Vogtle Units 3 and 4 are currently under construction and are anticipated to be operational in 2021 and 2022, respectively. Under the PPA, MEAG has agreed to sell JEA the output associated with approximately 41.2 percent of MEAG's interest in the Project, or approximately 206 MWs of electricity, capacity and ancillary services based upon the nominal ratings of the two additional units.

B. PPA Background

MEAG and JEA entered into the current PPA as of December 31, 2014,⁹ pursuant to which MEAG agreed to sell “the capacity, energy and ancillary services actually generated by, attributable to, or resulting from ... and any Environmental Attributes and Production Tax Credit attributable to” MEAG's ownership share of the Project (collectively, the “Output”).¹⁰ More specifically, MEAG agreed to purchase the Output from an affiliated Special Purpose Entity

⁷ The 49 Participants of MEAG Power are the Cities of Acworth, Adel, Albany, Barnesville, Blakely, Brinson, Buford, Cairo, Calhoun, Camilla, Cartersville, College Park, Commerce, Covington, Doerun, Douglas, East Point, Elberton, Ellaville, Fairburn, Fitzgerald, Forsyth, Fort Valley, Grantville, Griffin, Hogansville, Jackson, LaFayette, LaGrange, Lawrenceville, Mansfield, Marietta, Monroe, Monticello, Moultrie, Newnan, Norcross, Oxford, Palmetto, Quitman, Sandersville, Sylvania, Sylvester, Thomaston, Thomasville, Washington, West Point, Whigham, Georgia, all municipal corporations organized and existing under the laws of the State of Georgia, and Crisp County, Georgia.

⁸ The Alvin W. Vogtle Electric Generating Plant (known as Plant Vogtle), is located near Waynesboro in eastern Georgia near the South Carolina border and is jointly owned by Georgia Power (45.7%), Oglethorpe Power Corporation (30%), MEAG (22.7%) and Dalton Utilities (1.6%).

⁹ The original power purchase agreement between MEAG and JEA was executed in 2008, and subsequently was amended via the PPA in 2014 to incorporate provisions in connection with the issuance of a loan guaranty by the U.S. Department of Energy for a portion of the financing for the Project.

¹⁰ Capitalized terms used herein in reference to the PPA have the meaning ascribed to them in the PPA.

(“MEAG Power SPVJ LLC”) via its own power purchase agreement, and then resell that Output to JEA via a back-to-back sale mechanism using the PPA.

The PPA clearly envisions that the underlying transaction constitutes interstate commerce. In this regard, the PPA specifies that the Delivery Point for the electricity sold is “at the point where said transmission forms part of the Georgia Integrated Transmission System,” and that JEA is obligated to “arrange, either directly or indirectly through a third party, for all transmission service and transmission auxiliary services and ... pay all costs pursuant to the transmission provider’s tariff and the transmission provider’s protocols including all costs associated with line losses, necessary to transmit the Output delivered under this Agreement from the Delivery Point to any point at which [JEA] redelivers the Output to its customer(s).” PPA, Section 604(b).¹¹ The PPA also imposes a number of conditions on JEA (an entity subject to rate regulation only by the State of Florida) that go to the core of its ability to serve its customers. For example, the PPA includes conditions that dictate the entities to whom JEA can sell electricity purchased from MEAG (PPA Sections 305 (Resale Covenant) and 306 (Tax Covenant)), and imposes obligations on JEA with respect to the operation of its electric system in Florida and the rates that it is required to charge its retail end use customers (PPA Section 307 (Rate Covenant)).¹²

¹¹ JEA has arranged for that transmission to occur using the interstate transmission system for ultimate delivery to JEA’s end use customers in Florida, when and if construction of the Project is completed and it begins to generate electricity.

¹² This latter condition is especially significant, not only because it directly intrudes on the regulatory authority of the State of Florida, but also because MEAG is not required by the PPA to deliver electric energy to JEA on or before a date certain, if ever. Notwithstanding this uncertainty, JEA continues to make monthly payments and otherwise honor its contractual obligations under the PPA.

C. Recent Developments

Since late 2017, JEA has engaged in discussions with MEAG concerning the Project, and has stated that it is in favor of discontinuing the Project given the extensive cost overruns that have occurred. For example, JEA (though its legal counsel) sent MEAG a letter on September 29, 2017, in which JEA stated that in light of the cost overruns and delays associated with the construction of the Project, that JEA “does not wish to proceed” with its construction or the PPA. *See Exhibit C.* In response to JEA’s expressions of concern, MEAG demanded that unless JEA promptly provided written assurances that it would fulfill its obligations under the PPA, MEAG was prepared to proceed immediately to enforce its rights under the Agreement and under applicable law.¹³

JEA again reached out to MEAG on August 17, 2018 regarding JEA’s conclusion that the continued construction and operation of the Project was no longer economically feasible. *See Exhibit E.* In that letter, JEA noted that the most recent report issued by the lead owner for Plant Vogtle identified an additional \$2.3 billion cost overrun, and that the guaranteed maximum price of the Project had increased from \$14.5 billion (with an in-service date of 2016) to \$27.5 billion (with an expected in service date of 2021 for Unit 3 and 2022 for Unit 4).

In response to that letter, the Interim CEO of JEA and the CEO of MEAG engaged in additional discussions over JEA’s concern, with the most recent discussion occurring on September 10, 2018. Notwithstanding those discussions, and without any prior notice or warning to JEA, on September 11, 2018, MEAG filed a complaint against JEA in the U.S. District Court for the Northern District of Georgia (the “MEAG Complaint”), in which MEAG

¹³ *See Exhibit D.*

requested the court to both approve and order JEA to perform its obligations under the PPA.¹⁴ In this regard, in Paragraph 67 of the Complaint, MEAG requested the Court, *inter alia*, to order

- (a) That JEA take all Output (as defined in the PPA) made available to it under the Agreement;
- (b) That JEA use all Output in compliance with the terms of the PPA;
- (c) That JEA make all payments to MEAG Power as and when required by the terms of the PPA;
- * * *
- (f) That JEA rescind its August 17, 2018 letter; and
- (g) That JEA, in all other ways, act in strict compliance with the terms of the Agreement and do nothing to threaten the continued financing of the project.

The MEAG Complaint contains a number of allegations which directly implicate, and reinforce the need for the Commission to confirm, the jurisdictional nature of the PPA under the FPA, and to require that the PPA be filed with the Commission for review and approval as is required under the FPA. Specifically, MEAG admitted that:

- It did not anticipate that it would need the Output until between 2034 and 2037 (*MEAG Complaint* at ¶ 9);
- The PPA is a “hell-or-high-water” contract that specifically provides that JEA has no right, under any circumstances, to abandon the PPA or be relieved of its contractual obligations (*Id.*);
- By structuring its ownership in the Project in the manner it did, and then entering into the PPA, MEAG “could take more of an ownership share of Units 3 and 4 than its Participants needed in the relative short term by shifting the cost and benefit of power” from those units to other purchasers, such as JEA (*Id.* at ¶ 11); and
- In August 2018, it was announced that the budget for the Project would need to be revised upward by over \$2 billion (*Id.* at ¶ 34).

¹⁴ A copy of MEAG’s Complaint (omitting Exhibit A thereto, which contains a copy of the PPA) is attached hereto as Exhibit F. In addition to the MEAG lawsuit, a second lawsuit is pending in Florida State Court, in which the City of Jacksonville, Florida and JEA filed a Complaint for Declaratory Judgment against MEAG on the same day. In that second lawsuit, the City of Jacksonville and JEA requested the court to rule that JEA lacked authority under Florida law to execute the PPA, and that the PPA was therefore *ultra vires*, void *ab initio*, and unenforceable. See Exhibit G. Unlike the MEAG Complaint, the City’s Complaint does not implicate the Commission’s jurisdiction under the FPA, as it involves issues associated with the authority of JEA to *enter into* and *purchase* electricity under the PPA.

Finally, MEAG requests the court to enter an order, *inter alia*, finding that the PPA is lawful and enforceable.

III. THE FPA GRANTS THE COMMISSION EXCLUSIVE JURISDICTION OVER THE PPA AND ALL INTERSTATE TRANSACTIONS THEREUNDER

A. The Commission has exclusive jurisdiction over any interstate transmission or interstate sales of electricity for resale, regardless of the entities involved

Section 201(b) of the FPA grants the Commission exclusive jurisdiction over several types of electricity transactions:¹⁵

- The transmission of electric energy in interstate commerce;
- The sale of electric energy at wholesale in interstate commerce; and,
- All facilities for such transmission or sale of electric energy.

See 16 U.S.C. § 824(b)(1).¹⁶ As a result of this exclusive jurisdiction, the states do not have authority to regulate interstate transmission or sales of electricity at wholesale in interstate commerce. *See United States v. Public Utilities Comm’n*, 345 U.S. 295, 307, 311, 314 (1953) (“*US v. PUC*”); *Ark. Power & Light Co. v. FPC*, 368 F.2d 376, 384 (8th Cir. 1966) (“*Arkansas P&L*”) (“Federal regulation of sales for resale under Section 201 of the Federal Power Act thus precludes concurrent state jurisdiction.”).

¹⁵ The Commission has reiterated this concept innumerable times. *See, e.g., Pa. Power & Light Co.*, 23 FERC ¶ 61,006 at 61,018, reh’g denied, 23 FERC ¶ 61,325 (1983); *S. Co. Servs., Inc.*, 37 FERC ¶ 61,256 at 61,652 (1986); *Fla. Power & Light Co.*, 40 FERC ¶ 61,045 at 61,120-21, reh’g denied, 41 FERC ¶ 61,153 at 61,382 (1987); *Houlton Water Co. v. Me. Pub. Serv. Co.*, 60 FERC ¶ 61,141 at 61,515 (1992); *N. Ind. Pub. Serv. Co.*, 66 FERC 61,213 at 61,488 (1994); *Conn. Light & Power Co.*, 70 FERC ¶ 61,012 at 61,030, reconsid. denied, 71 FERC ¶ 61,035 (1995); *Cent. Vt. Public Serv. Corp.*, 84 FERC ¶ 61,194 at 61,973-75 (1998); *Progress Energy, Inc.*, 97 FERC ¶ 61,141 at 61,628 (2001); *Armstrong Energy Ltd. P’ship, LLLP*, 99 FERC ¶ 61,024 at 61,104 (2002); *Niagara Mohawk Power Corp.*, 100 FERC 61,019 at P 17 (2002); *Barton Village, Inc. v. Citizens Utilities Co.*, 100 FERC ¶ 61,244 at P 12 (2002); *Va. Electric & Power Co.*, 103 FERC ¶ 61,109 at P 6 (2003); *S. Cal. Edison Co.*, 106 FERC ¶ 61,183 at P 14, 19 (2004); *Midwest Indep. Transmission Sys. Operator, Inc.*, 106 FERC ¶ 61,337 at P 14 & n.17 (2004); *Entergy Servs., Inc.*, 120 FERC ¶ 61,020 at P 28 (2007); *Aquila Merchant Servs., Inc.*, 125 FERC ¶ 61,175 at P 17 (2008).

¹⁶ *See also New York v. FERC*, 535 U.S. 1, 6, 122 S. Ct. 1012, 152 L.Ed.2d 47 (2002) (confirming that FERC has jurisdiction over all transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce); citing *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758, 93 S. Ct. 1870, 36 L.Ed.2d 635 (1973).

The United States Supreme Court has reiterated this regulatory construct and, as recently as 2016, confirmed the Commission’s broad authority under the FPA to regulate matters that directly affect the sale of wholesale electric power in interstate commerce as “obligat[ing] FERC to oversee all prices for those interstate transactions and all rules and practices affecting such prices.” *FERC v. Electric Power Supply Ass’n*, 136 S.Ct. 760, 767 (2016) (“*Elec. Power Supply Ass’n*”) (emphasis added). Included within the “interstate transactions” that the Commission is obligated to oversee are the interstate transactions contemplated by the PPA.

Section 201(c) of the FPA establishes that “electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof” 16 U.S.C. § 824(c). Section 201(d) of the FPA makes clear that the term “sale of electricity at wholesale” means “a sale of electric energy to any person for resale.” 16 U.S.C. § 824(d). In other words, the FPA extends the Commission’s jurisdiction over not only interstate transmission of electricity, but also the sale of such electricity “to any person for resale.” Because JEA is a “person” under the FPA, and resells the electric energy and related products purchased from MEAG under the PPA to its end use customers in Florida (*i.e.*, in interstate commerce), the underlying sale of electric energy by MEAG to JEA pursuant to the PPA is subject to this Commission’s jurisdiction under Section 201(b) of the FPA. *See US v. PUC*, 345 U.S. at 316 (holding that a municipality was a “person” for purposes of the FPA, and that the Commission therefore had jurisdiction over an electric company’s sales of electricity to a municipal county for resale).¹⁷

¹⁷ JEA is aware of the recent decision issued by the U.S. Court of Appeals for the DC Circuit (“CADC”) in *City of Clarksville, Tennessee v. FERC*, No. 16-1244 (Apr. 24, 2018), which declined to apply the Supreme Court’s analysis of this issue under the FPA in *U.S. v. PUC* on the grounds that the facts presented in *US v. PUC* were “inapposite” to those pending before the CADC in *Clarksville* under the Natural Gas Act. As a result, JEA submits that the CADC’s decision in *Clarksville* is not relevant to the Commission’s review of and determination on the questions presented in this Petition.

B. In reviewing its jurisdiction under FPA § 201(b), the Commission looks to the nature of the underlying transaction, and not the entities involved

The Commission has exclusive jurisdiction over all transactions involving the sale of electric energy at wholesale in interstate commerce, including such transactions under the PPA. It is unquestionable that, if these transactions were being made by a public utility, they would be subject to Commission jurisdiction under Section 201(b) of the FPA. As a result, any argument that could be raised against Commission jurisdiction over the PPA based on the claim that MEAG is an entity of the State of Georgia and, as such, is exempt from the application of the FPA pursuant to Section 201(f) is simply not relevant. Instead, the Commission has found on numerous occasions that public entities are in fact subject to the FPA to the extent they avail themselves of interstate transactions.

With regard to state regulated activities, public entities like MEAG are generally exempt from regulation under the FPA as a “public utility,” but only as to those activities that are subject to state regulation or matters that are wholly intrastate. *See* FPA § 201(f). Neither is true in the case of MEAG’s PPA with JEA or the interstate services that are contemplated thereunder. *Arkansas P&L*, 368 F.2d at 383 (the municipal exemption applies to the party’s status as a public utility under the FPA and “not to the Commission’s jurisdiction over sales in interstate commerce for resale”).

Here, under the PPA, MEAG has agreed to sell electricity generated in Georgia to JEA for transmission to and resale in Florida to JEA’s customers. The PPA expresses the clear intent of the parties that the transaction involves “the sale of electric energy at wholesale in interstate commerce.” Once electricity or natural gas is placed in interstate commerce, the Commission has jurisdiction over that sale – regardless of the parties involved. *See US v. PUC*, 345 U.S. at 313-14; *Arkansas P&L*, 368 F.2d at 383.

C. Long-held precedent requires the Commission to assert jurisdiction over all interstate transmission and interstate sales of electricity for resale in order to avoid a regulatory gap in oversight

The PPA is a “facility” that expressly allows MEAG (an entity created under the laws of Georgia) to impose and enforce conditions on the operation of JEA’s Electric System in Florida. The existence and enforcement of those conditions is not subject to the jurisdiction of either Georgia or Florida. As a result, if the Commission fails to assert jurisdiction over the PPA, the sale of electric energy at wholesale in interstate commerce that the PPA contemplates will avoid all regulatory oversight.

One of the primary purposes of the FPA is to eliminate this regulatory gap in jurisdiction (which is otherwise known as the *Attleboro* gap, after the controlling case).¹⁸ See *US v. PUC*, 345 U.S. at 307 (The FPA “was intended to ‘fill the gap’ – the phrase is repeated many times in the hearings, congressional debates and contemporary literature – left by *Attleboro* in utility regulation. Congress interpreted that case as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission [now FERC] with precisely that power.”); see also *Elec. Power Supply Ass’n*, 136 S. Ct. at 780 (The FPA “prevents the creation of any regulatory no man’s land,” as “some entity must have jurisdiction.”).

The Georgia Public Service Commission has been investigating the issue of cost recovery related to the Plant Vogtle construction for some time. In October 2017, MEAG filed an Application to Intervene in the Georgia Commission’s cost investigation proceeding related to

¹⁸ In 1927 in *Public Util. Comm’n of R. I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927), the Supreme Court held that the Commerce Clause prevents state and local regulators from regulating certain interstate electricity transactions, including wholesale sales (i.e., sales for resale) across state lines. *Id.* at 89-90. This inability of the state commissions to regulate the wholesale sales of power between multi-state utilities or with utility affiliates formed a regulatory gap in coverage, an underlying cause of the adoption of the FPA several years later.

the construction of Plant Vogtle, and made quite clear in its Application that MEAG was *not* subject to the Georgia Commission's jurisdiction. In its petition, MEAG argued that:

While MEAG Power is exempt from Commission regulation under O.C.G.A. § 46-3-152, and the Participants [i.e., MEAG's members] are regulated at the local level and exempt from rate regulation by the [Georgia] Commission by way of the Constitution of the State of Georgia, Article III, Section VI, Para. 5(d) and O.C.G.A. § 46-3-12, the outcome of this proceeding could affect MEAG Power and its Participants as to the completion of the Vogtle Units 3 & 4 Project.¹⁹

Because MEAG maintains that its activities and rates are exempt from regulation by the Georgia Commission, it necessarily follows that MEAG's sales of Output from the Project (whether under the PPA to JEA or otherwise) similarly are exempt from regulation by the Georgia Commission. And there can be no dispute that the State of Florida lacks authority to regulate the activities of MEAG, including those taken by MEAG in connection with the PPA. As a result, if this Commission does not assert its exclusive jurisdiction over MEAG's interstate sale of electricity at wholesale to JEA under the PPA, and its exclusive jurisdiction under FPA Sections 205 and 206 to review the terms and conditions associated with that interstate sale by MEAG, then there is no entity that would have the ability to oversee or otherwise regulate those sales. This is the very "regulatory gap" that the FPA was designed to address after *Attleboro*.

D. Commission oversight of the PPA is necessary and appropriate

The need for the Commission to assert jurisdiction over the PPA becomes even more apparent when the specific provisions of the PPA are reviewed. For example, the PPA allows MEAG to impose and enforce conditions on:

- the rates charged by JEA to its customers (PPA Section 307);

¹⁹ See, Application to Intervene of the Municipal Electric Authority of Georgia, *In Re: Verification of Expenditures Pursuant To Georgia Power Company's Certificate of Public Convenience and Necessity for Plant Vogtle Units 3 and 4, Seventeenth Semi-annual Construction Monitoring Report; Proposed Forecast Cost and Schedule Revisions; and Determination of Continuation or Cancellation of the Project*, Georgia PSC Docket No. 29849 (emphasis added), found at <http://www.psc.state.ga.us/factsv2/Document.aspx?documentNumber=169880>.

- the operation of JEA’s electric system and its use of operating reserves in connection with that system (PPA Section 307);
- the entities to whom JEA can sell the Output purchased by it under the PPA (PPA Sections 305 and 306); and,
- the manner in which JEA is obligated to recover its costs under the PPA from its customers (PPA Section 202(h)).

At the same time, JEA has no right under the PPA to dispatch or otherwise schedule the operation of the Project or the delivery of its Output (PPA Section 202). Indeed, MEAG is under no obligation thereunder to ensure that the Project achieves commercial operation and in fact delivers Output to JEA, let alone on time or within an agreed upon budget. Instead, JEA is required by the terms of the PPA to pay its share of the Project’s cost of construction – regardless of whether the Project is completed or is operating or operable (PPA Section 205(g)). In the end, the question under the terms of the agreement is not if JEA must pay under the PPA – there is no question it must – but instead is merely how much and when (*see, e.g.*, PPA Section 211(b), establishing JEA’s payment obligations in the event construction of the Project is terminated or cancelled prior to commercial operation).

With no oversight and answering to no electorate or regulator, it has become clear that MEAG has no incentive to impose any cost discipline on its contractors, or any disincentive from exercising prudent management and control of the Project rather than simply continuing to pass the limitless cost-overruns onto JEA.²⁰ Indeed, when the Georgia Commission attempted to exert oversight over these cost overruns, MEAG politely but firmly informed the Georgia Commission that it lacked jurisdiction over MEAG and its transactions. When JEA attempted to

²⁰ In this regard, although the construction of the Project originally was being undertaken on a fixed-price basis, it is now being done on a cost-plus basis by a new EPC contractor due to the 2017 filing of bankruptcy of the initial EPC contractor. MEAG is now passing through those increased cost-plus assessments to JEA, who has no say in the matter or, unless this Commission asserts jurisdiction, any ability to have any regulatory oversight on the costs.

engage MEAG in discussions concerning the same issues, MEAG stated that unless JEA promptly provided written assurances that it would fulfill its obligations under the PPA, MEAG was prepared to proceed immediately to enforce its rights under the Agreement and under applicable law. And when JEA again requested MEAG to vote in favor of canceling the Project, MEAG's response was to file the MEAG Complaint with no prior notice to JEA.

MEAG's actions clearly illustrate the existence of a significant regulatory gap – a gap that carries with it a very real risk of serious economic harm to both JEA and its customers. Unless the Commission acts to assert jurisdiction and fill this gap, there is no agency that will be able to oversee MEAG's activities with respect to the Project and the PPA, and ensure that the rates, terms and conditions contained within the PPA (along with their implementation by MEAG) are “just and reasonable” and are not “unduly discriminatory or preferential.”

IV. REQUESTED FINDINGS OF LAW UNDER THIS PETITION AND REQUEST FOR EXPEDITED TREATMENT

The Commission's rules of procedure contemplate the ability of a party to petition for an order making findings of law on matters within the scope of this Commission. *See* 18 CFR § 385.207. As outlined above, both MEAG and JEA intended the PPA to encompass sales of electric energy at wholesale in interstate commerce. Both the PPA and its underlying transactions clearly fall within the Commission's exclusive purview under the FPA, and the fact that MEAG is a public entity does not alter that conclusion (let alone grant MEAG the right to make such interstate transactions without any regulatory oversight).

In light of the foregoing, JEA respectfully requests the Commission issue an order:

1. declaring that the PPA and the underlying sale of electric energy and related products by MEAG to JEA are wholesale transactions in interstate commerce, and are thus subject to the Commission's exclusive jurisdiction under FPA Section 201(b);

2. Declaring the PPA between MEAG and JEA is a “facility” for such wholesale transactions in interstate commerce, and are thus subject to the Commission’s exclusive jurisdiction under FPA Section 201(b); and
3. Finding that, as a facility for such wholesale transactions in interstate commerce, MEAG is obligated as the Seller to present the PPA to the Commission for review and approval under the FPA.

The Commission should be able to settle the jurisdiction issue swiftly. There are no relevant facts in dispute, the statutory provisions are clear, and the precedent supporting inclusion of the PPA and any interstate transactions contemplated thereunder as wholesale transactions in interstate commerce, and thus subject to the Commission’s exclusive jurisdiction under FPA Section 201(b), is clear and compelling. Until the Commission resolves this threshold jurisdictional issue, over which it has exclusive jurisdiction, MEAG likely will not file the PPA with the Commission for approval under Section 205 of the PPA, and the U.S. District Court hearing the MEAG Complaint will be unable to determine if the PPA constitutes a lawful contract that is subject to potential enforcement.

Respectfully submitted,

JEA



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September 17, 2018

EXHIBIT A

AFFIDAVIT IN SUPPORT OF PETITION FOR DECLARATORY ORDER

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of JEA

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)
)

Docket No. EL18-____-000

AFFIDAVIT OF AARON ZAHN
IN SUPPORT OF PETITION FOR A DECLARATORY ORDER

I, Aaron Zahn, being duly sworn, depose and say:

1. My name is Aaron Zahn and my business address is 21 West Church Street, Jacksonville, Florida 32202-3139. I am the Interim Managing Director and Chief Executive Officer for JEA, which is a body politic and corporate and an independent agency of the City of Jacksonville, Florida (“JEA”). I have served in this role since April 2018. I am responsible for managing all aspects of JEA’s operations.

2. I am the authorized representative of JEA and am providing this affidavit in support of the Petition for Declaratory Order of JEA (the “Petition”).

3. I have read the Petition and am familiar with the contents therein.

4. I caused the Petition to be prepared; and that the statements appearing therein are true and correct to the best of my knowledge, information, and belief.

5. This concludes my affidavit.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and accurate.

September 14, 2018

Aaron Zahn, Interim Managing Director and Chief
Executive Officer

EXHIBIT B
THE PPA

EXHIBIT C

**LETTER FROM JEA TO MEAG
(September 29, 2017)**

EXHIBIT D

**LETTER FROM MEAG TO JEA
(February 23, 2018)**

EXHIBIT E
LETTER FROM JEA TO MEAG
(August 17, 2018)

EXHIBIT F
THE MEAG COMPLAINT

EXHIBIT G

THE CITY OF JACKSONVILLE COMPLAINT