111 FERC ¶ 61,120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Niagara Mohawk Power Corporation

v. Docket No. EL03-27-003

Huntley Power LLC, NRG Huntley Operations, Inc.,
Dunkirk Power LLC, NRG Dunkirk Operations, Inc.,
Oswego Harbor Power LLC, and NRG Oswego
Operations, Inc.

ORDER DENYING REHEARING

(Issued April 22, 2005)

1. In this order, we deny rehearing of an order denying the complaint filed by Niagara Mohawk Power Corporation (Niagara Mohawk) against several subsidiaries of NRG Energy, Inc. (NRG)[1] concerning alleged nonpayment for station power service.[2] This action benefits customers by ensuring that they pay for only those services that are actually provided.

[1] *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 FERC ¶ 61,169 (2004) (November 19 Order).

[2] The Commission defines station power as the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site, and for operating the electric equipment that is on the generating facility's site. *See PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251 at 61,889 (2001) (*PJM II*), *clarified and reh'g denied*, 95 FERC ¶ 61,333 (2001) (*PJM III*).

Background

2. On November 26, 2002, Niagara Mohawk filed a complaint against six subsidiaries of NRG,[3] claiming that the Generators had taken bundled retail station power service from Niagara Mohawk since July 1999, when NRG purchased three generating stations from Niagara Mohawk, but had refused to pay for the service. Niagara Mohawk sought from the Commission certain findings so that a pending state court proceeding to enforce payment could move forward. The Generators countered that the generating stations had self-supplied most of their station power needs, and that there had been no sale of energy by Niagara Mohawk to the Generators.

3. Each of the generating facilities is owned by a separate NRG subsidiary and consists of several coal or gas-fired units, and each facility is interconnected with Niagara Mohawk's transmission facilities at multiple points. A significant portion of each generating facility's electricity needs can be supplied directly from transformers tied directly to the generator output bus of the operating generator units. Niagara Mohawk does not charge for, or meter, this electricity use, termed "Normal House Service."

4. At each generating facility, some of the electricity-consuming equipment either can be or is connected to Niagara Mohawk transmission facilities that are separately metered to measure flows into the station. Also, some of the electricity-consuming equipment can only be supplied by using Niagara Mohawk-owned transmission facilities through separately metered interconnection points. Both of these types of electricity are referred to as "Reserve House Service."

5. The Commission issued an order setting the complaint for evidentiary hearing.[4] Subsequently, the parties filed a joint statement of issues and a joint motion to waive an Initial Decision in the case, pursuant to Rule 710 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.710 (2004). The parties stated that the issues in the case

[3] The six subsidiaries are Huntley Power LLC; NRG Huntley Operations, Inc.; Dunkirk Power LLC; NRG Dunkirk Operations, Inc.; Oswego Harbor Power LLC; and NRG Oswego Operations, Inc. (collectively, Generators).

[4] *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 102 FERC ¶ 61,295, *reh'g denied*, 105 FERC ¶ 61,321 (2003), *reh'g denied*, 105 FERC ¶ 61,123 (2003).

could be presented to the Commission by means of a paper hearing. They proposed to file a joint stipulation of facts, followed by initial and reply briefs submitted directly to the Commission. The Commission granted the request to waive the Initial Decision.[5]

November 19 Order

6. In the November 19 Order, the Commission addressed four issues identified in the parties' Joint Statement of Issues.[6] First, the parties asked whether Niagara Mohawk may charge retail energy rates under its state tariff for station power service. The Commission stated that, to the extent that each of the Generators generated more electricity than it consumed in station power, it may net its gross output against its station power requirements. Only when an NRG Generator consumes more station power than it generates in output, as measured over the appropriate netting period, may a supplier collect retail energy rates. We reiterated that netting over a reasonable period of time does not involve retail sales of electricity.[7]

7. The Commission found that, since the Generators were self-supplying during the periods at issue in the complaint, there were no sales of energy, and Niagara Mohawk was not entitled to charge or collect a retail energy rate for station power. The Commission also found that the record in this proceeding demonstrated that all power delivered was transmitted over transmission facilities.[8] As no delivery occurred over any Niagara Mohawk local distribution facilities, we found there could be no charges for the use of Niagara Mohawk's local distribution facilities, and Niagara Mohawk had no basis for requiring NRG to buy or pay for the delivery of station power when NRG self-supplies. We further explained that, for the State of New York to have jurisdiction, there must be a state-jurisdictional service provided, and in this case there was no such service.[9]

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[5] *See Niagara Mohawk Power Corp. v. Huntley Power LLC*, 104 FERC ¶ 61,229 (2003).

[6] November 19 Order, 109 FERC ¶ 61,169 at P 36.

[7] *Id.* at P 37-41.

[8] *See id.* at P 42 & n.46.

[9] *Id.* at P 41-44.

8. Significantly, the Commission held that these findings applied to all time periods in question, both prior to and after April 1, 2003, when the New York Independent System Operator's (NYISO) station power provisions went into effect. After section 4.24 of NYISO's Services Tariff became effective, the Commission-jurisdictional tariff was controlling. Before that date, as the Generators had maintained a positive net output at all relevant times, they had taken no station power from Niagara Mohawk.[10]

9. Second, the Commission answered to what extent those holdings would change if NRG had, or had not, contractually agreed to purchase station power service from Niagara Mohawk. Because Generators had taken no station power from Niagara Mohawk during the periods at issue, we made no findings about the intent of the parties.[11]

10. Addressing the parties' third stated issue, we discussed the appropriate netting period. For the times both prior to and after April 1, 2003, when NYISO's station power provisions went into effect, we explained why monthly netting periods applied.[12]

11. Finally, we focused on delivery of station power to auxiliary facilities at each of the generating stations that are geographically separate and outside of the stations' perimeters. We found that these facilities' station power requirements may be netted against each station's gross output. We reiterated an earlier holding that "'all energy received by a generator, no matter at what voltage or meter, is netted against all energy produced by a facility in a given month,'"[13] and noted that the delivery of power to these auxiliary locations do not use Niagara Mohawk's local distribution system; thus, Niagara Mohawk may not charge local distribution rates for that delivery.[14]

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[10] *Id*. at P 45.

[11] *Id*. at P 46.

[12] *Id*. at P 47-48.

[13] *Id*. at P 52, *citing KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 at P 25 (2002) (*Keyspan III*), *reh'g denied*, 107 FERC ¶ 61,142 (*Keyspan IV*), *clarified*, 108 FERC ¶ 61,164 (2004) (*KeySpan V*).

[14] *Id*. at P 49-53.

Requests for Rehearing

12. Niagara Mohawk and Northeast Utilities Service Company (NUSCO) filed requests for rehearing of the November 19 Order. Niagara Mohawk challenges the Commission's jurisdiction to make many of the rulings in the order; asserts that the Commission's findings reversed its prior determinations in other proceedings without adequate explanation; and objects to other specific holdings, as discussed below. NUSCO adopts the arguments and specifications of error set forth in Niagara Mohawk's request for rehearing. For convenience, we will refer only to Niagara Mohawk's request for rehearing.

Discussion

13. For the reasons given below, we deny the requests for rehearing.

Interplay of Federal and State Jurisdiction

14. On rehearing, Niagara Mohawk acknowledges that the Commission has jurisdiction to regulate wholesale sales and unbundled transmission service, and argues that states have jurisdiction over both sales and local delivery service to end-use customers, regardless of the classification of the facilities used to provide those services. Thus, according to Niagara Mohawk, any sale of and/or delivery of station power to NRG is subject to the jurisdiction of the New York Public Service Commission (New York Commission). Niagara Mohawk claims that the November 19 Order allows end-users such as the Generators to bypass state jurisdiction by virtue of their units being interconnected to facilities classified as transmission facilities, and thus infringes on New York's jurisdiction over the rates and terms of local delivery service.

15. Niagara Mohawk points out that the New York Commission determined that generators receiving station power must pay their allocated share of the delivering utility's retail stranded costs. It states that permitting customers such as NRG to elude paying charges for delivery service under the retail tariff will cause a significant increase in the rates for customers who cannot take service under the federal tariff and financial instability for utilities that can no longer collect stranded cost charges from customers such as NRG.

16. According to Niagara Mohawk, in the New York Commission proceeding, it was determined that such generators should not avoid paying for stranded costs even though they were not customers of the utility when such costs were incurred. Thus, Niagara Mohawk asserts that under New York law and regulations, NRG is a retail delivery customer, even if it is not purchasing energy from Niagara Mohawk, and argues that the

Commission's findings in the November 19 Order applying exclusive federal jurisdiction displace state authority. Niagara Mohawk cites *New York v. FERC* for the principle that "courts apply a presumption against preemption" when displacement of actual, existing state regulation would result, and the "the historic police powers of the State were not tobe superceded . . . unless that was the clear and manifest purpose of Congress."[15] Finally, Niagara Mohawk contends that Congress intended in section 201 of the Federal Power Act to withhold from the Commission the authority to override state jurisdiction over local distribution of electricity or local rates.

17. Niagara Mohawk also argues that the Commission may not approve tariff provisions, *i.e*., the station power provisions of NYISO's Services Tariff, that prevent states from asserting their jurisdictional charges in these circumstances. Citing *Detroit Edison Co. v. FERC*,[16] Niagara Mohawk claims that the Commission disregarded the limitation on end-use customers obtaining delivery service under Commission-approved tariffs, and asserts that the Commission failed to distinguish *Detroit Edison v. FERC* or to explain why its holdings do not violate that controlling precedent.

18. Finally, Niagara Mohawk contends that the Commission's concern that charging merchant generators for station power service would be discriminatory since Niagara Mohawk did not charge itself for those services when it owned the plants does not justify an expansion of Commission jurisdiction over the local delivery of energy. Niagara Mohawk asserts that it and other formerly vertically integrated utilities have divested most of their generating assets; accordingly, they have no opportunity to treat their own assets more favorably than those of merchant generators. It also comments that differences have arisen due to market restructuring that affect the comparability of the treatment of station power service before and after divestiture, asserting that there is nothing discriminatory about utilities adapting their business practices to the new market rules and new commercial environment. It concludes that a change in Commission rules over time does not produce discrimination, and in fact believes that the November 19 Order results in unfair discrimination between generators and other industrial customers.

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[15] Niagara Mohawk rehearing at 9, citing *New York v. FERC*, 535 U.S. 1, 18 (2002).

[16] 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison v. FERC*).

Commission Determination

19. We note initially that Niagara Mohawk's position that self-supply of station power is a sale for end use has previously been litigated and rejected. Raising the issue again on rehearing of the November 19 Order is a collateral attack on findings that the Commission made in earlier station power cases, and is a collateral attack being made by the same party that was active in those earlier proceedings. The same is true for the allegation that station power rules encroach on state jurisdiction over retail sales and local distribution. Specifically, both *PJM II* and *PJM III* involved, in addition to PJM's proposal to add station power rules to its tariff, petitions for declaratory order involving the station power practices of Niagara Mohawk and others in New York State, including the instant dispute between Niagara Mohawk and the Generators.[17] Niagara Mohawk and other individual transmission owners were active parties in *PJM II* and *PJM III*, while the transmission owners, including Niagara Mohawk, were active parties in *PJM IV*.[18] As discussed in *KeySpan IV*,[19] collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.[20] Nevertheless, we reiterate here that, although an off-line generator may *consume* energy as station power load, it is a separate question whether that consumed energy has been *sold at retail*. The self-supply of station power is distinguishable from a retail purchase of station power, and not all end use necessarily involves a sale for end use.

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[17] The Commission commented that, to the extent that Niagara Mohawk was charging NRG for the provision of station power under a retail rate when NRG was, in fact, self-supplying its station power requirements, that practice was not consistent with the findings in the order. The Commission concluded that that was a factual determination that could not be made on the pleadings in the record. *PJM II*, 94 FERC ¶ 61,251 at 61,893-94.

[18] *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*) (accepting in part proposed modifications to rules governing the provision of station power in PJM).

[19] 107 FERC ¶ 61,142 at P 20-22.

[20] *See, e.g., University of Tennessee v. Elliot*, 478 U.S. 788, 797-99 (1986); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966); *Nasem v. Brown*, 585 F.2d 801, 806 (D.C. Cir. 1979).

20. Furthermore, the Commission has explained previously that, when there is a conflict between station power provisions in Commission-jurisdictional and state-jurisdictional tariffs, the former must control.[21] That does not mean the Commission is approving or disapproving any rate, term, or condition of a retail tariff. Rather, we are only, and as narrowly as possible, harmonizing tariff provisions.

21. Niagara Mohawk's retail tariff (SC-7) impairs the ability of merchant generators to utilize the netting provisions of NYISO's Services Tariff, because SC-7 prevents them from self-supplying station power and forces them to pay for fictitious energy purchases when they are, in fact, self-supplying. The netting provisions of the NYISO Services Tariff calculate the transmission load for station power by calculating the net output of a wholesale generator's sales for resale that are injected into a transmission grid. Any provision in a state-regulated tariff that would contradict or impair such calculations, which is the effect of SC-7's calculation of energy purchases (since it calculates an amount different from the amount calculated under NYISO's Services Tariff), creates a conflict that must be resolved by the enforcement of the federally-regulated tariff. The necessity of this is demonstrated in *KeySpan IV*, wherein we explained how the New York Power Authority (NYPA) was subject to a state-regulated retail tariff with a contract demand ratchet that was triggered when a generator experienced a single hour of negative net output. Under that retail tariff, the ratchet, once triggered, made that amount of demand the contract (billing) demand for the next 18 months; thus, the operation of that retail tariff effectively prevented NYPA from using NYISO's Services Tariff for station power procurement and delivery for those 18 months.[22] We concluded that resolving the conflict in favor of the federally-regulated tariff ensured that NYPA would be able to use NYISO's Services Tariff's netting provision, so that its ratepayers could receive the benefits of the lower costs of self-supplied station power, or station power acquired from third parties.

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[21] *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 at P 45 (2004) (*MISO*).

[22] *See KeySpan IV*, 107 FERC ¶ 61,142 at P 43.

22. What the Commission has done in the November 19 Order is not to intrude into state jurisdiction over retail rates or local distribution services, but only to determine based on applicable law and fact what type of service (wholesale or retail) is actually being provided and to act accordingly.[23] As we illustrated in *KeySpan IV*, conflicts may arise. When they do, the Commission seeks to resolve such conflicts in the most narrowly tailored and careful manner. We have done so here. As we have emphasized from the first of the station power cases, our only jurisdiction is over the transmission of station power. The netting provisions at issue herein are designed to determine when, in fact, such transmission has taken place. That determination derives from the decades-old practice of treating station power as negative generation, which we discussed at length in *PJM II* and *PJM III*.[24] The netting provisions determine the net output of a wholesale merchant generator and whether it has self-supplied station power or has taken station power from another, and if so, what the transmission load is. Such determinations are solely within the jurisdiction of this Commission. To the degree that such calculations

[23] *Cf. Entergy Services, Inc. v. FERC*, 400 F.3d 5 (D.C. Cir. 2005) (finding that the Commission did not act beyond the scope of its authority by ordering a utility to refund rates ostensibly collected pursuant to state-approved retail tariffs because the rates at issue, in fact, involved what the utility should have considered, and billed as, a wholesale service).

[24] As we noted in *PJM II*, 94 FERC ¶ 61,251 at 61,886 and 61,892, integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased generating facilities from those integrated utilities in order to enter the market as competing suppliers had a reasonable expectation that, as the new owners of the same, but now divested, generating facilities, they likewise would not be charged for station power.

conflict with, and are undermined by, a state-regulated tariff, the federally-regulated tariff must control.[25] This is not an impermissible encroachment on the New York Commission's authority over retail rates.

23. The principle of note in *New York v. FERC* is that the text of the Federal Power Act supports our jurisdiction "to regulate the unbundled transmissions of electricity retailers."[26] Our station power precedent is consistent with section 201 of the Federal Power Act; states had never previously regulated unbundled interstate transmission of electric energy, and thus we have not displaced existing state jurisdiction.

24. We also have not interfered with or prevented stranded cost recovery, or even significantly impaired such recovery. Utilities may, for example, still recover stranded costs and benefits: consistent with Order No. 888 and our regulations adopted in that order from their retail-turned-wholesale customers;[27] and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities, as we discuss further below.

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[25] *See MISO*, 106 FERC ¶ 61,073 at P 45 (holding that, in the event of a conflict between federal and state tariff provisions, the federally-regulated tariff provision must control); *KeySpan IV*, 107 FERC ¶ 61,142 at P 42-43 (noting that, where the operation of a retail tariff effectively prevented a customer from utilizing NYISO's netting provision, the conflict must be resolved in favor of the wholesale tariff); *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094 at 61,360 (1992) (explaining that the Natural Gas Act preempts state and local law to the extent the enforcement of such laws conflict with the Commission's exercise of its jurisdiction). The Commission has the authority to assess whether facilities are transmission or local distribution facilities, and thus whether they are subject to our jurisdiction. *See Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,033 at P 30 & n.31 (2005) (*Nine Mile II).*

[26] 535 U.S. at 24.

[27] *See* 18 C.F.R. § 35.26(b)(1)(ii) (2004). *See also Nine Mile II*, 110 FERC ¶ 61,033 at P 40 (explaining that merchant generators were never retail customers before Order No. 888 and had largely not existed before Order No. 888, and thus were not the "retail-turned wholesale" customers who could be assessed stranded costs and benefits).

25. Further, we find that Niagara Mohawk's attack on our approval of the station power provisions in NYISO's Services Tariff is beyond the scope of this proceeding. The November 19 Order did not accept the pertinent tariff provisions; these provisions were accepted for filing in *KeySpan III*. In any event, we have explained that *Detroit Edison* is distinguishable from cases involving New York utilities attempting to assess retail charges on merchant generators that choose to net station power. As we stated in *Nine Mile II*, the jurisdictional question in *Detroit Edison* was:

> . . . whether local distribution service was being provided under MISO's transmission tariff, which would enable unbundled retail customer to bypass retail tariffs. Here, in contrast, Nine Mile is not taking any state-jurisdictional, local distribution service from Niagara Mohawk. Nor, for that matter, is it taking any local distribution service from NYISO. . . . Thus, we are not allowing Nine Mile to bypass any truly applicable state-authorized local distribution charges. Rather, we are simply saying that Nine Mile is taking only Commission-jurisdictional service and can be charged only a Commission-jurisdictional rate. Additionally, in *Detroit Edison*, there was no retail tariff provision that conflicted with a Commission-jurisdictional tariff provision, as is the case here.[**28**]

26. Also, because, as the parties have stipulated in this case,[**29**] station power is delivered to the Generators over transmission facilities only, NRG is taking only Commission-jurisdictional service and is not bypassing applicable state-authorized local distribution charges.

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28 *Nine Mile II*, 110 FERC ¶ 61,033 at P 32; see also *AES Somerset, LLC v. Niagara Mohawk Power Corp*., 110 FERC ¶ 61,032 at P 37 (2005) (*AES Somerset*).

29 *See* November 19 Order, 109 FERC ¶ 61,169 at P 42 & n.46.

27. Finally, to the extent that we may have relied on the specter of discrimination in our November 19 Order, we reiterate our statement in *KeySpan IV* that the potential for discrimination between utilities and merchant generators in New York State still exists. We explained:

> Incumbent utilities, whether they retain some of their own generating capacity or purchase capacity and energy to resell, directly compete with the merchant generators, who own divested facilities and whom the incumbent utilities would charge station power delivery rates. As we noted in *PJM II*, integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power. Merchant generators who purchased these facilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested facilities, they likewise would not be charged for station power. That expectation has not been met, which in fact helped to spur the development of station power procurement and delivery rules for ISO tariffs . . .. The discrimination that we are aiming to forestall is between the former owners of the divested generating facilities and the current owners, who seek alternatives to the supply of station power solely from incumbent utilities so that they can more effectively compete for customer load with the incumbent utilities, to the ultimate benefit of ratepayers. This is consistent with our overarching goal of developing station power procurement and delivery rules that foster competition in electricity products.[[30]]

28. In the instant proceeding, we are similarly permitting merchant generators to compete fairly with utilities for customer load, fostering competition in electricity markets.

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[30] *KeySpan IV*, 107 FERC ¶ 61,142 at P 66 (footnotes omitted).

Consistency with Precedent

29. In the November 19 Order, the Commission explained the application of Order No. 888[31] to the provision of station power service:

> Order No. 888 is not appropriately read as authorizing a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator where the generator is not, in fact, using local distribution facilities, but has chosen to use only Commission-jurisdictional facilities and the netting provisions of a Commission-jurisdictional tariff.[[32]]

30. Regarding the use of the term "stranded costs," the Commission explained that that term referred to generation-based stranded costs, resulting when customers leave a utility's system to take power service from a competing power supplier as a result of open access. In contrast, when a utility divests its generators as part of retail restructuring, "the sale negated the need for stranded cost recovery especially when the utility was paid a premium over book value for its divested generators. Indeed, in that instance, the recovery of stranded costs via retail charges for station power over and above the premium would be construed as a windfall and is not authorized by Order No. 888."[33] Moreover, the order explained, Order No. 888's reference to the ability to charge even when there are "no identifiable local distribution facilities" related to "situations where large industrial or commercial customers that formerly took bundled

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[31] *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[32] November 19 Order, 109 FERC ¶ 61,169 at P 31, *quoting Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003) (*Nine Mile I*), *reh'g denied*, *Nine Mile II*.

[33] November 19 Order, 109 FERC ¶ 61,169 at P 32.

retail electric service at relatively high voltages, so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable," a situation that was not present in the station power cases. Thus, we concluded that Order No. 888 did *not* provide justification to charge a merchant generator for delivery of station power where the generator uses *no* local distribution facilities and *no* local distribution service is actually provided.

31. On rehearing, Niagara Mohawk states that the Commission failed to provide a sound explanation for "reversing" Order No. 888, claiming that the November 19 Order attempts to define the nature and extent of retail service, the extent to which local delivery facilities are involved, the scope of stranded costs that can be recovered in retail rates, and from whom they can be recovered, areas that Order No. 888 left to the purview of states. Niagara Mohawk argues that the November 19 Order contradicts the plain language of Order No. 888's holding that "even where there are no identifiable distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users."[34]

32. Niagara Mohawk argues that the rules articulated in the November 19 Order are inconsistent with the Commission's prior decisions on the bounds of its jurisdiction over local delivery service; it states that Order No. 888 recognized the existence of local delivery service as a basis of state jurisdiction separate from the use of distribution facilities.[35] Niagara Mohawk further argues that the Commission ignores its statement in Order No. 888 that we will leave state authorities to deal with any stranded costs occasioned by retail wheeling, and it asserts that the November 19 Order's discussion of the need for stranded cost recovery intrudes into the area of retail ratemaking. Niagara Mohawk also reads the November 19 Order to suggest that a utility's divestiture of its generation disqualifies it from stranded cost recovery, which it states cannot be squared with Order No. 888, and it states the November 19 Order interprets Order No. 888 as excluding merchant generators from the ranks of large industrial or commercial customers.

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[34] Niagara Mohawk rehearing at 16, *citing* Order No. 888 at 31,849.

[35] *Id*. at 17, *quoting* Order No. 888 at 21,650 ("The authority of state commissions to address retail stranded costs is based on their jurisdiction over local distribution facilities and the service of delivering electric energy to end users.")

33. Niagara Mohawk concludes that the rules articulated in recent station power orders are inconsistent with many prior Commission decisions on the limitations on its jurisdiction over local delivery service. It asserts that, even if the Commission provides a satisfactory explanation for its reversal of past rulings, the new rules should only be implemented on a prospective basis.

34. Niagara Mohawk cites other Commission orders where it claims we reiterated that states have jurisdiction over some portion of energy delivery service to end users regardless of the type of facility used to make delivery and thus consistently establishing the dividing line between Commission and state jurisdiction.[36] It notes that Order No. 888 was concerned with ensuring that customers have no incentive to structure a purchase in order to avoid using "identifiable local distribution facilities" to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits, and argues that here, as there, the Commission should ensure that customers should not be able to bypass state tariffs.

Commission Determination

35. In the November 19 Order, we explained that the Commission was referring in Order No. 888 to generation-based stranded costs, which may become stranded if, as a result of open access, former retail customers (such as industrial or commercial customers) leave a utility's system to take power service from a competing power supplier, and not the very different case of a merchant generator which has acquired the generating assets of the utility and which was not previously a retail customer of the utility. Merchant generators were never retail customers before Order No. 888 and, in fact, largely did not exist before Order No. 888. Thus, they are not the "retail-turned wholesale" customers addressed in Order No. 888. And, where, in Order No. 888, we stated that states have jurisdiction over the service of delivering energy to end users even when there are no identifiable local distribution facilities, we were addressing situations such as where large industrial or commercial customers took bundled retail electric service at high voltages (rather than the low voltages typically associated with local distribution facilities) so that local distribution facilities might not be readily identifiable, which is distinguishable from the circumstances in this proceeding.

[36] *Id*. at 6-7, *citing Detroit Edison Co*., 95 FERC ¶ 61,415, *reh'g denied*, 96 FERC ¶ 61,309 (2001); *San Francisco Bay Area Rapid Transit District*, 87 FERC ¶ 61,255 (1999), *reh'g denied*, 90 FERC ¶ 61,291 (2000) (*BART*).

36. A state may approve whatever rate level it deems appropriate, including the recovery of stranded costs and benefits, when a utility is selling station power at retail or is using local distribution facilities for the delivery of station power. When neither of those services is being provided, however, and a merchant generator is self-supplying its station power requirements in accordance with applicable tariffs, and any delivery service is transmission service, the charges specified in NYISO's tariffs apply to the exclusion of any retail tariff. This is, as well, consistent with Order No. 888's pro-competition policy because it prevents competing suppliers from being charged inappropriate costs by utilities with whom they compete for load, thus encouraging competition in electricity products.

37. Niagara Mohawk states that it understood Order No. 888 to provide that there is always local delivery service involved in service to end-use customers, that states have exclusive jurisdiction over local delivery service, and that states may impose non-bypassable distribution or retail stranded cost charges. It alleges that the Commission's finding that the delivery of station power cannot take place where no local distribution facilities have been used violates the terms under which they agreed to turn over operation of their transmission facilities to NYISO.

38. We reject this allegation. We have not undermined any critical assurances made in Order No. 888. We have only stated that Order No. 888 cannot be relied upon to justify the utilities' efforts to burden competing suppliers with additional, and unjustified, costs that would make them less competitive as compared to the utilities. Our station power orders have clarified the class of customers from whom local distribution rates that include stranded costs and benefits are appropriately collected, *i.e.*, customers who are taking state-jurisdictional, local distribution service. As we explained in *KeySpan IV*,[37] we also have not interfered with or prevented stranded cost recovery, or even significantly impaired any such recovery, because utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities. Nothing in our station power orders is to the contrary.

[37] 107 FERC ¶ 61,142 at P 49.

39. Thus, we have not reversed or changed our holdings in Order No. 888; we have only clarified that a subset of merchant generators cannot, on the basis of what we said in Order No. 888, be charged retail rates when they are not taking retail service.[38] Even if the allegation that our interpretation of Order No. 888 somehow impairs stranded cost recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from *appropriate* classes of customers or to extend the recovery period for stranded costs.

40. Nor are we improperly distinguishing merchant generators from other retail customers, as Niagara Mohawk contends. Merchant generators like the Generators were not retail customers of Niagara Mohawk or the other transmission owners. Therefore, they are not "retail-turned-wholesale" customers; the prior owners of the generating facilities were the incumbent utilities, not the merchant generators. In addition, the NYISO Services Tariff expressly excludes large industrial and commercial customers (who are the retail-turned-wholesale customers that Order No. 888 discusses), so they cannot self-supply nor terminate service under retail tariffs. These entities will still be liable to pay any stranded costs.

41. Regarding Niagara Mohawk's position that any new rules articulated in our recent station power orders should be implemented only on a prospective basis, we note that the holdings in these cases evolved directly from our earliest rulings in the *PJM* cases. We do not regard our holdings as constituting new rules; they merely apply the precedent from early cases to new factual situations. Parties have been on notice that merchant generators may not be required to purchase station power since we issued *PJM II*,[39] and here prospective-only application of our policy would not be appropriate.

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[38] We have clarified that Order No. 888 requires that a service must actually be provided before the rates for that service may properly recover stranded costs or benefits. *E.g.*, *Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 at P 17, *reh'g denied*, 105 FERC ¶ 61,357 (2003), *reh'g rejected*, 106 FERC ¶ 61,181, *order on voluntary remand*, 108 FERC ¶ 61,316 (2004), *reh'g pending*. In other words, Order No. 888 is consistent with traditional cost-causation principles.

[39] *PJM II*, 94 FERC ¶ 61,251 at 61,891-92.

42. Finally, as discussed in *KeySpan IV*,[40] the *BART* orders are inapposite. Those orders involved the issue of whether Pacific Gas and Electric Company (PG&E) was charging BART state direct access charges in addition to the Open Access Transmission Tariff's (OATT) transmission rates for the delivery of federal preference power. The Commission found that PG&E was charging BART the appropriate OATT rate and suggested that BART take any concerns it had regarding the state charges to the California Commission. On rehearing, the Commission found that PG&E's local distribution facilities were, in fact, being used to wheel the preference power to BART's loads. Thus, those orders do not address the question posed in this case, *i.e.*, whether any retail charges would apply when a merchant generator does not either purchase energy at retail or use local distribution facilities. As we noted in earlier station power cases,[41] the question of whether a particular merchant generator actually is using local distribution facilities is case-specific; the fact that BART uses PG&E's local distribution facilities in California is irrelevant to the question of whether any particular merchant generator in New York is using the local distribution facilities of a New York utility, such as Niagara Mohawk.

Period Prior to April 1, 2003

43. Niagara Mohawk claims on rehearing that, prior to April 1, 2003, all withdrawals of unbundled electric energy from NYISO's transmission system to serve retail load in Niagara Mohawk's area were subject to the retail delivery rates in Part IV of NYISO's OATT; the OATT, according to Niagara Mohawk, incorporates the delivery rates of its retail tariff by reference. Thus, Niagara Mohawk claims that NYISO's OATT provisions expressly required that Niagara Mohawk's retail tariff rates be applied to all station power delivered to NRG prior to April 1, 2003. Niagara Mohawk contends that the Commission found in the November 19 Order that "the express requirements of the NYISO OATT and of Niagara Mohawk's retail tariff may be disregarded because '[e]ven prior to April 1, 2003, . . . Generators had expressed a desire to self-supply, and had maintained a positive net output at all relevant times.'"[42]

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[40] *KeySpan IV*, 107 FERC ¶ 61,142 at P 52.

[41] *See PJM III*, 95 FERC ¶ 61,333 at 62,186.

[42] Niagara Mohawk rehearing at 27, *quoting* November 19 Order, 109 FERC ¶ 61,169 at P 45.

44. Niagara Mohawk also reasons that the November 19 Order violates the filed rate doctrine and the prohibition against retroactive ratemaking because there was no tariff on file prior to April 1, 2003 that allowed generators to net station power. It contends that the Commission cannot apply the provisions of NYISO's Market Services tariff "to services provided prior to the date they became effective and in violation of the express provisions of the NYISO OATT and Niagara Mohawk's retail tariff prohibiting such netting."[43] Niagara Mohawk further argues that the Generators cannot claim to have taken service under NYISO's netting provision before April 1, 2003 because they had not applied for NYISO transmission service until after that date.

Commission Determination

45. While we agree that, in principle, Niagara Mohawk is entitled to receive compensation for any use of its transmission facilities to the extent allowed under NYISO's tariffs, the contention that Part IV of NYISO's OATT applies to the situation presented in this proceeding was never raised prior to Niagara Mohawk's rehearing request. The Commission looks with disfavor on parties raising new issues on rehearing, and we have held that a complainant cannot amend a complaint on rehearing.[44] Accordingly, we need not decide whether Part IV of NYISO's OATT would govern here.

46. In any event, Niagara Mohawk misconstrues the nature of the Commission's finding on the appropriate netting period for the pre-April 2003 months. For there to be retroactive ratemaking or a violation of the filed rate doctrine, as Niagara Mohawk claims, there must first be a rate on file. Indeed, Niagara Mohawk concedes that both the filed rate doctrine and the rule against retroactive ratemaking are grounded in enforcement of the terms and conditions of a filed rate schedule. But there is no such filed rate schedule here. The station power procurement and delivery provisions of the NYISO Services Tariff were not in effect prior to April 1, 2003. And while Niagara Mohawk's retail tariff was on file at that time, we have found that no retail service was, in fact, provided. Where a customer is not taking service under a filed rate schedule,

[43] *Id*. at 28.

[44] *See, e.g., Transmission Agency of Northern California v. Pacific Gas & Electric Company*, 85 FERC ¶ 61,320 at 62,257 & nn.5-6 (1998); *Prairieland Energy, Inc*., 87 FERC ¶ 61,096 (1999) (explaining reluctance to chase moving target by considering new evidence or rationales presented for first time on rehearing).

neither precedent properly applies. While Niagara Mohawk claims that we have "disregarded" the "express requirements" of both Niagara Mohawk's retail tariff and the NYISO tariff, in fact, neither of these filed rate schedules controls.

47. Rather, for the time period between NRG's acquisition of its facilities (July 1999) and the effective date of the station power provisions of the NYISO Services Tariff (April 2003), in the absence of a controlling rate schedule (either federal or state), the Commission must find an off-the-contract (or extra-contractual) solution to the parties' dispute. In *AES Somerset*, on which we relied in part in the November 19 Order, the parties similarly asked the Commission to choose between one of two time periods: the one-month netting interval advocated by AES Somerset and the shorter netting interval advocated by Niagara Mohawk.[45] While both of these netting intervals are terms of filed rate schedules, the Commission there was not, in fact, applying or enforcing the terms and conditions of either of those filed rate schedules, much less retroactively changing a filed rate schedule's terms or conditions or authorizing the charging of a rate other than a filed rate. The same is true in this case.

48. As we explained in *AES Somerset*, the one-month netting interval is consistent with what had been the long-standing netting practices of vertically-integrated utilities in New York, including Niagara Mohawk (later codified in the NYISO Services Tariff). We also found it compelling that PJM had adopted a one-month netting interval in 2001, and in deciding as we did we thus avoided the creation of an unnecessary seam between the two contiguous regional organizations.[46]

Sale of NRG's Entire Output

49. According to Niagara Mohawk, NRG conceded that, prior to April 1, 2003, all of the metered output of the generating plants was sold to third parties. Niagara Mohawk concludes from this statement that NRG did not retain any energy that could be used to meet station power needs other than that self-supplied behind the meter, and that NRG necessarily obtained additional station power from Niagara Mohawk. Niagara Mohawk asserts that the Commission erred by failing to reach this conclusion, or even to consider the issue in the November 19 Order.

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[45] *See AES Somerset*, 110 FERC ¶ 61,032 at P 63-72.

[46] *Id.* at P 71.

Commission Determination

50. It was not necessary for the Commission to decide this issue in order to address each of the questions identified in the Joint Statement of Issues. Niagara Mohawk did not reserve this issue for consideration when it, together with other parties, crafted the Joint Statement of Issues. The Commission addressed the stipulated issues in the November 19 Order, and will not now, on rehearing, broaden the scope of matters to be litigated.

Contractual Commitment

51. The parties asked in the Joint Statement of Issues to what extent our analysis would change if NRG had, or had not, agreed to purchase station power service from Niagara Mohawk. The parties' briefs indicated that the underlying contract issue will be determined in New York state court. In the November 19 Order, we stated that, since NRG had not taken any station power from Niagara Mohawk during the periods at issue in the complaint, we did not need to make any findings about the intent of the parties.

52. Niagara Mohawk argues on rehearing that we erroneously failed to consider whether NRG was under a contractual commitment to purchase station power service from it. Niagara Mohawk refers to an earlier order by the Commission setting for hearing whether NRG committed contractually to purchase station power from Niagara Mohawk and concludes that "the Commission must consider the existence and terms of any commitments by an NRG Generator to take local delivery of station service pursuant to the terms of Niagara Mohawk's retail tariff . . ."[47]

Commission Determination

53. We disagree that the issue of NRG's contractual intent was before us when we issued the November 19 Order. The parties jointly agreed on the questions to be decided by the Commission and we waived the necessity of a trial-type hearing and an Initial Decision accordingly, superseding any earlier determination to explore NRG's intent at hearing. The parties did not fully brief the question of NRG's intent, and we had insufficient evidence on which to base a decision. At the rehearing stage of this proceeding, the question of NRG's contractual commitment is beyond the scope of the proceeding.

[47] Niagara Mohawk rehearing at 33.

Netting Period

54. Finally, Niagara Mohawk argues that, even if the Commission could exercise jurisdiction over the terms of Niagara Mohawk's retail service to the Generators, we could not require a 30-day netting interval under the facts of this case. Niagara Mohawk opines that the on-site netting concept was developed to apply to a generating plant's station power loads that can be served without using the interconnected utility's transmission system, but contends that the station power at issue here requires the transmission system for its delivery. Niagara Mohawk terms this on-site netting "a fiction that allows the Generators regularly to receive delivery of substantial electric energy over Niagara Mohawk's transmission facilities without paying for it."[48] Niagara Mohawk continues that netting is a fiction because costs are imposed by electric flows on its transmission system, and NRG receives benefits from those flows; it asserts that these costs and benefits are not erased by flows occurring in different directions at different times. It further objects that netting is applied only for the benefit of generators and thus asserts that costs for local delivery services are shifted from generators to other end-use customers.

55. Niagara Mohawk states that the stipulated facts of this case demonstrate that its transmission system is used to deliver power to NRG's station loads, and concludes that "[t]here is no justification for denying Niagara Mohawk compensation for the delivery service that the . . . Generators concede it provides."[49]

Commission Determination

56. We agree that, in principle, Niagara Mohawk is entitled to receive compensation for use of its transmission facilities to the extent allowed under NYISO's tariffs. However, on the facts before us, as the Generators were self-supplying their station power needs, no transmission service was being provided under NYISO's tariffs. Further, if Niagara Mohawk is arguing once again that the use of a monthly netting period (or any netting period) involves retail sales subject to exclusive state jurisdiction,

[48] Niagara Mohawk rehearing at 33.

[49] *Id*. at 35.

it is engaging in a collateral attack on our earlier *PJM* orders. As we explained in *KeySpan IV*,[50] netting is no more than the traditional accounting for station power as negative generation, that is, calculating the output of a particular generating facility net of station power requirements, rather than as gross output. We will not revisit this issue here.

57. Second, Niagara Mohawk is incorrect that the delivery of station power is subject to exclusive state jurisdiction. We flatly rejected that proposition in *PJM II*, in which we held "[i]n the event that the provision of station power involves the unbundled retail transmission of electric energy in interstate commerce in a retail choice state [as is New York], we would have jurisdiction over such transmission."[51] Significantly, we also emphasized that:

> [I]n a retail choice state, an end user is still buying retail transmission service and unbundled power supply as separate purchases (not as a single bundled purchase) even when one supplier sells both services. Once services are unbundled, they cannot be treated as re-bundled simply because one supplier is involved.[52]

[50] *KeySpan IV*, 107 FERC ¶ 61,142 at P 37-41.

[51] *PJM II*, 94 FERC ¶ 61,251 at 61,889 & n.51. We also noted that, where such delivery also involved the use of local distribution facilities, that aspect of the transaction may be regulated by a state regulatory authority. *Id.* at 61,891 & n.60. But that is not the case here; there is no such service being provided here.

[52] *Id.* at 61,891 & n.60.

The Commission orders:

The requests for rehearing of the November 19 Order are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.