

105 FERC ¶ 61,337
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

AES Somerset, LLC

Docket No. EL03-204-000

v.

Niagara Mohawk Power Corporation

ORDER GRANTING COMPLAINT

(Issued December 23, 2003)

1. In this order, the Commission grants a complaint by AES Somerset, LLC (AES) alleging that Niagara Mohawk Power Corporation (Niagara Mohawk) unlawfully seeks to charge AES for the provision of station power. The Commission finds that Niagara Mohawk is not physically interconnected with AES's Somerset generating unit and that at no time since AES acquired the Somerset unit did Niagara Mohawk sell or deliver station power to AES. Rather, AES has self-supplied station power for the periods in issue in the complaint, and Niagara Mohawk never provided any station power service to Somerset. This order benefits customers by ensuring that they pay for only those services that are actually provided.

OVERVIEW OF THE COMMISSION'S STATION POWER ORDERS

2. In recent years, the Commission has issued a series of orders on station power, which is 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.¹

3. The recent line of station power cases began with a series of orders involving PJM. The Commission found in PJM II that station power may be provided to a

¹ 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).

generating facility in three ways: (1) on-site self-supply (from generation located “behind-the-meter”); (2) remote self-supply (from another generator owned by the same company); or (3) third-party supply.² The Commission ruled that “[f]or both on-site and remote self-supply, the generator is using only its own generating resources. It is not consuming another party’s energy. The generator typically accounts for its self-supply of station power by netting station power requirements against gross output” and thus “there is no sale (for end use or otherwise) between two different parties, but only one party using its own generating resources for the purpose of self-supply and accounting for such usage through the practice of netting.”³

4. In the same order, the Commission considered a request by NRG that the Commission find that the provision of station power is subject to the Commission’s jurisdiction as a wholesale transaction. The Commission found that, if NRG is self-supplying station power, Niagara Mohawk could not charge it for station power under a retail tariff; but, to the extent that NRG’s facilities were “incapable of self-supplying station power under any circumstances (whether because of their particular configurations or otherwise), then NRG would appear to be ineligible for self-supplying.”⁴

5. The Commission also entertained a request by NYSEG that the Commission disclaim jurisdiction over NYSEG’s provision of station power as an unbundled retail sale of electricity. The Commission found in that regard that “all generators that are self-supplying station power may net their station power requirements against gross output, without regard to the form of corporate ownership. Thus, a self-supplying generator cannot be required to purchase station power under a retail tariff simply because it is a merchant generator.”⁵ However, the Commission determined that provision of station power to merchant generators under a retail tariff, when the merchant generators have negative net output and cannot self-supply, would be appropriate.

² PJM II, 94 FERC at 61,890.

³ Id.

⁴ Id. at 61,893. The Commission concluded that that factual determination could not be made based on the pleadings before it in that proceeding.

⁵ Id. at 61,892-93 (emphasis in original).

6. In PJM IV,⁶ the Commission approved a proposal by PJM to change the time period over which a generator's usage of station power is netted against its gross output from one hour to one month, on the basis that monthly netting is appropriate because it coincides with PJM's monthly billing cycle, so that PJM would need to examine net output only once a month to determine if any retail sales of station power occurred during that month, and would not have to develop a new settlement system.

7. On May 15, 2002, the Commission issued four orders concerning station power, further explaining the Commission's jurisdiction over station power and its delivery.⁷ In KeySpan I, the Commission again emphasized the difference between the energy used to meet station power needs (which does not involve a sale subject to Commission jurisdiction) and the delivery of that energy (which may involve a sale subject to Commission jurisdiction).⁸ In KeySpan I, the Commission also distinguished between, on the one hand, the delivery of station power over local distribution lines and considered to be a retail service and, on the other hand, the delivery of station power over transmission (or wholesale distribution) lines and considered to be transmission service under the jurisdiction of the Commission.⁹

8. Later in 2002, the Commission considered tariff provisions proposed by NYISO to address the delivery of station power.¹⁰ The proposal, which the Commission accepted, provided for monthly netting to determine whether a generator has self-supplied, in which case it will not pay transmission charges. If a generator remotely self-supplies or

⁶ PJM Interconnection, LLC, 95 FERC ¶ 61,470 (2001) (PJM IV).

⁷ Midwest Generation, L.L.C. v. Commonwealth Edison Co., 99 FERC ¶ 61,166 (2002); KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc., 99 FERC ¶ 61,167 (2002) (KeySpan I), order on reh'g, 100 FERC ¶ 61,201 (2002); Sunbury Generation, L.L.C. v. PPL Electric Utilities Corp., 99 FERC ¶ 61,168 (2002) (Sunbury I), order on reh'g, 100 FERC ¶ 61,200 (2002); USGen New England, Inc., 99 FERC ¶ 61,169 (2002) (USGen), order on clarification, 100 FERC ¶ 61,199 (2002).

⁸ See KeySpan I, 99 FERC at 61,679; accord Sunbury I, 99 FERC at 61,683.

⁹ See KeySpan I, 99 FERC at 61,679-80; accord Sunbury I, 99 FERC at 61,683; USGen, 99 FERC at 61,686.

¹⁰ See KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc., 101 FERC ¶ 61,230 (2002), reh'g pending (KeySpan III).

uses third party supply to meet its station power needs, monthly netting determines the quantity of transmission the generator must obtain.¹¹

9. The Commission also found that, “[t]o the extent that transmission facilities are involved [in the delivery of station power], such delivery service will be subject to NYISO’s OATT. Any delivery of station power over local distribution facilities and the compensation for such delivery is a matter properly for the New York Public Service Commission (New York Commission) and not for this Commission.”¹² The Commission also found that NYISO’s proposal to net station power on a monthly basis was reasonable, and it granted a request for clarification 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 . . . [A]ny energy that falls under the definition of station power must be netted against energy produced during the given month.”¹³

10. In Northeast Utilities Services Co. v. NRG Energy, Inc.,¹⁴ Northeast Utilities complained that NRG was required by an Interconnection Agreement between them to pay retail rates for station power purchased from a Northeast Utilities affiliate. NRG argued that its generators were only connected to transmission facilities.¹⁵ The Commission determined that “when . . . NRG . . . is not able to self supply, there is a sale of station power from a third party.”¹⁶ The Commission further stated that the Northeast Utilities affiliate “may impose state-approved charges regardless of who provides the energy, or whether a sale of energy occurs, or whether the delivery uses no identifiable distribution facilities.”¹⁷

¹¹ Id. at P 8, 23.

¹² Id. at P 20.

¹³ Id. at P 24, 25.

¹⁴ 101 FERC ¶ 61,327 (2002) (NU), rev’d in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co., 104 FERC ¶ 61,051 (2003), reh’g pending (Warrior Run)

¹⁵ Further, NRG contended that each of its subsidiaries could self-supply station power by netting energy consumed within each station against its output. The Commission held that the time period for netting should be that which is allowed by ISO-New England.

¹⁶ Id. at P 25.

¹⁷ Id. (emphasis added).

11. The Commission corrected that misstatement in Warrior Run, however, explaining that where there are no local distribution facilities involved in the delivery of station power, but only transmission facilities, the Commission has jurisdiction over the delivery and the rates for the delivery. The Commission noted that:

language from NU reflects a misreading of Order Nos. 888 and 888-A, where we discussed local distribution service that would remain subject to state jurisdiction after unbundling – so that a state would be able to “assign stranded costs and benefits through a local distribution service charge.” We did not intend to suggest, as the dictum in NU implies, and as Allegheny Power argues, that the use (or, here, non-use) of local distribution facilities for delivery of station power is entirely irrelevant, no matter the circumstances, to whether a local distribution charge for delivery of station power can be assessed. Indeed, to accord Order Nos. 888 and 888-A such a reading results in rates that would be contrary to longstanding principles of cost causation. Allowing Allegheny Power to charge for retail distribution service in this circumstance would also frustrate Commission efforts to create a more level playing field with more comparable treatment between merchant generators and vertically integrated utilities.^[18]

12. In Warrior Run, the Commission further found that no local distribution facilities were involved in the delivery of station power from the supplier, Allegheny Power, to the Warrior Run facility, and that the delivery was made only over transmission facilities. Thus, the Commission would have jurisdiction over the delivery of energy over transmission facilities, and any charge for distribution would be an impermissible double charge for transmission service.¹⁹

AES COMPLAINT AND NIAGARA MOHAWK ANSWER

13. AES is the owner and operator of a 675 MW generating facility in Somerset, New York (the Somerset facility). The Somerset facility was previously owned and operated by New York State Electric and Gas Corporation (NYSEG) until February 1998. At that time, NYSEG transferred the facility to its generator affiliate, NGE Generation. In May 1999, NGE Generation sold the facility to AES.

¹⁸ Warrior Run, 104 FERC ¶ 61,051 at P 17 (footnotes omitted).

¹⁹ Id. at P 16.

14. The Somerset facility is located within the geographic area designated as Niagara Mohawk's franchised service territory, but is not now and has not previously been physically interconnected with any Niagara Mohawk transmission or distribution facility. Rather, the Somerset facility is interconnected with a NYSEG substation which, in turn, connects to 345 kV transmission lines belonging to the New York Power Authority (NYPA). When the facility is on-line, station power is provided through the facility's 24 kV bus and subsequently to the station service buses. When the facility is off-line the station power is provided from the 345 kV transmission system through NYSEG's 345 kV ring bus.²⁰ NYSEG owns the transmission lines that connect the 345 kV ring bus to NYPA. Niagara Mohawk does not own, control, or maintain any interconnection facilities to provide station power to the Somerset facility. AES alleges that during the years that NYSEG and NGE Generation operated the Somerset facility, there was no station power service relationship between NYSEG or NGE Generation and Niagara Mohawk.

15. On March 17, 1999, a Niagara Mohawk customer representative notified AES that Niagara Mohawk anticipated providing station power to the Somerset facility at retail as soon as the sale from NGE Generation went through, since Niagara Mohawk had "determined that the [facility] should be on the retail tariff," and provided AES with a retail service application and accompanying forms, including Form Gf, "General Information for Connection of Existing On-Site Generation."

16. AES states that it returned the application for retail service to Niagara Mohawk unexecuted, and advised Niagara Mohawk that it disputed the requirement that Niagara Mohawk provide retail service to the Somerset facility.²¹ AES did execute Form Gf, the information form, under protest. AES notified Niagara Mohawk that it "reserve[d] the right to contest, at a later date, that [Somerset] should be on a retail rate tariff for this electric service."²²

17. On June 8, 2000, AES received invoices from Niagara Mohawk in the amount of \$808,648.95 for electric service which Niagara Mohawk stated it had supplied to Somerset between May 14, 1999 and March 31, 2000. AES states that, although it viewed these invoices as inapplicable, in order to avoid litigation AES and Niagara Mohawk settled on a lesser amount in September 2001, although AES again stated that

²⁰ Complaint at 6.

²¹ Complaint at 7.

²² Complaint at 8.

its payment should not be construed as assent that Niagara Mohawk's charges were applicable.²³

18. On July 24, 2002, Niagara Mohawk presented AES with invoices in the amount of \$1,911,254.96, for the period from April 2000 through June 2002. In response, AES stated in a September 5, 2002 letter to Niagara Mohawk that a retail rate was not applicable, because the Somerset facility self-supplies station power. AES also states that in that letter it offered to compensate Niagara Mohawk for the value of any energy consumed while the facility was off-line, if Niagara Mohawk could demonstrate that it acquired and paid for such energy, and that Niagara Mohawk has not responded to this offer.²⁴ In its complaint, AES states that, in fact, in all months prior to April 2003, the Somerset facility had positive net output when measured over a monthly period, and should therefore be considered to have self-supplied station power.²⁵

19. On March 26, 2003, AES informed Niagara Mohawk that the Somerset facility would self-supply station power pursuant to the New York Independent System Operator, Inc.'s (NYISO's) Services Tariff, which included netting provisions for station power and which became effective on April 1, 2003. On April 4, 2003, Niagara Mohawk responded by letter seeking clarification, and stating that it would continue billing AES for station power under its retail rates. In an April 26, 2003 letter, AES stated that, in KeySpan III,²⁶ the Commission had found that "because a generator that self-supplies . . . does not engage in a sale at retail or any other kind of sale, the charges under . . . the NYISO OATT [Open Access Transmission Tariff] associated with unbundled retail access are not applicable to self-supplied or remotely self-supplied station power. To the extent a generator needs transmission to remotely self-supply, point-to-point transmission service charges under Part II of the NYISO's OATT will apply."²⁷ AES states that the Somerset facility had positive net output for April and May 2003, yet Niagara Mohawk is

²³ Complaint at 9.

²⁴ Complaint at 10.

²⁵ Complaint at 3; see also Exhibit 7 to Jesikiewicz Affidavit attached to Complaint.

²⁶ See supra note 10.

²⁷ Exhibit 10 to Jesikiewicz Affidavit attached to Complaint, citing KeySpan III, 101 FERC ¶ 61,230 at P 22.

continuing to bill AES at retail rates.²⁸ Niagara Mohawk has continued to invoice AES for station power through June 2003.²⁹

20. AES filed the instant complaint asking the Commission to prohibit Niagara Mohawk from (i) violating the Commission's orders holding that Niagara Mohawk may not charge merchant generators retail rates for self-supplied station power, (ii) violating NYISO's Services Tariff, which provides that if a generator has positive net output over a monthly basis, that generator is self-supplying its station power requirements and should pay Locational Based Marginal Prices (LBMP) for power taken from the transmission system; and (iii) violating the Federal Power Act's prohibition of undue discrimination³⁰ by imposing requirements on the Somerset facility now that it is owned by AES, which Niagara Mohawk did not impose on the facility when it was owned by NYSEG and NGE Generation. AES further asks the Commission to prohibit Niagara Mohawk from charging it retail rates for self-supplied station power, including retail rates for transmission and distribution service and stranded cost recovery, or taking any actions to disconnect the Somerset facility from the New York state bulk power transmission system.³¹ Finally, AES states that the Commission should apply a monthly netting period for Somerset to enable AES to continue NYSEG's and NGE's longstanding practice of netting the Somerset facility's station power requirements, and because it is consistent with periods the Commission found reasonable and approved for NYISO and PJM.³²

21. Notice of AES's complaint was published in the Federal Register, 68 Fed. Reg. 39906 (2003) with motions to intervene and comments due on or before July 15, 2003. Niagara Mohawk filed an answer, and timely motions to intervene were filed by KeySpan-Ravenswood, Reliant Resources (Reliant), NYISO, NYPA, and a timely notice of intervention was filed by the New York Commission/New York State Department of Public Service. The NRG Companies (NRG) and NYSEG and Rochester Gas and Electric Corporation (collectively, NYSEG) filed motions to intervene out of time. The Independent Power Producers of New York (IPPNY), the Electric Power Supply

²⁸ Complaint at 17.

²⁹ On September 22, 2003, AES filed with the Commission an additional invoice presented to it by Niagara Mohawk on August 24, 2003 showing a charge of \$60,980.32 for station power for July 2003.

³⁰ See 16 U.S.C. §§ 824d, 824e (2000).

³¹ Complaint at 3.

³² Complaint at 21.

Association (EPSA), AG-Energy, Nine Mile Point Nuclear Station (Nine Mile) and the PSEG Companies (PSEG) filed timely motions to intervene and comments supporting AES. Northeast Utilities Service Company (NUSCO) and the Joint Transmission Owners filed requests to intervene and comments out of time.

22. In its answer to AES's complaint, Niagara Mohawk first states that this matter should be brought before the New York Commission, as it is a challenge to the applicability of Niagara Mohawk's retail tariff. It then states that AES's complaint assumes that a tariff filed by NYISO with the Commission precludes the application of Niagara Mohawk's retail tariff, filed with the New York Commission, for retail sales. Niagara Mohawk adds that while the Commission's rules regarding netting govern the transmission portion of station service, those rules cannot extend to the local delivery service charges assessed under Niagara Mohawk's retail tariff, which "consist principally of . . . stranded cost and benefit charges,"³³ citing Detroit Edison Co. v. FERC.³⁴ Niagara Mohawk asserts that AES is seeking to be exempted from precisely such local delivery charges.

23. Niagara Mohawk states that it has billed AES for delivery of station service electricity since May 1999, and that those bills are based on the reading of NYSEG's meters at the Somerset facility at times when the consumption of electricity at the generating unit exceeds its output.³⁵ Niagara Mohawk states that it provides station service to generators in its service territory under its standby SC-7 tariff, approved by the New York Commission, which measures the amount of electricity provided to each retail customer at 15-minute intervals, as compared to NYISO's Services Tariff's monthly netting provision. Niagara Mohawk also notes that, under its SC-7 tariff, at least 75 percent of the charges it bills to the Somerset facility are stranded cost and stranded benefit charges.³⁶ Niagara Mohawk further asserts that, although it is not physically interconnected with the Somerset plant, because its location is within the geographic area that is Niagara Mohawk's service territory, Niagara Mohawk has the exclusive right, in

³³ Answer at 4.

³⁴ 334 F.3d 48, 54 (D.C. Cir. 2003) (Detroit Edison).

³⁵ Answer at 5-6.

³⁶ Niagara Mohawk also states that it has proposed revisions to SC-7 (not yet approved by the New York Commission) that would break down the components of station power service even further, so that the Somerset facility could purchase station power from NYISO's energy market or another source, pay NYISO for transmission under NYISO's tariff, and pay Niagara Mohawk for local delivery charges. Answer at 8.

accordance with its retail tariff, to bill AES for the delivery of station power to the Somerset facility.³⁷

24. Niagara Mohawk argues that AES is improperly asking the Commission to assert jurisdiction over local delivery service (including stranded cost and benefit charges) which is solely within the New York Commission's jurisdiction. Niagara Mohawk states that this result would conflict with the Commission's own analysis of its jurisdiction in Order No. 888, in which the Commission explicitly recognized that only states had jurisdiction over "the service of delivering electric energy to end users," even when no local distribution facilities are used for the transaction.³⁸

25. Niagara Mohawk acknowledges that in Warrior Run the Commission held that a utility may not charge a generator taking station service for the allocated cost of the utility's distribution system if that distribution system is not being used to provide the station power. It states, however, that Warrior Run confirms the Commission's position that, regardless of whether local distribution facilities are employed to deliver electricity to an end user, the state has jurisdiction to approve charges for the recovery of "an allocated share of retail stranded costs and benefits from all customers."³⁹

26. Additionally, Niagara Mohawk states that, because in Detroit Edison the D.C. Circuit ruled that the Commission had no jurisdiction to accept a tariff which allows unbundled retail customers to take distribution service "under the rates and other terms

³⁷ Answer at 5.

³⁸ Answer at 10, citing Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Order No. 888, FERC Stats. & Regs., ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 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, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (TAPS), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002).

Niagara Mohawk further asserts that, in NU, the Commission found that, when there is a delivery of energy to an end user, including station power to a generator, the transaction "retains an element of state jurisdiction" and the utility providing the delivery service "may impose state-approved charges on such retail deliveries regardless of . . . whether the delivery uses no identifiable delivery facilities." Answer at 11.

³⁹ Answer at 12.

applicable to Commission-jurisdictional transmission . . . service,⁴⁰ the New York Commission may adopt a netting period for such service that is different from the one in NYISO's transmission tariff, or may choose not to allow netting. Niagara Mohawk further states that the Commission has explicitly recognized the obligation of a generator to arrange and pay for local delivery service under the applicable state commission-approved tariff.⁴¹ And finally, Niagara Mohawk states that NYISO's tariff was only effective as of March 22, 2003, so that even if AES were correct that the netting provisions of the NYISO tariff would eliminate AES's liability for station service charges to Niagara Mohawk after that date, the NYISO tariff could have no impact on AES's station service obligations prior to March 22, 2003.

27. As to the comments, several parties support AES's position. IPPNY supports AES's complaint and requests that the Commission grant AES's requested relief by affirming the Commission's prior rulings that an electric generating facility that does not use the distribution facilities of a transmission and distribution utility is not subject to that utility's retail rates for delivery of station power that the generator self-supplies from one of its own units. IPPNY also notes that many of its members are independent generators who are receiving similar bills from Niagara Mohawk, whereas, upon information and belief, those generators still owned by vertically integrated utilities are not charged for such services.⁴² IPPNY also asserts that Niagara Mohawk does not acknowledge that, in KeySpan III, the Commission rejected Niagara Mohawk's position and instead held that its retail distribution rates should not apply to self-supplied station power where no distribution facilities are used.⁴³ AG-Energy, PSEG and EPSA all support the AES complaint and the comments filed by IPPNY.

28. NUSCO, however, opposes AES. It argues that the Commission has previously ruled that whenever there is a delivery of energy that is consumed by an end-user, even if no local distribution facilities are involved, "the transaction retains an element of state jurisdiction," and the utility may therefore impose state-approved charges on such retail deliveries.⁴⁴ NUSCO points to the Commission's Detroit Edison decision, asserting that "even where there are no identifiable local distribution facilities, states nevertheless have

⁴⁰ Answer at 15.

⁴¹ Answer at 16, citing KeySpan III, 101 FERC ¶ 61,230 at P 7.

⁴² IPPNY comments at 7.

⁴³ IPPNY comments at 6 n.12, citing KeySpan III, 101 FERC ¶ 61,230 at P 21.

⁴⁴ NUSCO comments at 2 n.4, citing NU, 101 FERC ¶ 61,327 at P 25.

jurisdiction in all circumstances over the service of delivering energy to end users."⁴⁵ NUSCO adds that even under Warrior Run, a state may impose local distribution service charges on a generator, even in the absence of local distribution facilities, as long as such charges are not for the cost of the transmission facilities subject to Commission jurisdiction.

29. Additionally, Niagara Mohawk, Nine Mile and KeySpan filed answers to other parties' pleadings. Niagara Mohawk in its answer reiterates its earlier argument that the Commission has clearly stated that generators consuming power to operate station equipment are end-users receiving retail service and that Order No. 888 clearly concluded that, regardless of federal jurisdiction over the transmission component of a transaction, states retain jurisdiction to assess stranded costs and benefits and to determine how those costs should be allocated among retail customers. Nine Mile and KeySpan dispute Niagara Mohawk's position. IPPNY filed a motion to strike Niagara Mohawk's answer.

30. Niagara Mohawk filed a motion to lodge a decision issued by the New York Commission on November 25, 2003, approving revisions to the SC-7 tariff.

DISCUSSION

31. **Procedural matters.** Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. ' 385.214 (2003), the timely, unopposed motions to intervene of the entities that filed them make them parties in this proceeding. Under Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. ' 385.214(d) (2003), the late-filed motions to intervene are granted, in light of the movants' interests, the early stage of the proceedings, and the absence of undue prejudice or delay.

32. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. ' 385.213(a)(2) (2003), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed by KeySpan Ravenswood, Niagara Mohawk and Nine Mile and we therefore reject them. IPPNY's motion to reject Niagara Mohawk's answer is therefore moot. We will, however, grant Niagara Mohawk's motion to lodge the New York Commission's November 25 decision.

33. **Analysis.** Niagara Mohawk concedes that it is not physically interconnected with AES's Somerset unit. Rather, Niagara Mohawk's sole justification for charging AES under its retail standby service tariff is that the Somerset unit is located within the geographic area that is Niagara Mohawk's franchised service territory, and that this fact

⁴⁵ NUSCO comments at 5, citing Detroit Edison Company, 102 FERC ¶ 61,282 at P 19 (2003) (footnotes omitted).

(supposedly accordingly to Order No. 888) allows it to charge AES under its retail tariff. Niagara Mohawk's position has no merit. Niagara Mohawk has not shown that it has ever sold or delivered station power to the Somerset facility, or that it is doing anything more than seeking to charge AES for services that AES never agreed to and that Niagara Mohawk never provided. And, as we explain below, Order No. 888 does not justify charging for such fictitious services.

34. Niagara Mohawk further claims that when NYSEG owned the Somerset plant, it was remotely self-supplying station power at Somerset from another NYSEG-owned unit, but that AES must purchase station power from a third party. Even assuming arguendo that these facts are correct, nowhere does Niagara Mohawk demonstrate that it is the third party from whom AES is purchasing station power; indeed, it would appear that the meter readings on which the invoices for the fictitious services are based come from another company's meters. So while Niagara Mohawk broadly asserts that it "provides station service to generators in its service territory pursuant to its state-approved standby SC-7 tariff" (Answer at 7), in point of fact, Niagara Mohawk provides no evidence that it has ever provided such service to AES. Furthermore, when the Somerset unit is not in service and must receive station power from a third party, the delivery service is provided over only the 345 kV transmission facilities. Even in this case, there are no local distribution facilities used for delivery service.

35. Rather, AES has shown, and Niagara Mohawk has not disputed, that the Somerset plant had a positive net output in every month between May 1999 and May 2003.⁴⁶ As we found in PJM II, "a generator may net its station power requirements against the

⁴⁶ Exhibit 7 to Jesikiewicz Affidavit attached to Complaint.

Because AES has had a positive net output for each month in issue in this complaint, we find that for each of those months, AES was self-supplying station power.

Arguably, since the NYISO Services Tariff did not take effect until April 1, 2003, AES could not rely specifically on the monthly netting provision of that tariff prior to that date. We find, however, that it was reasonable for AES to rely on a one-month netting method to determine its net output even prior to April 2003. We had approved a one-month netting provision in PJM IV in 2001. Moreover, as AES notes, NYISO's choice of monthly netting "codifies the long standing practice in New York by NYSEG and other vertically integrated utilities that never imposed upon themselves or each other retail charges for station power." Complaint at 21. Thus, use of a monthly netting period promotes the Commission's goal of eliminating, insofar as possible, "disparities between merchant generators and vertically-integrated utilities" with respect to the provision of station power. PJM II, 94 FERC at 61,893.

generating facility's gross output whenever the generating facility's gross output exceeds or equals its station power requirements,"⁴⁷ and that in those circumstances the generator is using its own generation to fulfill its own power needs, and thus "there is no sale (for end use or otherwise) between two different parties, but only one party using its own generating resources for the purpose of self-supply and accounting for such usage through the practice of netting."⁴⁸ Thus, AES has demonstrated that there was no sale for end use to it, and Niagara Mohawk may not therefore charge AES either for selling energy to the Somerset plant, or, given the absence of any physical interconnection between the Somerset facility and Niagara Mohawk, for delivering energy to the Somerset plant.

36. For this reason, as well, the revisions to the SC-7 tariff approved by the New York Commission on November 25, 2003 are not relevant to our decision here. The Commission has long recognized that there may be circumstances in which a standalone generator could take delivery of energy from a vertically-integrated utility over the utility's local distribution facilities, and in that situation state-jurisdictional tariffs could govern the sale and delivery of station power. Here, however, Niagara Mohawk is providing no service to the Somerset plant, neither energy nor delivery, since, as noted above, the Somerset facility had a positive net output for every month in question, is not interconnected with any Niagara Mohawk facilities, and in any event only takes energy at transmission-level voltages over those facilities with which it is directly interconnected (which are not Niagara Mohawk facilities).

37. In this regard, AES states, without contradiction by Niagara Mohawk, that (1) the Somerset facility is not connected to the Niagara Mohawk system, but is physically connected to NYSEG's 345 kV system;⁴⁹ (2) Niagara Mohawk never billed or charged NYSEG or NYSEG's affiliate NGE Generation for station power or delivery when

⁴⁷ PJM II, 94 FERC at 61,882.

⁴⁸ Id.

⁴⁹ Niagara Mohawk states that the Somerset unit "is not connected to any Niagara Mohawk transmission facilities or distribution lines or facilities and . . . no Niagara Mohawk facilities are used in the interconnection of the Facility to NYPA's transmission lines" (Appendix A to Answer at 3). Niagara Mohawk also concedes that "Niagara Mohawk does not own or maintain any transmission facilities to provide station power to the Facility and . . . NYSEG owns and reads the meters that measure the amount of station power consumed by the Facility" (Appendix A to Answer at 4).

NYSEG and NGE Generation owned the unit;⁵⁰ (3) Somerset is physically capable of taking station power from the 345 kV system into which it injects energy and, when the facility is off-line, the station power is provided from NYSEG's 345 kV system;⁵¹ and (4) Niagara Mohawk has never responded to Somerset's letter of September 5, 2002 seeking verification that Niagara Mohawk paid NYISO for energy consumed by Somerset as station power (Exh. 5). Niagara Mohawk provides no evidence that it provided the Somerset plant with station power energy⁵² or delivered station power energy to Somerset over Niagara Mohawk's local distribution facilities.⁵³ We therefore find that Niagara Mohawk has never sold or delivered station power to the Somerset generator, either when the unit was owned by NYSEG or NGE Generation or after the unit was sold to AES in May 1999.⁵⁴

⁵⁰ Niagara Mohawk concedes this fact in its Answer at 15 n.28; see also Appendix A to Answer at 3, in which Niagara Mohawk admits that prior to AES's acquisition of the Somerset facility, there was "no physical or contractual station service relationship between" Niagara Mohawk and the Somerset unit.

⁵¹ Complaint at 6.

⁵² Under the NYISO Services Tariff's netting provision, the fact that in some hours AES may have drawn station power from the grid does not overcome the fact that, when netted, AES had a net positive output at the Somerset plant. But even apart from this fact, Niagara Mohawk has never demonstrated that, at the times when AES may have drawn power from the transmission grid, Niagara Mohawk either procured or generated the power for the Somerset plant, or provided delivery of that power over its local distribution facilities.

⁵³ In its acceptance of Niagara Mohawk's revisions to the SC-7 tariff, the New York Commission made clear that it was approving "state-jurisdictional charges for services provided under standby tariffs that are in addition to the charges for services furnished under station use tariffs," November 25 Decision at 12 (emphasis added). Thus, the New York Commission similarly recognizes that the SC-7 tariff should only apply to those local distribution services which are actually provided by the local utility, and which could, in some situations, be made in tandem with FERC-jurisdictional charges for transmission service, but which cannot replace or duplicate such charges.

⁵⁴ See PJM II, 94 FERC at 61,893 (finding that Niagara Mohawk's practice of charging NRG for the provision of station power under a retail rate, when NRG was in fact self-supplying its station power needs, is not consistent with Commission's findings in PJM II).

38. As we discuss in our concurrently-issued Nine Mile order,⁵⁵ a merchant generator like AES has a choice of suppliers of station power, and AES has chosen to self-supply its station power needs under the NYISO tariff. To allow Niagara Mohawk to charge AES for station power would prevent AES from self-supplying its own station power and, in effect, would compel it to take and pay for a fictitious service from a utility to which it is not even interconnected and whose local distribution facilities it is not using. Such a result is inimical to competition. A standalone generator such as Somerset should be able to self-supply station power either remotely or locally, or to take service from another supplier under a retail tariff. The pro-competitive goals of Order No. 888 require no less.⁵⁶ It should not be, and is not, required to purchase station power from a particular utility – especially one with which the generator is not physically interconnected.

39. We also reject Niagara Mohawk's position that the fact that the Somerset facility is not physically interconnected with Niagara Mohawk's system has no bearing on Niagara Mohawk's right to impose local delivery service charges on AES for the delivery of station power to Somerset. It states that it may do so, because the New York Commission ruled that it is appropriate for the charges paid by generators for station service to include a share of the stranded cost and benefit charges paid by all Niagara Mohawk retail customers, and that approximately 75 percent of the retail charges that Niagara Mohawk has billed to AES for the Somerset facility comprise such stranded cost and benefit charges.⁵⁷

40. Niagara Mohawk bases this view on language in Order No. 888, which assumes that the utility is, in fact, providing the customer with a service, which has not been demonstrated here, either before the unit was sold or after. Here, no Niagara Mohawk facilities are being used to provide station power to Somerset. Moreover, the point of interconnection between the Somerset unit and the NYPA system, where energy is injected into the transmission grid and where station power energy would be received, is at 345 kV, a transmission level voltage. Any services that would be provided, if Niagara

⁵⁵ Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corporation, 105 FERC ¶ 61,336 (2003) (Nine Mile) (Docket No. EL03-234-000).

⁵⁶ As to Niagara Mohawk's argument that the D.C. Circuit's Detroit Edison decision controls here, the Court in that decision stated that that the Commission cannot extend its jurisdiction to the charges for local delivery service, and as shown above, in this case there has been no local delivery to the Somerset plant. See also Nine Mile, 105 FERC ¶ 61,336 at P 26.

⁵⁷ Answer at 6-7.

Mohawk were to sell station power to Somerset, would not involve Niagara Mohawk's local distribution facilities that are subject to retail regulation.

41. Niagara Mohawk has cited to Order No. 888 to support its allegation that the state can authorize charges to merchant generators for station power even when (a) to obtain power, the generators have chosen to self-supply and utilize the netting provisions of the NYISO Services Tariff, and (b) to receive the station power, the generators are only using transmission facilities.⁵⁸

42. As we have emphasized in our station power orders since PJM II, where a merchant generator is, in fact, using local distribution facilities owned by another for delivery of station power (as may be the case for third-party supply), it is the responsibility of the merchant generator to make appropriate arrangements for such service.⁵⁹ However, as we explain in more detail below, 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. In short, the utility must actually be providing a service before it can levy charges.

43. It is particularly inappropriate for parties to rely on Order No. 888 to justify their attempts to prevent generators from using the netting provision of a Commission-jurisdictional tariff (such as the NYISO Services Tariff) on the grounds that this Commission, in Order No. 888, supposedly approved the assessment of stranded costs and benefits on the new owners of divested generation where no identifiable local distribution facilities are being used, as is the case with respect to the Somerset facility. In fact, when a merchant generator is not using the local distribution facilities of another party to receive station power, Order No. 888 cannot be relied on to justify the imposition of any delivery charge other than transmission charges subject to this Commission's

⁵⁸ In a June 26, 2003 letter to the president of IPPNY, Niagara Mohawk's General Counsel asserts: "In our view, station power service retains an element of state-jurisdictional distribution delivery service. For that reason, we firmly believe that we are entitled to continue assessing state-jurisdictional charges for the distribution component of the service." See Exhibit 1 to Complaint in Nine Mile. As explained at length in our Nine Mile order and later in this order, we disagree.

⁵⁹ "The delivery of station power may also involve the usage of local distribution facilities; this aspect of the transaction may be subject to regulation by a state regulatory authority." PJM II, 94 FERC at 61,891 n.60 (emphasis added).

jurisdiction (as is expressly provided for under the NYISO Services Tariff). This position is fully consistent with our previous station power orders. While this Commission cannot approve or disapprove a retail rate for standby service, it is within our purview to interpret and enforce the tariffs on file at the Commission, including the NYISO Services Tariff's netting provision, and to interpret and enforce our own orders, such as Order No. 888.

44. The passage in question from Order No. 888 reads as follows:

First, even when our technical test for local distribution facilities identifies no local distribution facilities for a specific transaction, we believe that states have authority over the service of delivering electric energy to end users. Second, through their jurisdiction over retail delivery services, states have authority not only to assess stranded costs but also to assess charges for stranded benefits, such as low-income assistance and demand-side management. Because their authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination of method they find appropriate. They do not have to assign them to specific facilities.

Thus, while we believe that in most cases there will be identifiable local distribution facilities subject to state jurisdiction, we also believe that even when there are no identifiable local distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users. Under this interpretation of state/federal jurisdiction, customers have no incentive to structure a purchase so as to avoid using identifiable local distribution facilities in order to bypass state jurisdiction and thus avoid being assessed charges for stranded costs and benefits.⁶⁰

45. First, by the use of the term "stranded costs," the Commission throughout Order No. 888 was referring to generation-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility's system to take power service from

⁶⁰ Order No. 888 at 31,783 (footnotes omitted).

a competing power supplier.⁶¹ However, when a utility divests its generators as part of its retail restructuring, the sale negates the need for stranded cost recovery under the Order No. 888 model. This is particularly true when the utility recovers a premium over book value in the purchase price for the divested generation. The recovery of stranded costs via retail charges for station power above and beyond the premium already received by the divesting utility could reasonably be construed as a windfall, and is not authorized by Order No. 888.

46. Second, the references in this passage to “no identifiable local distribution facilities” are addressing such situations as where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local distribution facilities (which typically are lower voltage facilities⁶²) may not be readily identifiable as among the facilities now used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility’s service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation in this proceeding, where the generation has been divested to a merchant generator and the rates charged to that merchant generator for local distribution service are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.⁶³

47. In short, Order No. 888 is not authority for Niagara Mohawk’s position that a merchant generator may be charged for delivery of station power even though, as is the case here, the generator uses none of Niagara Mohawk’s local distribution facilities and, indeed, is not directly interconnected to any Niagara Mohawk local distribution facilities, and no local distribution service is actually provided.

⁶¹ See TAPS, 225 F.3d at 699; Order No. 888-A at 30,176, 30,350-51; accord Order No. 888 at 31,637, 31,790, 31,798, 31,849. As we explained in Order No. 888, if power customers leave their utilities’ systems to reach other power suppliers without paying a share of prudently-incurred generation costs, the generation costs incurred to serve those customers will become stranded unless they can be recovered from other customers. Order No. 888 at 31,785; accord Order No. 888-A at 30,349, 30,350-51.

⁶² Order No. 888 at 31,771, 31,780, 31,783.

⁶³ Order No. 888 at 31,845-46.

The Commission orders:

(A) AES's complaint is hereby granted and AES may be charged only in accordance with NYISO's Services Tariff, as discussed in the body of this order.

(B) Niagara Mohawk is hereby directed to comply with its obligations to provide NYISO any data needed for NYISO's administration of its station power provisions pursuant to the NYISO Services Tariff.

(C) Niagara Mohawk is hereby directed to submit a report describing its actions taken in compliance with Ordering Paragraph (B), no later than 30 days after the issuance of this order

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.