

105 FERC ¶ 61,336
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nine Mile Point Nuclear Station, LLC

v.

Docket No. EL03-234-000

Niagara Mohawk Power Corporation

ORDER GRANTING COMPLAINT

(Issued December 23, 2003)

1. On September 26, 2003, Nine Mile Point Nuclear Station, LLC (Nine Mile) filed a complaint pursuant to section 206 of the Federal Power Act (FPA), alleging that Niagara Mohawk Power Corporation (Niagara Mohawk) is interfering with Nine Mile's ability to obtain station power service under the Market Administration and Control Area Services Tariff (Services Tariff) of the New York Independent System Operator, Inc. (NYISO). This order grants Nine Mile's complaint and directs Niagara Mohawk to take actions in conformance with the findings in the order. This action benefits customers by resolving disputes over station power-related services.

COMPLAINT

2. Nine Mile states that it purchased a nuclear generating station in Oswego, New York from Niagara Mohawk in December 2000 and has operated the two units at that station since that time. Nine Mile has received station power service¹ under Niagara

¹ Nine Mile relies on the definition of station power found in NYISO's Market Administration and Control Area Services Tariff (Services Tariff). See New York Independent System Operator, FERC Electric Tariff, Original Volume No. 2, First Revised Sheet No. 67A, Section 2.172c.

Mohawk's retail tariff SC-7.² Nine Mile states that it sought to terminate service under the retail tariff effective as of September 17, 2003, in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff.³ The NYISO Services Tariff provides that a generator may self-supply station power during any calendar month when its net output for that month is positive, or when its net output is negative and another generator owned by the same entity has positive net output in sufficient amount during that month to offset its negative net output (i.e., remote self-supply).

3. Nine Mile states that, based on its operations to date, it expects that each generating unit will experience positive net output over the monthly netting period provided under the NYISO Services Tariff. To the extent a unit experiences a prolonged outage, Nine Mile states that it intends to self-supply that unit's station power remotely from power generated by the sister unit. Nine Mile concludes that, under Commission precedent, it will be entirely self-sufficient with respect to station power. Nine Mile asserts that only Commission-jurisdictional charges for the delivery of station power, if applicable, should be charged. Thus, there should be no retail service charges from Niagara Mohawk.

4. Nevertheless, Nine Mile asserts that Niagara Mohawk has not responded to Nine Mile's notice of termination but rather intends to continue to assess retail charges on Nine Mile and has threatened suspension of delivery service for non-payment. Nine Mile also alleges that Niagara Mohawk is failing to assist NYISO in the administration of its station power rules and that NYISO will thus be unable to accurately account for and issue bills reflecting Nine Mile's self-supply of station power. Nine Mile concludes that Niagara Mohawk's stance jeopardizes the implementation of station power service under the NYISO Services Tariff and will impose unlawful retail charges on Nine Mile as well as potentially inaccurate charges by NYISO by virtue of Niagara Mohawk's failure to provide NYISO meter information needed for accurate administration of the NYISO settlement process. According to Nine Mile, these practices will result in hundreds of thousands of dollars in unlawful charges.

² P.S.C. No. 207 Electricity, Service Classification No. 7 (Sale of Standby Service to Customer With On-Site Generation Facilities).

³ NYISO, FERC Electric Tariff, Original Volume No. 2, Section 4.24.

5. Nine Mile cites to several Commission orders⁴ for its contention that merchant generators like Nine Mile that self-supply station power are not subject to retail charges since there is no sale for end use, and further that when a generating station nets station power, no state jurisdiction attaches to the delivery of any power consumed, because such delivery does not involve a “sale,” as long as no facilities classified as local distribution facilities are involved, which Nine Mile states is the case here. Nine Mile posits that generators that only remotely self-supply over facilities subject to this Commission’s jurisdiction, *i.e.*, its circumstance, are only responsible for rates subject to this Commission’s jurisdiction. The complaint repeats Commission conclusions that the determination of whether a generating facility has positive net output can be measured over a reasonable time period,⁵ and that a utility cannot require a merchant generator to take retail station power service under retail rates.⁶

6. Nine Mile requests that the Commission: (1) direct Niagara Mohawk to cease charging retail rates after September 16, 2003 to the extent Nine Mile’s accounts are net positive for each month, through either on-site or remote self-supply of station power; (2) direct Niagara Mohawk to coordinate with NYISO to provide information needed to ensure that Nine Mile is charged accurately for its self-supply of station power; and (3) grant other necessary and appropriate relief to allow Nine Mile to self-supply station power service.

ANSWER

7. In its Answer, Niagara Mohawk frames the issue in this case in terms of whether it may recover under its state-approved retail tariff charges for the delivery of energy consumed by Nine Mile’s generating plants. Niagara Mohawk asserts that the Commission and the courts have confirmed that states have jurisdiction over the local delivery of power to end users in all circumstances. According to Niagara Mohawk, the

⁴ See, *e.g.*, PJM Interconnection, LLC, 94 FERC ¶ 61,251 (2001) (PJM II), order denying reh’g and providing clarification, 95 FERC ¶ 61,333 (2001) (PJM III); KeySpan-Ravenswood, Inc., 101 FERC ¶ 61,230 (2002), reh’g pending (KeySpan III).

⁵ See PJM II, 94 FERC at 61,892.

⁶ Id.

Commission found, in Order No. 888,⁷ that recognizing state authority over the service of local delivery of electricity to end users, regardless of the classification of the facilities involved, ensured that retail customers would have no incentive to bypass state-authorized stranded cost and benefit charges by connecting directly to transmission facilities.⁸ Niagara Mohawk concludes that Order No. 888's statement that states have jurisdiction in all circumstances over the service of delivering energy to end users includes circumstances involving no "sale" of energy from one party to another.

8. Niagara Mohawk states that, since July 1, 2002, it has provided station power service under retail tariff SC-7, which applies to service provided to customers with on-site generation facilities, such as Nine Mile. Rates under the SC-7 classification are "stratified" so that charges to customers taking service at a higher voltage do not include the costs of lower voltage distribution facilities. Usage under the SC-7 rate classification is measured in 15-minute increments. The New York Public Service Commission (New York Commission), Niagara Mohawk states, approved Niagara Mohawk's SC-7 rate classification, finding that the SC-7 rates are consistent with state policy that provides that generators receiving delivery of station power should be required to pay their allotted share of stranded costs and stranded benefits. The bulk of the charges to customers like Nine Mile under SC-7, Niagara Mohawk claims, are stranded cost and benefit charges.

9. According to Niagara Mohawk, states retain jurisdiction over the service of local delivery of power regardless of the type of facilities used to provide that service. Niagara Mohawk cites to Detroit Edison Co. v. FERC, 334 F.3d 48 (D.C. Cir. 2003) (Detroit

⁷ 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, 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).

⁸ Order No. 888 at 31,783. Niagara Mohawk also quotes this excerpt: "Because [states'] authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination or method they find appropriate. They do not have to assign them to specific facilities." Id.

Edison), where, Niagara Mohawk maintains, the court vacated an order that allowed a retail customer to take delivery service under a FERC-approved tariff rather than a state-approved retail tariff. Niagara Mohawk interprets the court's decision as concluding that the Commission cannot allow an end user to take local delivery service under a FERC-jurisdictional tariff, and thereby interfere with the state's attempt to allocate stranded costs, because to do so exceeds the Commission's statutory authority.

10. Niagara Mohawk next analyzes this precedent in the context of station power, citing Northeast Utilities Services Co. v. NRG Energy, Inc.⁹ In that case, the Commission held, among other things, that transmission providers may impose state-approved charges on retail deliveries of station power. In a more recent ruling "clarifying" NU, according to Niagara Mohawk, the Commission confirmed its position that the state has jurisdiction to approve charges for the service of delivering electricity to end users, including charges for the recovery of retail stranded costs and benefits.¹⁰ Niagara Mohawk concludes that the rates in its SC-7 tariff for its delivery of station power to Nine Mile fully satisfy the rate design guidelines outlined by the Commission in Warrior Run. Niagara Mohawk reasons that, because the New York Commission has exercised its jurisdiction to impose retail charges for the local delivery of electricity to generator end users, including shares of stranded costs and benefits, Nine Mile's claim "that the NYISO's federal tariff applies exclusively and preemptively to all aspects of its station power delivery service is simply wrong."¹¹

11. Finally, Niagara Mohawk cites several policy reasons for recognizing state jurisdiction over local delivery service. First, it argues that depriving state regulators of this jurisdiction would take away their authority to impose non-bypassable distribution or retail stranded cost charges. As a consequence, Niagara Mohawk speculates, this would open an avenue for bypass of state stranded cost and benefit charges for all those who could restructure existing transactions to bring themselves within the definition of "self-suppliers," resulting in a heavier burden for those other customers unable to exploit it. Last, Niagara Mohawk warns that such a regime would drag the Commission into the

⁹ 101 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).

¹⁰ See Warrior Run, 104 FERC ¶ 61,051 at P 15-17.

¹¹ Answer at 3.

process of retail ratemaking, forcing it to “assume the role of arbiter of retail stranded cost recovery issues.”¹²

NOTICE, INTERVENTIONS, COMMENTS, AND RESPONSIVE PLEADINGS

12. Notice of Nine Mile’s complaint was published in the Federal Register, 68 Fed. Reg. 57,685 (2003), with motions to intervene and comments due on or before October 20, 2003. The New York Commission filed a notice of intervention and comments, and supplemental comments, opposing the complaint. Timely motions to intervene raising no substantive issues were filed by NRG Companies (NRG),¹³ the New York Power Authority, and Northeast Utilities Service Company on behalf of the NU Operating Companies. Timely motions to intervene and comments in support of the complaint were filed by Long Island Power Authority and LIPA (LIPA), the Independent Power Producers of New York, Inc. (IPPNY), AES NY, L.L.C. and AES Eastern Energy, L.P. (AES), and Reliant Resources, Inc. (Reliant). New York Transmission Owners (NY Transmission Owners)¹⁴ filed a timely motion to intervene and comments opposing the complaint.

13. Among those supporting the complaint, AES believes that the Commission should reaffirm its prior rulings that Niagara Mohawk has no authority to bill Nine Mile or any other merchant generator retail rates for self-supplied station power. It asserts that Niagara Mohawk’s continuing attempt to bill retail rates to generators that self-supply station power, including AES’s generating facility located in Somerset, New York, is expressly prohibited by Commission precedent. IPPNY, which represents a large number of generators that are self-supplying their station power requirements but are still being billed under so-called retail tariffs for station power service by Niagara Mohawk, asserts that an order granting the relief requested by Nine Mile is necessary to promote uniform, efficient and non-discriminatory station power supply practices in the emerging regional

¹² Id. at 20.

¹³ NRG consists of NRG Power Marketing, Inc., Arthur Kill Power LLC, Astoria Gas Turbine Power LLC, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor Power LLC.

¹⁴ NY Transmission Owners are comprised of Central Hudson Gas & Electric Corp., Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corp. (NYSEG), Rochester Gas and Electric Corp., and Orange and Rockland Utilities, Inc.

wholesale electricity markets. LIPA and Reliant similarly support the complaint and urge the Commission to grant the relief requested in the complaint.

14. NY Transmission Owners and New York Commission believe that the Commission should deny the complaint because the relief it requests conflicts with Commission policies and is beyond Commission jurisdiction, and because Nine Mile has failed to establish that discrimination exists. They contend that the complaint effectively asks the Commission to declare that the state has no jurisdiction to regulate local delivery service to the Nine Mile facilities, and they argue that the Commission has no authority to define the limits of the state's jurisdiction over local delivery service. They assert that the FPA controls, and the statute leaves the regulation of local delivery service to the states. Moreover, they argue that both Commission precedent and, more importantly, Detroit Edison have already expressly recognized the state's ability to regulate local distribution/delivery service. Therefore, they conclude that the relief requested should be denied and the complaint dismissed.

15. Nine Mile filed a response to the arguments raised by the New York Commission and Niagara Mohawk. Niagara Mohawk subsequently filed an answer.

16. On December 5, 2003, Niagara Mohawk filed a motion to lodge a decision issued by the New York Commission on November 25, 2003, accepting revisions to its retail tariff SC-7. On December 12, 2003, the New York Commission also filed a motion to lodge that decision.

DISCUSSION

Procedural Matters

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. ' 385.214 (2003), the notice of intervention and the timely, unopposed motions to intervene of the entities that filed them make them parties in this proceeding. 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 Nine Mile's response and Niagara Mohawk's subsequent answer and will, therefore, reject them. We will, however, grant Niagara Mohawk's and the New York Commission's motions to lodge the New York Commission's November 25 decision.

Station Power Cases

18. 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 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.¹⁵ 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.”¹⁶

19. 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.”¹⁷

20. 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.”¹⁸ 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.

¹⁵ PJM II, 94 FERC at 61,890.

¹⁶ Id.

¹⁷ Id. at 61,893. The Commission concluded that that factual determination could not be made based on the pleadings before it in that proceeding.

¹⁸ Id. at 61,892-93 (emphasis in original).

21. On May 15, 2002, the Commission issued four orders concerning station power, further explaining the Commission's jurisdiction over station power and its delivery.¹⁹ 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).²⁰ 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.²¹

22. Later in 2002, the Commission considered tariff provisions proposed by NYISO to address the delivery of station power.²² 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 uses third-party supply to meet its station power needs, monthly netting determines the quantity of transmission the generator must obtain.²³

23. 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

¹⁹ 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).

²⁰ See KeySpan I, 99 FERC at 61,679; accord Sunbury I, 99 FERC at 61,683.

²¹ See KeySpan I, 99 FERC at 61,679-80; accord Sunbury I, 99 FERC at 61,683; USGen, 99 FERC at 61,686.

²² See KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc., 101 FERC ¶ 61,230 (2002), reh'g pending (KeySpan III).

²³ Id. at P 8, 23.

compensation for such delivery is a matter properly for the New York Commission and not for this Commission.”²⁴ 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.”²⁵

24. In NU, 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.²⁶ The Commission determined that “when . . . NRG . . . is not able to self supply, there is a sale of station power from a third party.”²⁷

25. 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.”²⁸

26. 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

²⁴ Id. at P 20.

²⁵ Id. at P 24, 25.

²⁶ 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.

²⁷ 101 FERC ¶ 61,327 at P 25.

²⁸ Id. (emphasis added).

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.^[29]

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.³⁰

Tariff Provisions

27. The Commission has held that jurisdiction over the provision of station power depends on how it is supplied.³¹ Nine Mile has a choice of suppliers and has chosen to self-supply station power and take delivery service under NYISO’s Services Tariff. NYISO’s Services Tariff determines whether a generator’s net output is positive or negative, and thus the quantity of any transmission service utilized, on a monthly basis.

²⁹ Warrior Run, 104 FERC ¶ 61,051 at P 17 (footnotes omitted).

³⁰ Id. at P 16.

³¹ E.g., PJM II, 94 FERC at 61,891.

When Nine Mile maintains a positive net output for every month, it self-supplies station power pursuant to NYISO's Services Tariff, and there is no sale of station power.³² Moreover, as such delivery does not make use of any Niagara Mohawk local distribution facilities, there would be no delivery over and no charge for the use of Niagara Mohawk's local distribution facilities. Niagara Mohawk has no basis for requiring Nine Mile to buy or pay for the delivery of station power under its retail tariff SC-7 when Nine Mile self-supplies.³³

28. We do not believe that Detroit Edison requires a different result. Detroit Edison involved tariff provisions of the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) that potentially allowed an unbundled retail customer to take distribution service under Midwest ISO's Open Access Transmission Tariff, and thus to

³² See *id.* at 61,890-92. Niagara Mohawk's SC-7 retail tariff determines station power demand based on 15-minute increments, while Niagara Mohawk's Services Tariff does so monthly. Thus, in theory, a generator could accumulate significant station power charges if the charges were based on Niagara Mohawk's calculation, while, in contrast, maintaining monthly positive net output (and thus lower or no charges) as billed by NYISO. To the extent that there is any merit (and we believe there is not) to Niagara Mohawk's position that it must be able to recover under its retail tariff charges for energy delivered to Nine Mile's plants, there must be consistency between the amount of energy purchased and the quantity of transmission used. NYISO's Services Tariff must be controlling so that the wholesale and retail tariffs yield harmonious results so that customers are not over-billed and service providers are accurately compensated. Indeed, the recent New York Commission decision lodged by Niagara Mohawk expressly recognized the need to harmonize state and Federal regulations. See November 25 Decision at 14, 15.

³³ In this regard, the New York Commission made clear in its acceptance of Niagara Mohawk's revision to the SC-7 tariff 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 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. Although Nine Mile does not anticipate any negative net output over any month, should that occur, it must compensate the supplier.

avoid paying stranded cost charges assessed under a retail tariff. The court found that the Commission exceeded its statutory jurisdiction by accepting such tariff provisions. NYISO's netting provision does not provide for either transmission or distribution charges, however, but merely determines whether or not a generator has self-supplied station power and the quantity of delivery service – in this case, given that local distribution facilities are not used to provide such delivery service, Commission-jurisdictional transmission service – it takes and must pay for. Thus, Nine Mile's reliance on NYISO's netting provision is not contrary to Detroit Edison.

29. Contrary to Niagara Mohawk's assertion, Warrior Run did not merely clarify the rulings in NU. Rather, the Commission in Warrior Run explicitly reversed the misstatement that a transmission provider may impose charges based on the allocated cost of local distribution facilities even though no local distribution facilities are involved in the delivery of station power.³⁴ The Commission found there that “[s]ince the delivery apparently involves transmission facilities only, the Commission would have jurisdiction over the delivery and the rates for the delivery. In our view, a charge for distribution service levied by [the transmission provider] for the transmission of the station power over [its] transmission facilities would appear to be an impermissible double charge for transmission service.”³⁵ Thus, there is no basis for Niagara Mohawk's position that it can impose local distribution rates when self-supplied station power is delivered over only Commission-jurisdictional facilities, as is the case with Nine Mile.

30. This result is consistent with policy considerations discussed in previous station power cases. In PJM II, the Commission noted that vertically-integrated utilities traditionally had treated station power as net or negative generation. The Commission determined that “[i]f a generating facility netted its station power requirements against its gross output when it was owned by a vertically-integrated utility, the former owner cannot require the new owner to discontinue the practice of netting, and require the new owner to buy station power under a retail tariff, simply because the generating facility in question had changed owners.”³⁶ Further, allowing self-supplying merchant generators to net, as is permitted in New York, addresses the concerns of merchant generators that vertically-integrated utilities otherwise could favor their own or affiliated generating

³⁴ Warrior Run, 104 FERC ¶ 61,051 at P 17.

³⁵ Id. at P 16.

³⁶ PJM II, 94 FERC at 61,894.

stations to the competitive disadvantage of the new owners of facilities that had been divested.

Interpretation of Order No. 888

31. Niagara Mohawk and the New York Commission have cited to Order No. 888 to support their allegation that the state can authorize charges to merchant generators for station power even when the generators have chosen to self-supply and utilize the netting provisions of the NYISO Services Tariff and even when the generators are receiving station power over only Commission-jurisdictional facilities. 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."³⁷

32. 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.³⁸ 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.

33. 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

³⁷ See Complaint, Exhibit 1.

³⁸ "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).

distribution facilities are being used, as is the case with respect to Nine Mile's units. That is, when a merchant generator is not, in fact, using the local distribution facilities of another to receive station power (the case here), Order No. 888 cannot be relied on to justify the imposition of any delivery charge other than transmission charges subject to this Commission's 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.

34. 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.[³⁹]

35. 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

³⁹ Order No. 888 at 31,849 (footnotes omitted).

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 a competing power supplier.⁴⁰ 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.

36. 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 facilities⁴¹) 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,⁴² and rates to that merchant generator are at issue. Indeed, in Order No. 888, we reaffirmed that we would consider

⁴⁰ 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.

⁴¹ Order No. 888 at 31,771, 31,780, 31,783.

⁴² See, e.g., Niagara Mohawk Holdings, Inc., 95 FERC ¶ 61,381 at 62,412 n.13, reh'g denied, 96 FERC ¶ 61,144 (2001); Niagara Mohawk Power Corporation, 95 FERC ¶ 61,165 (2001).

other methods for dealing with stranded costs in the context of restructuring proceedings, such as divestiture or corporate unbundling.⁴³

37. 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 no local distribution service is actually provided.

Niagara Mohawk Compliance with NYISO Obligations

38. Nine Mile contends that Niagara Mohawk also has refused to comply with its obligations under the NYISO tariff provisions to make available certain metering data and other information required by NYISO for billing purposes. Specifically, Nine Mile states that Niagara Mohawk has not accepted all of the delivery points associated with Nine Mile's accounts in a manner that enables self-supply under the NYISO Services Tariff. According to Nine Mile, this is contrary to Niagara Mohawk's obligations under Section 2.05 of the ISO/Transmission Owner's Agreement.⁴⁴ Niagara Mohawk does not address these allegations in its Answer.

39. It is clear that Niagara Mohawk must provide certain data to NYISO that will assist NYISO in administering the station power provisions of its Services Tariff. Niagara Mohawk has offered no explanation or justification for its actions in this regard, and we will direct it to comply with its obligations under NYISO tariff provisions and to coordinate with NYISO in providing any required data. We will direct Niagara Mohawk to file a report no later than 30 days after the issuance of this order detailing the steps it has taken to comply with these requirements.

The Commission orders:

(A) Nine Mile's complaint is hereby granted and Nine Mile 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.

⁴³ Order No. 888 at 31,845-46.

⁴⁴ See Complaint at 3.

(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.