

109 FERC ¶ 61,169
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Niagara Mohawk Power Corporation

v.

Docket No. EL03-27-000

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 COMPLAINT

(Issued November 19, 2004)

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

¹ 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 (the Generators) of NRG,² claiming that the Generators have taken bundled retail station power service from Niagara Mohawk since July 1999, when NRG purchased three generating stations from Niagara Mohawk, but have 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 in their answer that the generating stations had self-supplied most of their station power needs, and that there has been no sale of energy by Niagara Mohawk to the Generators. The Generators relied on Commission precedent that they asserted held that generators have the right to self-supply station power by netting consumption against output on a monthly (or other reasonable period) basis.³

3. 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 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

4. At this juncture, therefore, the Commission is considering the merits of the complaint, based on the facts presented in the joint stipulation of facts and the arguments in the initial and reply briefs, as well as any pertinent information that was in the record

² 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).

³ *Citing, e.g., PJM III, supra.*

⁴ *Niagara Mohawk Power Corp. v. Huntley Power LLC, et al.*, 102 FERC ¶ 61,295 (March 14 Order), *reh'g denied*, 105 FERC ¶ 61,321 (2003). The March 14 Order held the hearing in abeyance pending settlement judge procedures. Niagara Mohawk and NRG attempted to informally resolve their dispute, but could not.

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

prior to the initiation of hearing procedures. We focus our discussion by responding to the questions in the joint statement of issues filed by Niagara Mohawk and NRG in this proceeding on September 8, 2003.

Station Power Needs at the Generating Stations

5. Each of the generating facilities is owned by a separate NRG subsidiary and consists of several coal or gas-fired units. Dunkirk's facility is interconnected with Niagara Mohawk's transmission facilities at eight points. Electricity generated by the plant is delivered to Niagara Mohawk's transmission system at four points, and there are four other points where the station and auxiliary equipment receive electricity transmitted over Niagara Mohawk transmission facilities. The Huntley facility is interconnected with Niagara Mohawk's transmission system at 12 points, six points where electricity generated by the plant is delivered to Niagara Mohawk's transmission facilities and six points where the station and auxiliary equipment receive electricity transmitted over Niagara Mohawk transmission facilities. The Oswego facility is interconnected with Niagara Mohawk's transmission system at ten points, two points where electricity generated by the plant is delivered to Niagara Mohawk's transmission facilities and eight points where the station and auxiliary equipment receive electricity transmitted over Niagara Mohawk transmission facilities.

6. Each of the Dunkirk, Huntley, and Oswego stations consume electric energy for heating, lighting, air conditioning, and office equipment needs of the buildings, and for the electric auxiliary equipment required to operate the boiler and turbine-generator sets to produce electricity. This auxiliary equipment includes a wide variety of devices ranging from fans and pumps to coal thaw sheds and coal pulverizers. A significant portion of each station's electricity needs can be supplied directly from transformers tied directly to the generator output bus of the operating generator units. This type of electricity is referred to as "Normal House Service." At Dunkirk and Huntley, approximately 94 percent and 87 percent, respectively, of each station's electricity needs have been Normal House Service since July 1999. Niagara Mohawk does not charge for, or meter, this electricity use.

7. At each station, 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 at each of the stations cannot be supplied directly from transformers tied directly to the generator output bus of operating generator units at that station, but 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.” When Niagara Mohawk owned the Dunkirk, Huntley, and Oswego stations, Niagara Mohawk identified and recorded the Reserve House Service consumed at each station.

8. On January 11, 2000, the first bill for electric service to the NRG Generators was sent by Niagara Mohawk. The charges were based on rates under Niagara Mohawk’s Retail Tariff P.S.C. No. 207 Electricity (Retail Tariff), for the supply and transmission of electricity to loads at the Huntley Station for the period June through December 1999. Additional bills followed. The NRG Generators made payments to Niagara Mohawk that, in their view, compensated Niagara Mohawk for the fair market value of the power they consumed that was delivered through and measured by revenue meters, approximately \$9.5 million as of August 4, 2003.

Positions of the Parties

9. According to Niagara Mohawk, NRG is challenging paying for delivery of electricity pursuant to Niagara Mohawk’s retail tariff on file with the New York Public Service Commission (New York Commission); Niagara Mohawk argues that NRG has not justified its claim that this Commission may encroach upon the New York Commission’s jurisdiction over the rates and terms of local delivery service to end users. Niagara Mohawk asserts that Order No. 888 held that jurisdiction over the rates and terms of delivering electricity to end users, and over the retail sale of electricity, rests solely with states, regardless of whether the facilities are identified as transmission or local distribution. Niagara Mohawk also cites to *Detroit Edison Co. v. FERC*,⁶ where, it 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 in so doing interfere with the state’s attempt to allocate stranded costs, because to do so exceeds the Commission’s statutory authority.

10. Niagara Mohawk reads Commission precedent as confirming that only states have jurisdiction to approve charges for the service of delivering electricity to end users. In this regard, Niagara Mohawk stresses that its retail tariffs were designed to recover stranded costs and benefits. Further, Niagara Mohawk contends that NRG could not net station power because its plants were configured to receive station power from Niagara Mohawk through service points at geographically separate locations and at lower voltages than those through which they deliver their output to Niagara Mohawk.

⁶ 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*).

11. Niagara Mohawk asserts that it may charge its New York Commission-approved rates for station power to NRG during all time periods at issue, pointing out that the NYISO Services Tariff station power provisions did not become effective until April 1, 2003. In addition, Niagara Mohawk notes that, prior to that date, NRG generators sold all of their metered output to third parties and retained no energy that could be used to self-supply Reserve House Service needs. Niagara Mohawk reasons that, because NRG Generators could not self-supply all of the station power they needed and did not purchase any from a third party, they necessarily obtained that electricity from Niagara Mohawk. Niagara Mohawk asserts that the requirement that the NRG Generators arrange for both transmission and local delivery service does not subject them to double-charging for transmission service because Niagara Mohawk has revised its SC-7 retail rates to provide for the separation of the prior combined charge for transmission and local delivery into separate components. It concludes that, for the state-jurisdictional local delivery services involved in the delivery of station power to NRG, the rates and terms of its retail tariff should continue to apply, including the 15-minute usage measurement provision and its charges for the recovery of retail stranded costs and stranded benefits.

12. In response, NRG relies on the fact that all of its generating stations are connected only to transmission facilities, that the plants are configured to allow output to return to provide station power using no distribution facilities, and that when Niagara Mohawk owned the plants it treated station power as transmission line losses, thus socializing the cost among its customers. The NRG Generators assert that, pursuant to Commission precedent, they have a right to self-supply station power by netting consumption against generation within each generating station. Niagara Mohawk's actions, according to NRG, are frustrating implementation of the NYISO's monthly netting provision.

13. NRG contends that, after April 1, 2003, the NYISO's Services Tariff and the Commission's station power orders preempt application of Niagara Mohawk's retail, "standby" service to the NRG Generators. Prior to that date, NRG asserts that it had a right to net station power on an hourly basis. NRG cites the hourly netting period discussed in *PJM II* and the underlying rationale for netting – to prevent undue discrimination by vertically integrated utilities against merchant generators, ensuring that merchant generators are treated comparably to the way that the utilities treated station power when they owned the facilities. Further, NRG notes that because Niagara Mohawk renders no local distribution service, it is not entitled to continue assessing state jurisdictional charges for local distribution costs.

14. NRG also states that, under Commission precedent, a retail tariff is preempted by Commission rulings where there is a conflict, and states do not have jurisdiction over the delivery of self-supplied station power over transmission facilities. NRG also challenges Niagara Mohawk's contention that the NRG Generators cannot net Reserve House Service merely because it is metered at a different location and different voltage,

claiming that the Commission has rejected that view and determined that all energy received by a generator, regardless at what voltage and what meter, is netted against all energy produced by a facility in a given month.⁷

15. Trial Staff notes that the parties agree that the generating stations at all relevant times generated more electricity than they consumed as station power⁸ and thus they were self-supplying during all relevant periods. Trial Staff concludes that there is no sale of electric energy by Niagara Mohawk, and it is not entitled to charge a retail rate. Trial Staff continues that, because the stations are connected only to transmission facilities, any energy delivered to the station is likewise delivered over transmission facilities and thus is transmission service. Again, the result is that Niagara Mohawk may not charge a retail rate. Trial Staff notes that, prior to April 1, 2003, Niagara Mohawk should be compensated for the use of its transmission facilities as called for in the appropriate transmission rate schedule. For the period after April 1, 2003, Trial Staff states that the station provisions of the NYISO's Services Tariff control.

16. Regarding the appropriate netting period, Trial Staff asserts that the NYISO's monthly netting provision should apply for the period after April 1, 2003, and recommends that prior to that date NRG likewise should be allowed to net on a monthly basis since it is consistent with the current procedure and because the Commission found monthly netting to be reasonable for PJM. With respect to power provided to off-site facilities, Trial Staff recommends that it be considered station power entitled to be netted. This position would be consistent with a prior Commission finding that all energy received by a generator may be netted against all energy produced in a given month, regardless at what voltage or meter, according to Trial Staff.

Discussion

A. Procedural Matters

17. On December 5, 2003, the New York Commission filed a motion for late intervention, motion to lodge, and a reply brief. The New York Commission asserts that there is good cause to allow the intervention because its participation will not disrupt the proceeding or prejudice the parties; the New York Commission agrees that it is bound by the stipulation of facts and the joint statement of issues. The New York Commission

⁷ *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 at P 25 (2002).

⁸ There is an exception for certain periods, but NRG is willing to remunerate Niagara Mohawk for that service.

explains that it did not participate earlier in the proceeding because it originally seemed restricted to the interests of the two litigants, but it has since become apparent that the issues raised have broader application.

18. NRG opposes the late intervention, stating that the New York Commission has not established good cause for the late filing. NRG asserts that the New York Commission had ample and early notice of the implications of the proceeding and that granting late intervention would disrupt the proceeding. NRG insists that the New York Commission's interest is adequately represented by Niagara Mohawk since they seek the same relief, and that other parties will be burdened and prejudiced if the reply brief is accepted, as there will be no opportunity to respond to any additional arguments raised by the New York Commission.

19. Parties seeking late intervention must demonstrate that good cause exists to grant such intervention.⁹ The New York Commission, which filed its motion to intervene a year after the complaint was filed and nine months after we ordered the evidentiary hearing, has failed to make this demonstration. Accordingly, we will deny the motion to intervene out-of-time. Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2004), only participants or persons who have filed timely motions to intervene which have not been denied may file motions. Because the New York Commission is neither a party nor a participant,¹⁰ its motion is not properly before the Commission, and we will dismiss it.

B. Station Power Precedent

20. The recent line of station power cases began with a series of orders involving PJM. The Commission found in *PJM II* and *PJM III* 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.¹¹ 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

⁹ See 18 C.F.R. § 385.214(d) (2004).

¹⁰ A participant is defined as either a party or Commission trial staff. See 18 C.F.R. § 385.102(b) (2004).

¹¹ *PJM II*, 94 FERC at 61,890.

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.”¹²

21. 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.”¹³

22. The Commission also entertained a request by New York State Electric & Gas Corporation (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.”¹⁴ 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.

23. In *PJM IV*,¹⁵ 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. The Commission found that monthly netting was appropriate because it coincided with PJM's monthly billing cycle, would require PJM to only examine net output once a month to determine if any retail sales of station power occurred during that month, and would not require PJM to develop a new settlement system.

¹² *Id.*

¹³ *Id.* at 61,893. The Commission concluded that that factual determination could not be made based on the pleadings before it in that proceeding.

¹⁴ *Id.* at 61,892-93 (emphasis in original).

¹⁵ *PJM Interconnection, LLC*, 95 FERC ¶ 61,470 (2001) (*PJM IV*).

24. On May 15, 2002, the Commission issued four orders concerning station power, further explaining the Commission's jurisdiction over station power and its delivery.¹⁶ 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).¹⁷ 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 (including low-voltage transmission) lines and considered to be transmission service under the jurisdiction of the Commission.¹⁸

25. Later in 2002, the Commission considered tariff provisions proposed by NYISO to address the delivery of station power, specifically section 4.24 of NYISO's Services Tariff.¹⁹ 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.²⁰

26. The Commission 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 state matter properly addressed by the New York

¹⁶ *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).

¹⁷ *See KeySpan I*, 99 FERC at 61,679; *accord Sunbury I*, 99 FERC at 61,683.

¹⁸ *See KeySpan I*, 99 FERC at 61,679-80; *accord Sunbury I*, 99 FERC at 61,683; *USGen*, 99 FERC at 61,686.

¹⁹ *See KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) (*KeySpan III*), *reh'g denied*, 107 FERC ¶ 61,142 (2004) (*KeySpan IV*), *clarified*, 108 FERC ¶ 61,164 (2004) (*KeySpan V*).

²⁰ *KeySpan III*, at P 8, 23.

Commission and not for this Commission.”²¹ 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.”²²

27. In a later filing, addressed in *Northeast Utilities Services Co. v. NRG Energy, Inc.*,²³ 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.²⁴ The Commission determined that “when . . . NRG . . . is not able to self supply, there is a sale of station power from a third party.”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.*”²⁶

28. 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:

²¹ *Id.* at P 20.

²² *Id.* at P 24, 25.

²³ 101 FERC ¶ 61,327 (2002) (*NU*), *rev’d in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (2003) (*Warrior Run*), *reh’g denied*, 105 FERC ¶ 61,357 (2003), *reh’g denied*, 106 FERC ¶ 61,181, *order on voluntary remand*, 108 FERC ¶ 61,316 (2004).

²⁴ 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.

²⁵ *NU*, 101 FERC ¶ 61,327 at P 25.

²⁶ *Id.* (emphasis added).

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.^[27]

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.²⁸

30. More recently, in December 2003, the Commission granted two complaints filed by customers of Niagara Mohawk, alleging that Niagara Mohawk was interfering with their ability to obtain station power service under the NYISO’s Services Tariff.²⁹ The Commission held that 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; hence, when a generator maintains a positive monthly net output it self-supplies station power and there is no sale of station power. The Commission also noted that when delivery of power to these generators does not make use of Niagara Mohawk’s local distribution facilities, there cannot be any charge for the “use” of local

²⁷ *Warrior Run*, 104 FERC ¶ 61,051 at P 17 (footnotes omitted).

²⁸ *Id.* at P 16.

²⁹ *Nine Mile Point Nuclear Station LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003) (*Nine Mile*), *reh’g pending*; *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 (2003) (*AES Somerset*), *reh’g pending*.

distribution facilities. The Commission thus concluded that Niagara Mohawk had no basis for requiring the generators either to buy or to pay for the delivery of station power under its retail tariff when the generators self-supply station power on-site.

31. These orders also discussed the application of Order No. 888³⁰ to the provision of station power service. The Commission explained that “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.”³¹ The Commission went on to state that “the utility must actually be providing a *service* before it can levy charges.”³²

32. The Commission stated, in this regard, that Order No. 888’s use of the term “stranded costs” was referring to generation-based stranded costs (generation-related costs stranded if, as a result of open access, customers left a utility’s system to take power service from a competing power supplier). But, when the utility divests its generators as part of retail restructuring (as was the case for Niagara Mohawk), 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

³⁰ 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, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996) (*Order No. 888*), *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), *aff'd sub nom., New York v. FERC*, 535 U.S. 1 (2002).

³¹ *Nine Mile*, 105 FERC ¶ 61,336 at P 32; *AES Somerset*, 105 FERC ¶ 61,337 at P 42.

³² *Id.*

³³ *Nine Mile*, 105 FERC ¶ 61,336 at P 34-36; *AES Somerset*, 105 FERC ¶ 61,337 at P 43-45.

33. Moreover, Order No. 888's reference to the ability to charge even when there are "no identifiable local distribution facilities" was directed to the situations where large industrial or commercial customers that formerly took bundled retail electric service at relatively high voltages, so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable. In such situations, when those customers opt to take advantage of open access and switch to competing suppliers, the possible inability to identify local distribution facilities should not be an obstacle to the inclusion of stranded costs in the retail rates to be charged such customers. But that situation was not present in either *Nine Mile* or *AES Somerset*.³⁴

34. The Commission thus concluded that Order No. 888 did not provide justification to charge a merchant generator for delivery of station power where, as was the case in both *Nine Mile* and *AES Somerset*, a merchant generator uses no local distribution facilities and no local distribution service is actually provided.³⁵

35. Finally, the Commission denied rehearing of *KeySpan III*, finding that many of the arguments raised on rehearing were collateral attacks on the *PJM* orders.³⁶ The Commission reiterated that the self-supply of station power is distinguishable from a retail purchase of station power and that netting over a reasonable period of time does not involve retail sales of electricity. The Commission found that section 4.24 of NYISO's Services Tariff does not encroach on state authority over retail sales. The Commission stated that, in the event of a conflict between federal and state tariff provisions, the federal tariff provisions must control.³⁷ The Commission found that the proposed one-month netting interval is just and reasonable.³⁸

³⁴ *Nine Mile*, 105 FERC ¶ 61,336 at P 36-37; *AES Somerset*, 105 FERC ¶ 61,337 at P 46-47.

³⁵ *Nine Mile*, 105 FERC ¶ 61,336 at P 37; *AES Somerset*, 105 FERC ¶ 61,337 at P 47.

³⁶ *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 107 FERC ¶ 61,142 (2004) (KeySpan IV).

³⁷ See also *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 at P 45 (2004) (*MISO*), *reh'g pending* (involving the station power rules of the Midwest Independent System Operator).

³⁸ See *id.* at P 43 (finding MISO's proposed monthly netting reasonable).

C. **Resolution**

36. The Joint Statement of Issues identifies the following issues to be decided:

(1) Whether Niagara Mohawk may charge and collect in whole or in part retail rates under a New York Commission-approved tariff for station power service to NRG during each of the following periods: (a) from and after October 1, 2003, when certain amendments to Niagara Mohawk's retail tariff were proposed to take effect; (b) from April 1, 2003 (when section 4.24 of NYISO's Services Tariff relating to station power took effect) until October 1, 2003; and (c) prior to April 1, 2003.

(2) To what extent, if any, would any of the answers to the questions in (1) change if NRG (a) did not agree to purchase retail station power service from Niagara Mohawk, or, alternatively, (b) agreed to purchase retail station power service from Niagara Mohawk?

(3) If Niagara Mohawk may charge NRG under its retail tariff for the supply and/or delivery of station power in any of the periods specified in (1) above, over what time period should NRG's use of service supplied be measured: (a) the 30-day period specified in NYISO's Services Tariff; (b) the 15-minute period specified in Niagara Mohawk's retail tariff; or (c) some other period?

(4) Whether each of the NRG generators can self-supply station power by "netting" against the output of its generation any usage at locations that are connected to Niagara Mohawk's transmission system at different locations than those through which the generation output is delivered to the system.

1. Whether Niagara Mohawk may charge retail energy rates under its state tariff for station power service

37. Throughout the course of our station power orders, we have made clear that generators may net their station power requirements against their gross output:³⁹ "[A] generator may net its station power requirements against the generating facility's gross output whenever the generating facility's gross output exceeds or equals its station

³⁹ *PJM II*, 94 FERC at 61,890.

power requirements.”⁴⁰ Further, all energy received by a generator, no matter at what voltage or meter, may be netted against all energy produced by that generator.⁴¹ To the extent each of the NRG Generators generated more electricity than it consumed in station power, it may net its gross output against its station power requirements. The only instance in which Niagara Mohawk (or another supplier) may collect retail energy rates for station power from an NRG Generator is when the generator consumes more station power than it generates in output (as measured over the appropriate netting interval, which we address below).⁴²

38. As we have also explained in numerous cases, netting over a reasonable period of time does not involve retail sales of electricity. Netting is simply 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.⁴³ Our precedent rejects the theory that a generator makes a retail purchase of station power whenever there is a single momentary power fluctuation during the netting period. The Commission has found that that theory is impractical and contrary to both traditional utility practice and our precedent, as well as anti-competitive.

39. Moreover, netting need not be done in real-time or second-by-second; rather, it must be done over a reasonable period of time. The NYISO authorizes netting over a monthly interval, as do both PJM and the Midwest ISO. Netting over a month is reasonable, we have found, and we have accepted tariffs for all three ISOs that provide for monthly netting.

40. While an off-line generator may be consuming energy in the form of station power at any particular moment, that consumed energy has not necessarily been sold at retail; merchant generators, we have consistently held, are entitled to self-supply, and the netting that determines if they have, in fact, self-supplied can be (and in New York is)

⁴⁰ *Id.* at 61,882.

⁴¹ *KeySpan III*, 101 FERC ¶ 61,230 at P 25; *KeySpan IV*, 107 FERC ¶ 61,142 at P 62-63.

⁴² We assume for present purposes that the generator is not self-supplying station power from another location and is not purchasing station power from another, alternative supplier.

⁴³ *See KeySpan IV*, 107 FERC ¶ 61,142 at P 37-41.

monthly netting. As we explained in *PJM II*, there will be times when generators have negative net output over the netting period, and so may incur station power charges under a retail tariff, or may be using local distribution facilities.⁴⁴

41. According to the parties' Joint Stipulation of Facts, each of the NRG Generators produced energy in excess of the maximum amount of station service in every hour at issue, with the exception of certain periods for which NRG is willing to remunerate Niagara Mohawk.⁴⁵ This is the key information for determining whether Niagara Mohawk may charge under its retail energy tariff. Accordingly, consistent with our precedent discussed above, we find that, since the NRG Generators were during the periods at issue self-supplying station power, there were no sales of energy, and Niagara Mohawk is not entitled to charge or collect a retail energy rate for station power (including for any amounts of station power that were transmitted to some of the NRG Generators' auxiliary equipment).

42. The record here also demonstrates that all power delivered was transmitted over transmission facilities.⁴⁶ As no delivery occurred over any Niagara Mohawk local distribution facilities, there can be no charges for the use of Niagara Mohawk's local distribution facilities, and Niagara Mohawk has no basis for requiring NRG to buy or pay, under a retail tariff, for the delivery of station power when NRG self-supplies. For the state to have jurisdiction, as we have explained in the precedent discussed above, there must be a state-jurisdictional service provided – here, there is no such service.

43. Moreover, Order No. 888 cannot be relied upon to justify the imposition of any delivery charges other than transmission charges subject to this Commission's jurisdiction. As explained in *AES Somerset* and *KeySpan IV*,⁴⁷ Order No. 888 does not authorize 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. The Commission was referring to generation-based stranded costs, which may become stranded if, as a result of open access, retail customers leave a utility's system to take power service from a competing power supplier, and not a merchant generator which has acquired the generating assets of the utility. And, where in

⁴⁴ *PJM II*, 94 FERC at 61,889-91.

⁴⁵ Stipulation at P 23, 30, 34.

⁴⁶ Stipulation at P 2-4, 13.

⁴⁷ *AES Somerset*, 105 FERC ¶ 61,337 at P 47; *KeySpan IV*, 107 FERC ¶ 61,142 at P 47.

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.

44. A state may approve whatever retail rate level it deems appropriate, including allowing for stranded costs and benefits, when a utility is, in fact, selling station power at retail or is, in fact, using local distribution facilities for the delivery of station power. When no station power service is being provided, and a merchant generator is self-supplying its station power requirements, a state cannot authorize a utility to charge and collect for station power service. Likewise, when no local distribution service to deliver station power is being provided, and a merchant generator is using only Commission-jurisdictional transmission facilities for station power deliveries, a state cannot authorize a utility to charge and collect for local distribution service.

45. These findings apply to all time periods in question. Clearly, after section 4.24 of NYISO's Services Tariff became effective on April 1, 2003, the Commission-jurisdictional tariff was controlling. As we explain in *KeySpan IV*, in the event of a conflict between federal and state tariff provisions, the federal tariff must control.⁴⁸ Even prior to April 1, 2003, however, NRG Generators had expressed a desire to self-supply,⁴⁹ and had maintained a positive net output at all relevant times.⁵⁰ Consistent with our precedent, generators that are self-supplying station power may net their station power requirements against their gross output, and with this netting, NRG Generators took no station power from Niagara Mohawk.

2. NRG's contractual intent

46. The parties ask to what extent the discussion above would change if NRG had, or had not, agreed to purchase station power service from Niagara Mohawk. Since, in fact, NRG Generators took no station power from Niagara Mohawk during the periods at issue, we need make no findings, and we make no findings, about the intent of the parties.

⁴⁸ See *KeySpan IV*, 107 FERC ¶ 61,142 at P 42-43.

⁴⁹ See Stipulation at P 14.

⁵⁰ *Id.* at P 23, 30, 34.

3. Appropriate netting period

47. The appropriate netting period from the time that NYISO's Services Tariff section 4.24 became effective onward is the 30-day period specified in that section. Revisions to Niagara Mohawk's retail tariff, PSC 207, relating to station power, which became effective on December 1, 2003, are not relevant to this determination. Moreover, although there are circumstances in which a generator could take delivery of station power energy from a vertically-integrated utility over the utility's local distribution facilities, and a state-jurisdictional tariff could govern the sale and delivery of station power, that is not the case here.

48. For the period prior to April 1, 2003, before the NYISO's Services Tariff was revised to address station power, it is reasonable and appropriate for NRG to likewise use one-month netting. NYISO's choice of monthly netting promotes uniformity in treatment of station power among merchant generators and vertically-integrated utilities, and corresponds to NYISO's billing and accounting practices;⁵¹ it also resulted from the input generated through an extensive stakeholder consultation process.⁵² Use of monthly netting thus promotes the Commission's goal of eliminating, as far as possible, "disparities between merchant generators and vertically-integrated utilities" with respect to the provision of station power.⁵³ We had also accepted a one-month netting provision in *PJM IV* in 2001 and in *MISO* in 2004.

4. Netting for off-site facilities

49. According to the Joint Stipulation, each of the NRG Generators operates facilities outside of the station perimeter. These include facilities such as a coal thaw shed and waste water treatment facility at the Dunkirk station, an off-site storage facility at Oswego, and a coal handling facility serving the Huntley station. The power for all of these facilities is delivered over Niagara Mohawk transmission facilities.

50. Niagara Mohawk argues that retail rates are appropriate because Reserve House Service is delivered to these locations through service points that are geographically separate from the service points at which the stations' generation output is delivered,

⁵¹ *KeySpan III*, 101 FERC ¶ 61,230 at P 24.

⁵² NYISO transmittal letter dated September 20, 2002 in Docket No. EL01-50-002 at 4.

⁵³ *PJM II*, 94 FERC at 61,893. See also *AES Somerset*, 105 FERC ¶ 61,337 at P 35, n. 46 (finding monthly netting reasonable prior to April 1, 2003).

because the power is delivered at lower voltages than the voltages at which output is delivered to the transmission system, and because some of the service points have no direct connection to the stations.

51. NRG asserts that netting at multiple points is necessary to prevent undue discrimination and states that Niagara Mohawk's position is inconsistent with a generator's right to remotely self-supply by drawing power off the grid at a different point from where power is injected.

52. In *KeySpan III*, we granted a 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," and directed the NYISO to modify the station power provisions of its tariff accordingly.⁵⁴ We reaffirmed this ruling in *KeySpan IV*, noting that "the existence of multiple interconnections for the import and export of energy, and the location or voltage levels of meters, are not *per se* obstacles to generators utilizing section 4.24" of NYISO's Services Tariff.⁵⁵ We find that this principle governs the treatment of the NRG Generators' auxiliary equipment; these off-site facilities are part of the generating stations and their station power requirements may be netted against the station's gross output.

53. Further, there is no aspect of power delivery to NRG's auxiliary locations that utilizes Niagara Mohawk's local distribution system, and thus no opportunity for retail local distribution service. Since the NRG Generators are only connected to Commission-jurisdictional transmission facilities, no local distribution facilities are used. Niagara Mohawk may not charge local distribution rates for any delivery of station power to the auxiliary locations.

The Commission orders:

(A) The complaint is hereby denied, as discussed in the body of this order.

(B) The New York Commission's late motion to intervene is hereby denied, as discussed in the body of this order.

⁵⁴ *KeySpan III*, 101 FERC ¶ 61,230 at P 25.

⁵⁵ *KeySpan IV*, 107 FERC ¶ 61,142 at P 63.

(C) The New York Commission's motion to lodge is hereby dismissed, as discussed in the body of this order.

By the Commission

(S E A L)

Linda Mitry,
Deputy Secretary.