107 FERC ¶ 61,142
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

KeySpan-Ravenswood, Inc. Docket No. EL01-50-004

v.

New York Independent System Operator, Inc.

ORDER DENYING REHEARING

(Issued May 10, 2004)

1. In this order, the Commission denies the requests for rehearing of the order issued on November 22, 2002 in Docket No. EL01-50-002.[1] This order benefits customers by clarifying the operation of the New York Independent System Operator, Inc.'s (NYISO) station power rules, which in turn ensures that wholesale merchant generators may obtain least-cost station power, whether by self-supplying it or purchasing it.

I. Background

2. This proceeding commenced in March 2001, when a merchant generator with generating facilities located in New York State, KeySpan-Ravenwood, Inc. (KeySpan), filed a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e (2000), challenging the station power practices of the NYISO. KeySpan requested, among other things, that the Commission modify the NYISO Services Tariff to ensure that merchant generators would be able to self-supply station power along the principles the

[1] KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc., 101 FERC ¶ 61,230 (2002) (Compliance Order).

Commission recently established with respect to PJM Interconnection, LLC (PJM),[2] which enable merchant generators to procure station power competitively, thereby freeing them from the incumbent (host) utility's monopolistic supply of station power.

3. In an order issued on May 15, 2002, the Commission found that KeySpan had met its burden of showing that the then-current NYISO rules for station power (contained in a technical manual that was not on file with the Commission) were not just and reasonable. The Commission held that "the NYISO must allow self-supplying merchant generators to net station power against gross output over some reasonable time period in order 'to ensure that they do not bear a cost that has no relationship to any "service" purportedly being provided by another party.'"[3] The Commission ordered the NYISO to file a proposed revised tariff to include the transmission of station power, emphasizing that the proposed station power rules need not track those aspects of the PJM station power rules that would not be appropriate for New York State.[4]

II. The NYISO's Compliance Filing

4. The NYISO made the required compliance filing on September 20, 2002 (Compliance Filing). The NYISO submitted a new section 4.24 to the NYISO Services Tariff that, according to the NYISO, is consistent with Commission precedent on station power procurement and delivery. As an initial matter, "station power" is defined to ensure that large industrial and commercial customers that purchase station power at retail under state-regulated tariffs, and that do not compete with incumbent utilities for

[2] The Commission established the fundamental principles of station power procurement and delivery in three orders: PJM Interconnection, LLC, 94 FERC ¶ 61,251 (PJM II), order denying reh'g and providing clarification, 95 FERC ¶ 61,333 (2001) (PJM III); and PJM Interconnection, LLC, 95 FERC ¶ 61,470 (2001) (PJM IV).

[3] KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc., 99 FERC ¶ 61,167 at 61,680 (2002) (footnote omitted) (Initial Order). We later granted rehearing in part and established hearing and settlement judge procedures with respect to the issue of whether certain facilities used to deliver station power to KeySpan were transmission facilities and, if so, what Commission-jurisdictional rates were appropriate. KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc., 100 FERC ¶ 61,201 (2002) (Rehearing Order). While KeySpan and Consolidated Edison Company of New York, Inc. reached a settlement on this issue, as noted in a letter order issued June 18, 2003, that settlement is in effect only until the issuance of a final and non-appealable order on the Compliance Filing.

[4] Initial Order, 99 FERC at 61,680.

customer load, will not inadvertently become eligible to self-supply station power.[5] This ensures that only merchant generators that are competing suppliers can self-supply station power.[6]

5. Section 4.24 of the NYISO Services Tariff is entitled "Procurement of Station Power." Pursuant to sections 4.24(a) and (b), a generator may self-supply its station power requirements when its monthly net output is positive, that is, when it is physically supplying energy for its station power requirements using its own facilities and is not using facilities that are owned by any transmission owner, or when its station power requirements are less than the amount of energy it is injecting into the New York Power System[7] for the month (local self-supply). For remote self-supply, the owner of multiple generating units may inject into the New York Power System the output of one or more of its generating units in an amount at least sufficient to supply the station power needs of

[5] Section 2.172(c) of the NYISO Services Tariff. This was accomplished by stating that the electrical equipment and building associated with station power consumption must be used exclusively in connection with the production of energy or any useful thermal energy associated with the production of energy.

[6] PJM II, 94 FERC at 61,890, establishes the key distinction between the self-supply of station power and the third-party supply of station power: a self-supplying generator is not using the generating resources of another entity, but rather is using only its own facilities and accounts for station power as negative generation. In contrast, when a generator purchases station power from a third party, two separate and legally distinct entities are parties to a commercial transaction where title to (and possession of) the energy transfers from the buyer to the seller.

[7] Section 2.112 of the NYISO Services Tariff defines the "New York Power System" as "all facilities of the NYS [New York State] Transmission System, and all those Generators located in the NYCA [New York Control Area] or outside the NYCA, some of which may from time-to-time be subject to operational control by the NYISO." section 2.115 in turn defines the "NYS Transmission System" as "the entire New York State electric transmission system, which includes: (1) the Transmission Facilities Under ISO Operational Control; (2) the Transmission Facilities Requiring ISO Notification; and (3) all remaining transmission facilities within the NYCA." Finally, the "New York Control Area" is defined in section 2.111 as "the Control Area that is under the control of the ISO which includes transmission facilities listed in the ISO/TO Agreement Appendices A-1 and A-2, as amended from time-to-time, and Generation located outside the NYS Power System that is subject to protocols (e.g., telemetry signal biasing) which allow the ISO and other Control Area operator(s) to treat some or all of that Generation as though it were part of the NYS Power System."

other of its generating units, which units then withdraw and consume that amount from the New York Power System for use as station power.[8]

6. Section 4.24 uses a one-month period over which to measure net output, which is the same netting interval as the Commission earlier approved for use in PJM. According to the NYISO, using the same netting interval as PJM would, among other things, avoid creating a seam between the two interconnected ISOs.[9] Section 4.24(c) states that the determination of net output on a monthly basis will not affect the price of energy sold at any bus at any hour during the month.

7. Section 4.24(d) governs the application of the NYISO's congestion management system to station power procurement. A generator that has positive net output and is injecting energy into the New York Power System is to be paid the appropriate locational based marginal price (LBMP)[10] at the bus for all energy delivered into the New York Power System. A generator that has negative net output and is remotely self-supplying station power from the New York Power System is to pay the LBMP at the bus for all of the energy it consumes.

8. Under section 4.24(e), the ISO "will determine the extent to which each affected generator self-supplied its Station Power requirements or obtained Station Power from third-party providers (including corporate affiliates) during the month and will incorporate that determination in its accounting and billing." This section further provides that, if any third-party purchases of station power require transmission service, such service is to be taken under Part IV of the NYISO Open Access Transmission Tariff (OATT)[11] unless the Generator has made other arrangements with the local Transmission Owner under that Transmission Owner's retail access tariff.

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[8] See also section 4.24(g) of the NYISO Services Tariff (governing remote self-supply from External Generators (that is, those generators located outside of the New York Control Area), whose energy must be scheduled as an Import into the New York Control Area).

[9] Compliance Filing at 7.

[10] LBMP is a congestion management methodology under which the price of energy at each location (bus) in the New York Transmission System is equivalent to the cost to supply the next increment of load at that location. Differences in the LBMPs at different busses reflect the costs associated with transmission constraints. Compliance Order at P 7, n.4.

[11] Part IV of the NYISO OATT contains the special provisions for retail transmission services over the transmission facilities of the parties to the ISO/Transmission Owner Agreement.

9. Pursuant to section 4.24(f), the local self-supply of station power does not incur charges for transmission services. To the extent that transmission services are required for the remote self-supply of station power, charges for Firm Point-to-Point Transmission Service under Schedule 7 of Part II of the NYISO OATT will apply.[12] Ancillary services charges are waived, because, according to the NYISO, the "costs and commitment of staff time that would be required to charge for ancillary services associated with the remote self-supply of Station Power would not be justified given the relatively small charges involved."[13] In contrast, ancillary services charges are not waived for any transmission service associated with the third-party supply of station power under Part IV of the NYISO OATT "because such charges may be more significant and are easier for NYISO staff to track using existing software capabilities."[14]

10. The NYISO states that, as the Commission had directed, it worked with its stakeholders to ensure that the proposed station power rules are appropriate for New York State. The NYISO notes that it held an "extensive" stakeholder process, including three presentations to its Scheduling and Pricing Working Group and another presentation to its Management Committee. The NYISO says that it circulated several drafts of the proposal and solicited stakeholder comments on them, and that the Compliance Filing reflects that input.[15]

III. The Compliance Order

11. On November 22, 2002, the Commission issued the Compliance Order, in which it accepted, as modified, the NYISO's Compliance Filing. Among other things, the Commission rejected the argument that section 4.24 would allow remotely self-supplying generators to avoid paying any state-regulated retail delivery charges. The Commission emphasized that, to the extent that a remotely self-supplying generator has station power delivered to it over local distribution facilities, the compensation for such delivery was a matter for the state to determine. The Compliance Order also rejected the request that NYISO's OATT transmission charges be the only charges applicable to the delivery of station power, unless the delivery is made exclusively over local distribution facilities.[16]

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[12] Part II of the NYISO OATT contains the terms and conditions for firm and non-firm transmission service on the transmission facilities of the parties to the ISO/Transmission Owner Agreement.

[13] Compliance Filing at 8 n. 21.

[14] Id.

[15] Id. at 4.

[16] Compliance Order at P 17-20.

12. The Compliance Order upheld the NYISO's proposal to have Part IV of the OATT apply to transmission service associated with third-party purchases of station power, while Part II applied to transmission associated with remote self-supply of station power. The Compliance Order denied the request that Part IV of the NYISO OATT apply to all transmission of station power. The Commission found that, while self-supplied station power is consumed, it is not sold at retail. Because Part IV contains special provisions for retail transmission service, it would be inappropriate to require self-supplying generators to take transmission service under Part IV.[17]

13. The Compliance Order approved the NYISO's proposal to exempt self-supplying generators from any ancillary services charges under Part II. While the New York Public Service Commission (New York Commission) claimed that this was undue discrimination, the Commission found that the NYISO had offered a reasonable basis for the exemption, namely, that the costs (including staff time) associated with billing for ancillary services charges under Part II were excessive when compared to the potential revenues.[18]

14. The Compliance Order rejected the New York Commission's protest that those generators that self-supply on site should be charged the LBMP for their station power load because on-site self-supply still involves a "delivery" of energy. The Commission reaffirmed its earlier findings that a generator may self-supply by netting its station power load against its gross output, to the extent that it is physically capable of withdrawing energy from its gross output without using any of the facilities of others and is producing at least as much energy as its station power load. Under those circumstances, there is no "delivery" of station power energy, and no reason to charge the LBMP. The Commission also upheld the NYISO's selection of a one-month netting interval (the time period in which net output is determined to be either negative or positive). It found that the NYISO's reasons for selecting a one-month netting interval were reasonable, given that the one-month interval corresponds with NYISO's billing and accounting practices and would prevent the creation of a "seam" with PJM.[19]

15. Intervenors had also claimed that the new section 4.24 was defective because there were several departures from PJM's station power rules and the NYISO had not sought the approval of the NYISO's Management Committee. In the Compliance Order, the Commission found that the NYISO was not required to obtain the Management Committee's concurrence to make the Compliance Filing because the NYISO was acting

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[17] Id. at P 21.

[18] Id. at P 22-23.

[19] Id. at P 22-24.

pursuant to a Commission order. The Commission stated that it had not required the NYISO to use any specific station power rules, including those approved for PJM.[20]

16. Finally, the Commission granted the request of an intervenor that the NYISO be directed to modify section 4.24 to clarify that any energy that falls under the definition of station power, regardless of voltage or point of receipt, must be netted against any energy produced by that facility in a given month.[21] Pursuant to the Compliance Order, the NYISO revised the language to section 4.24(b)(2) on December 20, 2003 in Docket No. EL01-50-003.

IV. Requests For Rehearing And Other Pleadings

17. The New York Transmission Owners (Transmission Owners),[22] the New York Commission, and Niagara Mohawk Power Corporation (Niagara Mohawk) each filed a timely request for rehearing. The NYISO, the Independent Power Producers of New York, Inc. (IPPNY), and KeySpan each filed a motion for leave to file an answer and an answer to the requests for rehearing. The Transmission Owners and Niagara Mohawk each filed a reply to the answers of IPPNY and KeySpan. Finally, the Transmission Owners filed a motion for expedited action and a motion to lodge the decision of the U.S. Court of Appeals in Detroit Edison v. FERC, 334 F.3d 48 (D.C. Cir. 2003) (Detroit Edison). IPPNY filed an opposition to the latter motions.

V. Discussion

A. Procedural Matters

18. Consistent with rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2003), which bars answers to requests for rehearing, we will reject the several answers to the requests for rehearing and the replies to the answers.

19. We will reject the motion to lodge. Detroit Edison is a publicly-available order; there is no need to lodge any such order, whether judicial or administrative, in a

[20] Id. at P 28-29.

[21] Id. at P 25.

[22] The Transmission Owners are Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc. (Con Edison); the Long Island Power Authority; New York State Electric & Gas Corporation (NYSEG); Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

Commission proceeding.[23] Furthermore, as is the case here, such a motion frequently is no more than a pretext for an untimely, and therefore impermissible, supplemental request for rehearing.[24]

B. Many of the Arguments Raised on Rehearing in this Proceeding Are Collateral Attacks on Final and Non-Appealable Orders

20. As a preliminary matter, we note that many of the allegations raised on rehearing of the Compliance Order are in fact collateral attacks on findings that the Commission has made in earlier station power cases by the same parties that were active in those earlier proceedings. More specifically, the New York Commission, Niagara Mohawk, and other individual Transmission Owners were active parties in PJM II and PJM III, while the Transmission Owners jointly were active parties in PJM IV.

21. Significantly, both PJM II and PJM III involved, in addition to PJM's proposal to add station power rules to its tariff, a petition for a declaratory order and a complaint involving the station power practices of NYSEG and Niagara Mohawk in New York State. In Docket No. EL99-86-000, NYSEG requested that the Commission disclaim jurisdiction over the so-called "standby service" (contained in a retail tariff on file with the New York Commission) through which NYSEG sought to provide station power to merchant generators. In Docket No. EL00-113-000, a merchant generator complained that Niagara Mohawk was improperly charging it for station power at generating facilities that the merchant generator had recently purchased from Niagara Mohawk; the merchant generator sought to self-supply station power or to purchase station power more economically from third parties. In these earlier cases, Niagara Mohawk took the position (which the Commission rejected) that the self-supply of station power is a sale for end use, a position that the parties seek to relitigate in this proceeding. Niagara Mohawk, the New York Commission, and the Transmission Owners also seek to relitigate such fundamental principles of station power precedent as the distinction between self-supply and third-party supply, whether netting station power over a reasonable period of time involves retail sales (and therefore encroaches on state jurisdiction), and the appropriateness of a one-month netting period, all of which have been litigated and resolved in those earlier station power cases.

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[23] We discuss the applicability of Detroit Edison to our station power precedent in AES Somerset, LLC v. Niagara Mohawk Power Corporation, 105 FERC ¶ 61,337 (2003), reh'g pending (AES Somerset), and Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corporation, 105 FERC ¶ 61,336 (2003), reh'g pending (Nine Mile Point). We incorporate those discussions herein.

[24] See 16 U.S.C. § 825l(a) (2000) (providing that requests for rehearing must be filed within 30 days).

22. We indicate the various instances of collateral attack throughout this order. Collateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency; for these reasons, collateral attacks and relitigation are strongly discouraged.[25] It serves no one's interest for the Commission to be asked in every station power proceeding to revisit the same issues over and over again. Furthermore, while this proceeding is the first involving the formal incorporation of station power rules in a NYISO tariff, the tariff language nonetheless implements the same fundamental principles of station power that have already been litigated and resolved in final orders, and by parties that anticipated the adoption of formal station power rules in New York State.[26] The New York Commission, for example, not only intervened and filed comments in the two proceedings involving New York State station power practices, but also intervened and filed comments opposing PJM's station power rules (which would not even apply in New York State), arguing (just as it does now) that the rules encroached on state jurisdiction over retail sales and local distribution. Therefore, the fact per se that this proceeding involves the first-time inclusion of station power rules in a NYISO tariff does not preclude our applying a policy discouraging collateral attacks and relitigation.

C. The NYISO Had Requisite Authority To Make the Compliance Filing

23. Citing to various provisions of the NYISO/TO Agreement, the Transmission Owners (Transmission Owners Rehearing at 5, 19) claim that NYISO's Compliance Filing is unauthorized absent the concurrence of the NYISO Management Committee. Section 3.03 of the NYISO/TO Agreement, which governs amendments to the NYISO Services Tariff and the NYISO OATT, does specify that any proposed amendment to the OATT or the Services Tariff requires Management Committee concurrence (or, in the alternative, that the NYISO Board certify that the amendment is necessary due to exigent circumstances). However, we find that section 3.03's requirement that the NYISO seek Management Committee concurrence to an amendment to the Services Tariff or the OATT does not apply to filings made in compliance with a Commission order issued in a

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

[26] Parties are within their rights to object to a difference (or similarity) between the PJM and NYISO station power rules (such as waiving ancillary services charges), but that is distinguishable from relitigating whether netting involves a retail sale; the latter, unlike the former, is a fundamental – and previously decided – principle of station power procurement and delivery that would not vary with each case.

section 206 complaint proceeding filed by a non-signatory to the NYISO/ISO Agreement, which is the situation before us in this proceeding.[27]

24. Had the NYISO acted voluntarily to amend its station power rules by filing a rate change application under section 205, the concurrence of the Management Committee would likely be necessary. But the NYISO made the Compliance Filing under compulsion of a Commission order issued pursuant to section 206, a situation not addressed by section 3.03. Finding that the NYISO must obtain the approval of the Management Committee before complying with a Commission order is contrary to the obligation of the Commission under section 206 to fix just and reasonable rates, terms, and conditions, would allow the Management Committee to exercise a veto over Commission orders, and would make NYISO compliance with Commission orders contingent on the approval of a majority of NYISO market participants. Further, the Transmission Owners' interpretation would improperly restrict the right of a party to file a section 206 complaint (by placing restrictions on the NYISO's ability to implement a Commission-directed remedy) in direct contravention to the language of section 3.03 that such section 206 rights are not to be adversely impacted by section 3.03. Therefore, we find that there are no infirmities in the NYISO's action in submitting the Compliance Filing.

25. The Transmission Owners claim (at 21-22) that Atlantic City Electric Company, et al. v. FERC, 295 F.3d 1 (D.C. Cir. 2002) (Atlantic City) is authority for its position that the concurrence of the Management Committee is a prerequisite for the Compliance Filing. Atlantic City involved questions that are not at issue here.[28] Nothing in Atlantic City supports the claim that an ISO committee can exercise a veto over a party submitting a filing in compliance with a Commission order and a Commission-directed remedy issued in a section 206 proceeding.[29]

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[27] See Southern Company Services, Inc., 61 FERC ¶ 61,339 at 61,328-39 & n.17 (1992) (a compliance filing is not a rate change application initiated by a public utility, but rather is a change the Commission expressly ordered that the utility is only implementing).

[28] Atlantic City, 295 F.3d at 1 (the questions in this case were: whether the Commission can require public utilities to cede their statutory right to file section 205 rate change applications, whether the Commission has the authority under section 203 of the Federal Power Act to require Commission approval for withdrawal from an ISO, and whether the Commission may require the generic reformation of preexisting wholesale power contracts to reflect new transmission pricing concepts).

[29] Having found that Atlantic City is inapplicable, we need not address the Transmission Owners' argument (at 23-24) that Atlantic City requires that the Compliance Filing be reviewed under a "public interest" standard.

26. Finally, the Transmission Owners allege (at 19) that the Commission's Initial Order in this proceeding "upheld" the then-current station power practices of the NYISO against KeySpan's request that the NYISO be required to adopt PJM's station power rules; the Transmission Owners also contend (at 19) that the Commission only directed the NYISO to place its station power rules in a tariff rather than in a non-tariff instrument (Technical Bulletin No. 34).

27. First, the Transmission Owners are actually seeking untimely rehearing of an issue decided in the Initial Order, not the Compliance Order. Second, even assuming (which we do not concede) that this issue is properly raised at this juncture, the Transmission Owners misread the Initial Order. Therein, we specifically found that "KeySpan has met its burden [under section 206] of showing that the NYISO's current treatment of station power in its operating bulletin is insufficient."[30] This finding is not limited to where the station power practices must be located (tariff or technical bulletin), it also includes what these station power practices must include. The latter is made clear by the next sentence in the Initial Order, that the NYISO "must allow self-supplying merchant generators to net station power against gross output over some reasonable time period;"[31] this, of course, is a fundamental principle of station power treatment originally decided in the PJM orders. Technical Bulletin No. 34 did not comport with this fundamental principle, because (among other things) it mandated that station power loads be served "solely" by the local utility.

28. Thus, we did not uphold the policies of Technical Bulletin No. 34, but ordered the submission in a compliance filing of new station power rules that are consistent with our precedent.[32] We reiterate, however, that the Initial Order did not require the NYISO to blindly duplicate PJM's station power rules, but rather directed it to work with its stakeholders to ensure that any station power rules proposed to be adopted were workable in New York State.[33] In other words, the Commission directed the NYISO to adopt the fundamental principles of station power procurement and delivery set out in the PJM orders, but allowed it to fine-tune its own station power rules to reflect New York State's unique circumstances.

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[30] Initial Order, 99 FERC at 61,679-80.

[31] Id. at 61,680.

[32] For this reason, we reject the Transmission Owners' claim (at 12 n.7) that such new rules needed to be submitted in a separate section 206 proceeding

[33] Initial Order, 99 FERC at 61,680.

D. Section 4.24 Does Not Encroach on State Authority over Retail Sales

29. Parties[34] allege that section 4.24 encroaches on the state's authority over retail sales by allowing such sales of station power to occur pursuant to a wholesale tariff. As evidence, they point to section 4.24(d), in which congestion management pricing is applied to withdrawals and injections of station power; this, they claim, means that energy for end use is being sold.

30. These allegations are groundless. First, by its own terms, section 4.24(d) applies only to self-supplying generators, not to those that purchase station power at retail. More specifically, under section 4.24(d), LBMP expressly applies only to those generators that have positive net output (as defined in section 4.24(b)) and are injecting energy into the grid (that is, those generators that are self-supplying on site) and remotely self-supplying generators that are withdrawing station power from the New York Power System. (In order to remotely self-supply under section 4.24, a company that owns multiple generators must have its generators with positive net output inject into the New York Power System sufficient energy to meet the station power requirements of its generators with negative net output.[35])

31. Thus, while section 4.24(d) does apply congestion management pricing to withdrawals or injections at multiple busses on the New York Power System, it is only self-supplying generators that are making such withdrawals and injections, not generators with negative net output that are purchasing station power at retail. Thus, section 4.24(d) is consistent with PJM II, in which we directed PJM to modify its initial proposed station power rules to ensure that retail sales or purchases of station power do not occur under the provisions of a wholesale tariff.[36]

32. Second, PJM also uses a LBMP system of congestion management, and we previously approved the application of congestion management pricing to the self-supply of station power in PJM IV. In that order, we quoted PJM's explanation of how LBMP pricing (there called LMP pricing) applies to the self-supply of station power in its tariff:

> If a generator is running and producing 100 MW, but uses 2 MW of station power from the energy it produces during a particular hour, then its net output will be 98 MW and it will be paid during that hour for the 98 MW at the LMP for that hour at its generation bus. If during the next hour the generator's plant produces no energy, but still consumes 2 MW, it will have

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[34] E.g., New York Commission Rehearing at 11-14; Niagara Mohawk Rehearing at 18; New York Transmission Owners Rehearing at 10, 15.

[35] Sections 4.24(a)(2), (g) of the NYISO Services Tariff.

[36] PJM II, 94 FERC at 61,982.

> negative net output of 2 MW, for which it will pay LMP at its bus during that hour. Further, if the generator uses remote self-supply for its 2 MW of station power, then another of its generating units elsewhere on the system is producing and delivering 2 MW into the PJM grid and that generation facility will be paid LMP at its generation bus for the 2 MW that it produces – at the LMP for the hour at which it is produced. If there is a difference in the LMPs at the two busses involved in this example, it will reflect congestion on the transmission system, for which the consuming generator will pay.[37]

33. Based on this explanation, we held that PJM's tariff provision and application of congestion management pricing was consistent with PJM II and PJM III.[38] Given that the PJM and NYISO tariffs apply substantially similar methods of congestion management pricing, we find that, just as was the case with PJM's tariff, section 4.24 neither authorizes retail sales of station power nor encroaches on state authority over retail sales. Notably, no party alleges that there are any substantial differences between the operation of LMP pricing in PJM and LBMP pricing in the NYISO with respect to station power, or that PJM's explanation of how congestion management pricing operates is not also applicable to section 4.24.

34. The New York Commission's allegation that section 4.24 authorizes retail sales seems to stem from its view that "consumption" is synonymous with "retail sale." For example, the New York Commission states (New York Commission Rehearing at 12-13, emphasis added), "a finding that a retail sale does not occur when an out-of-service generator consumes electricity delivered from the NYISO markets is unsustainable." It similarly alleges (at 3, emphasis added) that, under section 4.24, "a sale occurs because energy is delivered and consumed at retail."

35. It may be true that an off-line generator is consuming energy as station power load, but it is a separate question whether that consumed energy has been sold at retail. A generator may be consuming energy produced by another generating facility owned by the same entity (remote self-supply) or it may be purchasing energy produced by a third-party (a retail sale). As we consistently have held since PJM II, the self-supply of station power is distinguishable from a retail purchase of station power.[39] The latter, of course,

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[37] PJM IV, 95 FERC at 62,684-85 (footnote omitted).

[38] Id. at 62,685.

[39] This distinction is why we have held that affiliates, which are separate corporations, cannot self-supply one another with station power, but must purchase and sell station power just as they would from non-affiliates. Multiple generating units can self-supply station power only if they have a common corporate owner. PJM III, 95 FERC at 61,190.

involves two legally distinct entities, with a transfer of title or possession, whereas self-supply involves only one entity and no transfer of title or possession.[40] In short, not all end use necessarily involves a sale for end use.

36. The Transmission Owners similarly claim (at 11) that the "fact" that retail sales occur under section 4.24 "is confirmed" because section 4.8 of the NYISO Services Tariff require any entity withdrawing energy from the NYISO to execute an agreement for transmission services under the NYISO OATT and to pay for such services. But this proves nothing with respect to retail sales of station power. Clearly not all uses of transmission facilities involve retail sales, and not all transmission customers withdrawing energy from a particular point on a transmission grid necessarily are consuming it as station power.

E. Netting over a Reasonable Period of Time Does Not Involve Retail Sales of Electricity

37. The parties revisit the question of whether netting over a reasonable period of time (here, one month, the same period as in PJM) necessarily allows the generator to engage in retail purchases of electricity.[41] The New York Commission asserts (at 3) that the concept of netting encroaches on its jurisdiction because, in its view, "retail sales" of station power may occur at some time during the one-month netting period when the generator undergoes momentary instances of negative output.[42]

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[40] The Federal Power Act defines the term "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale." 16 U.S.C § 824(d) (2000) (emphasis added). Thus, two separate and legally distinct parties are required for a wholesale sale; no intervenor claims that this is not also true for a retail sale.

[41] Allowing station power to be netted over a reasonable period of time, the Transmission Owners claim (at 3), is "an astonishing situation" based on a "complete fiction" that is "internally inconsistent, illogical, inherently discriminatory, and contradicts any reasonable interpretation of the facts." The Transmission Owners do not explain, however, why they were comfortable with this "astonishing situation" of netting station power when they owned the same generating facilities at issue here.

[42] The New York Commission also contends (at 13-14) that the fact that integrated utilities netted the station power needs of their fleet of generators in the years before retail access is not justification for allowing merchant generators with their own fleets to net their station power needs today, because "few, if any, generators in New York" have such fleets. In fact, in the Nine Mile Point proceeding, that is precisely the factual situation before us: two units owned by a single corporate entity that seeks to remotely self-supply, while an incumbent utility seeks to require it to purchase all of its station power requirements at retail.

38. We previously addressed, and dismissed, these claims in our earlier station power cases.[43] As we explained in detail in PJM II, 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. We quoted PJM's transmittal letter for a succinct description of the historical treatment of station power as net, or negative, generation. That letter reads, in pertinent part:

> In general, vertically-integrated utilities in the PJM control area historically have treated station power as "negative generation." That is, the energy output of a generation facility typically was treated as its gross output less the power consumed at the facility. Station power used during periods when the generator was not operating likewise was treated as negative generation. To the extent that a generator facility's station power needs were not met with on-site power production, the facility received the necessary energy from the utility's transmission and/or distribution facilities. In the case of an integrated utility, such energy typically was supplied by its other generation stations or, if the utility was part of a centrally dispatched power pool such as PJM, by the pool's then available energy supplies. [44]

39. We further noted that "[t]he parties have not cited, and we are not aware of, an instance in which we have treated the self-supply of station power through netting as a sale."[45] We also addressed whether it is appropriate to consider net capacity as negative over a particular netting interval even though there could be instances during the designated netting interval when output might in fact be positive, precisely the point that the parties again raise here:

> We emphasize that a generator may net against its gross input as measured over a specific time period, typically one hour, such as in the PJM amendments, even though there may be occasions during that one hour when gross output is less than station power requirements. As long as net output is positive as measured over the entire one hour, then netting is appropriate. Our approach here is consistent with our precedent for measuring a QF's net output. In American Ref-Fuel of Bergen County,

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[43] Given that the propriety of netting station power was litigated in PJM II and in PJM III, and that both the New York Commission and Niagara Mohawk were active parties in these cases, they are mounting collateral attacks on those orders. E.g., PJM II, 94 FERC at 61,883 (noting that the New York Commission objects to PJM's characterization of station power as a wholesale transaction).

[44] PJM II, 94 FERC at 61,889-90.

[45] Id. at 61,890.

> 54 FERC ¶ 61,287 (1991), the Commission used a "rolling one-hour" period for measuring the size limitation (80 MW) applicable to qualifying small power production facilities. In that case, Ref-Fuel argued that because of the substantial variation in the heat content of solid waste, the net output of the facility would often exceed 80 MW, but that it would be able to use an automatic control system to lower the net output to 80 MW whenever it exceeded 80 MW. Thus, Ref-Fuel said that it could maintain the 80 MW net output level on average over a rolling one-hour period. The Commission agreed to this approach, recognizing that:
>
> > generation output fluctuates instantaneously and accordingly must be adjusted many times each hour to follow system load changes. System load or consumer demand typically is determined by averaging energy use over a period of time of 15 to 60 minutes.
>
> The Commission held that because a facility's generation output varies constantly, and the facility would have to compensate for over-production within the rolling 60-minute period by under-producing, a net output in excess of 80 MW would not automatically violate the size limitations of PURPA.[46]

40. Those findings are equally applicable here with respect to section 4.24. Simply because there may be momentary instances during the netting interval when a particular generating facility's output is negative does not mean that the facility's owner is buying station power at retail. As we said in PJM II:

> we have never required that net output be measured on a real time or second-by-second basis, but rather have taken the practical point of view that net output should be measured over a reasonable time period, so as to take into account fluctuations in electric production. Thus, while a generator that is undergoing, for example, a two- or three-month scheduled outage could not obtain station power under PJM's proposed amendments during the outage, fluctuations in gross output or station power requirements that produce momentary instances of negative net output during an appropriate time period are acceptable, so long as net output measured over the entire time period is positive.[47]

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[46] Id. at 61,891-92 (footnotes omitted).

[47] Id. at 61,892.

41. The New York Commission and the Transmission Owners would have us deem a generator to have made retail purchases of station power whenever there was a single momentary power fluctuation during the netting period, even though the generator has positive net output for the netting period. In other words, there would be no netting at all, only real-time measuring of output. This approach not only is impractical, and contrary to both traditional utility practice and our legal precedent, but it also is anti-competitive. Generators that have had a single instance of negative net output would be forced to purchase their station power requirements from a single supplier, the local utility, at rates that are likely to be higher than the costs of self-supply or competitive third-party supply.[48] This would make the generator's own energy uncompetitive when compared to energy sold by the local utility, with which merchant generators compete for load, with resulting harm to ratepayers. Starting with our first station power decision (PJM II), we consistently have insisted that station power procurement and delivery rules operate to foster competition in electricity markets.[49] We find that section 4.24 does precisely that, and that the interpretation that the New York Commission and the Transmission Owners again advance does not.

F. In the Event of a Conflict between Section 4.24 and a Retail Tariff, Section 4.24 Must Control, Consistent with Our Precedent

42. In a recent case involving the station power rules of the Midwest Independent System Operator, we stated:

> The Commission's station power rules do not supersede state jurisdiction but merely apply traditional legal boundaries to a complex factual situation; however, to ensure harmonious results in the provision of station power, in the event of a conflict between federal and state tariff provisions, the federal tariff provisions must control.[50]

43. As we held in MISO, in the event of a conflict between section 4.24 and any retail tariff, section 4.24 must control. The New York Power Authority (NYPA) illustrates the problems that would result absent resolving a conflict in favor of the wholesale tariff.[51] NYPA explains that the New York retail tariff that would apply to station power service at one of its generators has a contract demand ratchet that is triggered when a generator

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[48] If the local utility's rates were lower, a generator would be free to purchase its station power needs from that utility, since section 4.24 is an optional provision.

[49] PJM II, 94 FERC at 61,892.

[50] Midwest Independent Transmission System Operator, Inc., 106 FERC ¶ 61,073 at P 45 (2004), reh'g pending (MISO).

[51] Motion to Intervene and Comments of New York Power Authority at 2-3.

experiences a single hour of negative net output. Under the retail tariff, the ratchet, once triggered, makes that "registered demand" the contract (billing) demand for the next 18 months. The operation of the retail tariff effectively prevents NYPA from utilizing section 4.24 of the NYISO Services Tariff, which it is otherwise eligible to use, for station power procurement and delivery for those 18 months. (Otherwise, NYPA might have to pay redundant charges under both tariffs, passing such excess costs to its ratepayers.) Resolving the conflict in favor of the wholesale tariff ensures that NYPA is free to use section 4.24, so that its ratepayers can receive the benefits of the lower costs of self-supplied station power, or station power purchased from third parties, which is a pro-competitive result.

G. Section 4.24 Is Consistent with Order No. 888

44. The New York Commission alleges that there is an inconsistency between the Commission's analysis of Order No. 888 in the Compliance Order and in other Commission orders, specifically, San Francisco Bay Area Rapid Transit District, 87 FERC ¶ 61,255 (1999) and 90 FERC ¶ 61,291 (2000) (BART). It contends (at 8-9) that: "the Commission found in the BART Order that, even where there are no identifiable local distribution facilities, states have jurisdiction over retail delivery to end-users and so may assess separate charges for distribution service in addition to the Commission's jurisdictional charge for transmission service."[52] The New York Commission complains that there may be no opportunity for a state to attach stranded cost and customer charges to station power if it is preempted from including them on a transmission services bill and there is no distribution or energy sale element to station power use at the transmission level.

45. In the AES Somerset and Nine Mile Point orders, we addressed this issue and concluded that, when a utility is neither selling station power nor providing local distribution service to a merchant generator, Order No. 888 does not authorize the imposition of any charges other than transmission rates. In AES Somerset, we stated: "[W]hen 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 jurisdiction (as is expressly provided for under the NYISO Services Tariff)."[53] We explained at length that the language from Order No. 888 on which the New York Commission relies for its position does not in fact apply where a divesting utility sells its generating units to a competing supplier (merchant generator), but rather applies to the

[52] Niagara Mohawk (Niagara Mohawk Rehearing at 8-9) and the Transmission Owners (Transmission Owners Rehearing at 14) make similar claims.

[53] AES Somerset, 105 FERC ¶ 61,337 at P 43.

situation where a retail customer exits the utility's system or becomes a wholesale customer (a "retail-turned-wholesale" customer), and sunk costs associated with serving that customer in the past may otherwise not be recovered. We said:

> 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 a competing power supplier. 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.[54]

46. We explained that the references in Order No. 888 to "no identifiable local distribution facilities" addressed the situation:

> 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 facilities) may not be readily identifiable as among the facilities 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 . . . 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.[55]

47. A state may approve whatever rate level it deems appropriate, including the recovery of stranded costs and benefits, when a utility is selling station power at retail or

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[54] Id. at P 45 (footnote omitted and emphasis in original).

[55] Id. at P 46 (footnotes omitted).

is using local distribution facilities for the delivery of station power. When neither of those services is being provided, however, and a merchant generator is self-supplying its station power requirements in accordance with section 4.24 of the NYISO Services Tariff, the charges specified in the NYISO Services Tariff and the NYISO OATT apply to the exclusion of any retail tariff. This is consistent with Order No. 888's pro-competition policy because it prevents competing suppliers from being charged inappropriate costs by incumbent utilities with whom they compete for load, thus encouraging competition in electricity products, both retail and wholesale.

48. Niagara Mohawk claims (at 7) that our finding that the delivery of station power can take place without any use of local distribution facilities "undermine[s] the critical assurances in the Compliance Order that Order No. 888 provides to state utility commissions and to the electric industry."[56] The Transmission Owners allege (at 5) that this finding violates the terms under which they agreed to turn over operation of their transmission facilities to the NYISO. Both intervenors (Transmission Owners at 16; Niagara Mohawk at 10) argue that section 4.24 violates the Federal Power Act's ban on mandatory retail wheeling.

49. We reject these allegations. We have not undermined any critical assurances made in Order No. 888 or elsewhere. We have only stated that Order No. 888 cannot be relied on to justify the incumbent utilities' claim that competing suppliers should bear the same stranded costs as retail-turned-wholesale customers.[57] We have clarified Order No. 888 with respect to the class of customers from whom local distribution rates that include stranded costs and benefits are appropriately collected. Nor have we interfered with or prevented stranded cost recovery, or even significantly impaired such recovery. Incumbent utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers and from those merchant generators that actually do purchase

[56] In addition, Niagara Mohawk claims (at 9) that "the Commission has recognized that a generator's remote self-supply of station power does involve a delivery component. PJM II at 61,891 n. 60; PJM III at 62,184-85." (Emphasis in original.) Niagara Mohawk misstates our precedent. In footnote 60 in PJM II, we stated that the "delivery of station power may also involve the usage of local distribution facilities" (emphasis added), and we were similarly cautious throughout PJM III. In short, we have never held that remote self-supply (or third-party purchases) of station power necessarily involves the usage of local distribution facilities.

[57] Given that the owners of divested generation did not purchase station power at retail before they purchased the units, they are not the "retail-turned-wholesale customers" we had in mind in this passage of Order No. 888.

station power at retail or actually do take delivery over local distribution facilities,[58] and nothing in our station power orders is to the contrary. We have only clarified that a small subset of merchant generators – those that neither purchase station power nor use local distribution facilities – cannot, under Order No. 888, be charged retail rates because they are not receiving a retail service. Furthermore, even if the allegation that our interpretation of Order No. 888 somehow impairs stranded costs recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the incumbent utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from appropriate classes of customers or to extend the recovery period for stranded costs.[59]

50. As for the argument that section 4.24 allegedly mandates retail wheeling, this is the same allegation that Niagara Mohawk made earlier in PJM III, which makes the claim an impermissible collateral attack on a final and non-appealable order. In PJM III, we responded:

> With specific respect to Niagara Mohawk's allegation that our language "could" be read as mandating retail wheeling in contradiction to the FPA and our findings in Order No. 888 on mandatory retail wheeling, we stated in Order No. 888 (immediately after the passage that Niagara Mohawk quotes):
>
> > [W]e make clear that if a utility chooses, or a state lawfully requires, unbundled retail transmission service, such service should occur under this tariff [that is, the pro forma tariff], unless we specifically approve other terms.
>
> PJM II, specifically including our language in notes 60 and 63, is fully harmonious with this statement.[60]

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[58] We have clarified that Order No. 888 requires that a service must actually be provided before the rates for that service may properly recover stranded costs or benefits. E.g., AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power, 104 FERC ¶ 61,051 at P 17, reh'g denied, 105 FERC ¶ 61,357 (2003), petition for review filed on other grounds, Case No. 04-1051 (D.C. Cir. Feb. 17, 2004); accord AES Somerset, 105 FERC ¶ 61,337 at P 33-37, 40, 47. In other words, Order No. 888 is consistent with traditional cost-causation principles.

[59] For these reasons, we reject Niagara Mohawk's demand (at 11) that the Commission devise alternative means for incumbent utilities to recover the stranded costs they allegedly will not be able to recover from this subset of merchant generators.

[60] PJM III, 95 FERC at 62,185 (footnote omitted).

51. The NYISO did not violate any statutory obligation (or contractual obligation it has under its enabling tariffs) not to "seek" to impose retail wheeling, because it was required by the Initial Order to make the Compliance Filing, as we explained earlier in this order. Moreover, section 4.24 of the NYISO Services Tariff requires that any transmission services needed for third-party (retail) purchases of station power occur under Part IV of the NYISO OATT, which contains the special provisions for retail transmission pursuant to retail access tariffs on file with this Commission and the New York Commission. Since self-supply does not involve a retail sale in the first place, there is no retail wheeling involved, mandatory or otherwise.

52. Finally, the BART orders involved the issue of whether Pacific Gas and Electric Company (PG&E) was charging BART (under PG&E's OATT) state direct access charges in addition to the OATT's transmission rates for the delivery of federal preference power. The Commission found that PG&E was charging BART the appropriate OATT transmission rate and suggested that BART take any concerns it had regarding the state direct access charges to the California Commission. On rehearing, the Commission found that PG&E's local distribution facilities were in fact being used to wheel the preference power to BART's loads. Thus, the orders do not address the very question that the New York Commission poses: whether any retail charges would apply when a merchant generator does not either purchase energy at retail or use local distribution facilities. As we emphasized in earlier station power cases,[61] the question of whether a particular merchant generator actually is using local distribution facilities is case-specific; the fact that BART uses PG&E's local distribution facilities in California is irrelevant to the question of whether any particular merchant generator in New York State is using the local distribution facilities of a New York utility.

H. Section 4.24's Proposed One-Month Netting Interval Is Just and Reasonable

53. The New York Transmission Owners (at 24) object to the selection of a one-month netting interval on the grounds that the NYISO has failed to properly support its decision. In its Compliance Filing, the NYISO stated that it chose the same one-month netting interval as PJM because the Commission had already approved that length of time, using the same interval would prevent a seam between the two contiguous ISOs, merchant and utility-owned generators would be afforded similar treatment, and New York generators would not be artificially handicapped when competing with generators located in PJM.[62] As for the Transmission Owners' allegation that netting should be hourly because energy transactions are hourly, as the NYISO notes in its Compliance

[61] Id. at 62,186.

[62] Compliance Filing at 7.

Filing, this issue was previously litigated in PJM IV,[63] in which we explained how monthly netting does not impact hourly energy prices. Thus, we find that the NYISO has sufficiently supported its choice of a one-month netting interval, and that the one-month netting interval is just and reasonable.

I. Section 4.24's Proposed Treatment of Transmission and Ancillary Services Charges Is Just and Reasonable

54. The New York Commission (at 15) objects to having remote self-supplying generators take transmission service under Part II of the NYISO OATT, while purchasing generators take transmission service under Part IV of the NYISO OATT. It urges the Commission to require all merchant generators to take transmission service only under Part IV. We find the NYISO has supported the proposed disparate treatment and that it does not amount to undue discrimination. Part IV is a special section of the OATT governing the transmission associated with retail sales, including third-party purchases of station power. Because there are no retail sales associated with self-supply, Part IV would be inappropriate for self-supplying merchant generators. Self-supplying generators properly take service under Part II, the provision of the OATT governing firm and non-firm transmission that is not associated with retail transmission.

55. The New York Commission also objects to waiving the ancillary services charges under Part II for remotely self-supplying generators, while not waiving such charges under Part IV for purchasing generators. It complains (at 2-3): "there is no basis for freeing wholesale generators from charges imposed on other similarly-situated customers owning on-site generators. Transmission costs incurred to serve on-site generation customers are substantially the same as the costs of serving wholesale generators."

56. This argument ignores the NYISO's determination that the costs in the aggregate to meter and bill ancillary services for self-supplying generators would be excessive when compared to the collectible revenues. While the New York Commission regards the task of adding the ancillary services charges to the transmission bills as "ministerial" (at 6), the NYISO does not. Given that it is only the NYISO that actually handles data collection and billing, and therefore has the best understanding of the costs and staff commitment that would be required to bill ancillary services charges under Part II, we find that its views on the matter are credible, and we accept its proposal to waive ancillary services charges for Part II transmission service.

57. The New York Commission (at 5) complains that the NYISO earlier said in a pleading that it would not waive ancillary services charges, but that the NYISO nevertheless waived such charges. The New York Commission argues that this is an

[63] PJM IV, 95 FERC at 62,684.

unsupported reversal of position. The NYISO initially expressed its views on the appropriateness of a waiver only in a pleading, and parties are generally free to change their views in pleadings. It therefore was free to change its position at a later date when it actually filed the proposed tariff.

58. The New York Commission (at 7) further argues that waiving ancillary services charges for Part II transmission service creates undue discrimination because large industrial and commercial customers with on-site generators have similar "usage patterns" (when their on-site equipment is out of service) to off-line merchant generators, and the former customers do not have their ancillary services charges waived.

59. The New York Commission is comparing the wrong groups of entities. The NYISO Services Tariff expressly prohibits large industrial and commercial customers from self-supplying their station power requirements;[64] they must purchase their station power at retail, cannot self-supply, and therefore do not have their ancillary services charges waived. They are therefore similarly situated to, and treated comparably to, those merchant generators who also do not self-supply, but purchase station power at retail, and who also do not have their ancillary services charges waived. It is only self-supplying merchant generators whose ancillary services charges are waived, and large industrial and commercial customers cannot self-supply. Thus, when large industrial and commercial customers are compared to similarly-situated merchant generators (those that also purchase station power at retail), it is clear that there is no undue discrimination.

60. Finally, the New York Commission contends (at 7-8) that waiving ancillary services charges for self-supplying merchant generators "raises the potential for harm to the transmission system" because under-funding might threaten the security of system operations, absent cross-subsidization. The Commission does not take lightly the allegation that system security could be undermined by any of its orders or by the actions of any entity that it regulates. However, other than alleging that there may a potential for harm, the New York Commission does not present any evidence at all that any threat to reliability exists, and it acknowledges that such under-funding might not even happen. Thus, we reject its allegations as unfounded.

J. Other Issues

61. An intervenor had requested that the language of section 4.24 be revised to clarify that "when measuring a generator's self-supply of station power, [the NYISO] measures

[64] See P 5, supra. The New York Commission does not object to excluding large industrial and commercial customers from section 4.24, that is, from prohibiting them from self-supplying.

all of a generator's injections into the transmission system."[65] It complained that it was being assessed both energy and demand charges by the local utility for all energy flowing into its generator, even when the flow was over facilities that it fully owned, and it requested that the Commission clarify that "all energy received by a generator, no matter at what voltage or meter, is netted with all energy produced by a facility in a given month."[66]

62. In response, the Compliance Order (at P 25) directed the NYISO to revise section 4.24 to clarify that any energy that falls under the definition of station power, regardless of voltage or point of receipt, must be netted against any energy produced by that facility in a given month.[67] On rehearing, the New York Transmission Owners (at 12-13) and Niagara Mohawk (at 12-13) contend that this directive is inconsistent with PJM II, in which the Commission noted that a facility can be configured so that "its station power requirements are always supplied from an off-site source through separate feeder lines. In this situation, the facility could sell gross, not net, output, because its configuration prevents it from on-site self-supply and it cannot net its station power requirements against gross output."[68]

63. We intended paragraph 25 of the Compliance Order to be read consistently with footnote 55 of PJM II. Therein, we noted that a facility can be physically configured so that it cannot self-supply on site. But this is an exception to the general rule. Thus, we reaffirm that, apart from this exception with respect to on-site self-supply, the existence of multiple interconnections for the import and export of energy, and the location or voltage level of meters, are not per se obstacles to generators utilizing section 4.24.[69]

64. Niagara Mohawk requests (at 20-21) that the Commission require the NYISO to implement unspecified "protections" to ensure that transmission owners are not required under section 4.24 to provide free transmission services or forego transmission revenues. It claims that similar "protections" in PJM were the basis of the Commission's acceptance of PJM's station power rules. Section 4.24 requires that remotely self-

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[65] Motion to Intervene and Comments of Orion Power New York GP, Inc. at 1.

[66] Id. at 5.

[67] That compliance filing was made in Docket No EL01-50-003. A separate order in that proceeding will address the specific tariff language the NYISO proposed to implement this directive.

[68] PJM II, 94 FERC at 61,890 n.55.

[69] We specifically reject the contention (e.g., Transmission Owners Rehearing at 4) that in footnote 55, we held that netting must occur over the same set of interconnection facilities. That is a misreading of our precedent.

supplying generators must pay for associated transmission services. Thus, we find that section 4.24 properly requires payment by merchant generators using the transmission facilities of others for the delivery of station power, and find that nothing more is necessary.

65. Finally, the New York Commission claims (at 2) that, in earlier station power cases, the Commission "cited a need to eliminate discrimination between generators owned by integrated electric utilities and generators owned by others. Because New York utilities have largely divested their generation, the potential for discrimination does not exist in New York."

66. We find that the potential for discrimination between incumbent utilities and merchant generators in New York State still exists. Incumbent utilities, whether they retain some of their own generating capacity or purchase capacity and energy to resell, directly compete with the merchant generators, who own divested facilities and whom the incumbent utilities would charge station power delivery rates. As we noted in PJM II, integrated utilities had a long-standing practice of not charging themselves, their affiliates, or their fellow utilities for station power.[70] Merchant generators who purchased these facilities in order to enter the market as competing suppliers had a reasonable expectation that, as new owners of divested facilities, they likewise would not be charged for station power. That expectation has not been met, which in fact helped to spur the development of station power procurement and delivery rules for ISO tariffs (including KeySpan's filing of the instant complaint against the NYISO). The discrimination that we are aiming to forestall is between the former owners of the divested generating facilities and the current owners, who seek alternatives to the supply of station power solely from incumbent utilities so that they can more effectively compete for customer load with the incumbent utilities, to the ultimate benefit of ratepayers. This is consistent with our overarching goal of developing station power procurement and delivery rules that foster competition in electricity products.

[70] PJM II, 94 FERC at 61,892 (noting merchant generators' concern that incumbent utilities netted their own station power requirements, but require merchant generators that own divested facilities to buy station power at retail rates, which makes the merchant generators less competitive).

The Commission orders:

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

By the Commission.

(S E A L)

Magalie R. Salas
Secretary