UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

AES Somerset, LLC

v. Docket No. EL03-204-001

Niagara Mohawk Power Corporation

ORDER DENYING REHEARING

(Issued January 21, 2005)

1. In this order, the Commission denies the requests for rehearing of the order issued on December 23, 2003 in Docket No. EL03-204-00.[1] In the December 23 Order in this proceeding, the Commission found that Niagara Mohawk Power Corporation (Niagara Mohawk) was improperly seeking to charge AES Somerset, LLC (AES) for the provision of station power. The Commission reaffirms that at no time since AES acquired the 675 MW coal-fired generating unit in Somerset, New York (Somerset facility) did Niagara Mohawk sell or deliver station power to the facility, which instead self-supplied on site its station power for the period at issue. This order benefits customers by ensuring that they pay only for those services that they are actually provided and that wholesale merchant generators may obtain least-cost station power for the ultimate benefit of the customers they serve.

Background

2. This proceeding commenced in June 2003 when AES filed a complaint against Niagara Mohawk alleging that Niagara Mohawk was demanding that it pay retail tariff charges for station power consumed at AES's Somerset facility. As we explained in the December 23 Order, New York State Electric and Gas Corporation (NYSEG) owned and operated the Somerset facility until February 1998, when NYSEG transferred the

[1] *AES Somerset, LLC v. Niagara Mohawk Power Corporation*, 105 FERC ¶ 61,337 (2003) (December 23 Order).

facility to an affiliate, NGE Generation. In May 1999, NGE Generation sold the Somerset facility to AES.

3. The December 23 Order (at P 14) describes the physical configuration of the Somerset facility and its interconnections. The Somerset facility is located within the geographical boundaries of Niagara Mohawk's franchised service territory, but is not now, and has never been, directly interconnected with any Niagara Mohawk transmission or local distribution facilities. Rather, the Somerset facility is interconnected with a NYSEG substation which, in turn, connects to a 345 kV transmission line owned by the New York Power Authority (NYPA). When the facility is on-line, station power is provided through the facility's 24 kV bus and then to the station power buses. When the facility is off-line, the station power is provided from the 345 kV transmission grid through NYSEG's 345 kV ring bus. NYSEG, not Niagara Mohawk, owns the transmission lines that connect the 345 kV ring bus to NYPA. As noted in the December 23 Order, AES stated that, during the years that NYSEG and NGE Generation owned and operated the Somerset facility, there was no station power relationship between Niagara Mohawk and either NYSEG or NGE Generation.

4. The December 23 Order also notes (at P 16-18) that, soon after AES purchased the Somerset facility, it was contacted by Niagara Mohawk, which asserted that it would be providing station power to the Somerset facility and requested that AES sign a service agreement for service under a Niagara Mohawk retail tariff. AES refused to sign the service agreement, although it did sign, under protest, a separate "general information" form. When Niagara Mohawk subsequently sent invoices to AES,[2] AES paid a partial amount to avoid the costs of litigation, although it informed Niagara Mohawk that its payment was not to be construed as its agreement that the charges for station power were proper. In a September 5, 2002 letter, AES challenged Niagara Mohawk to demonstrate that Niagara Mohawk was, in fact, providing the Somerset facility with station power when the facility was off-line, and stated that it would pay for the station power if Niagara Mohawk could make such demonstration. AES asserted that, in fact, the Somerset facility had self-supplied its station power requirements for all months since its acquisition of the facility.

5. According to the December 23 Order (P 19), on March 26, 2003, AES informed Niagara Mohawk of its intention to utilize the station power procurement and delivery provisions contained in the Services Tariff of the New York Independent System

[2] The charges now total approximately $3.6 million.

Operator, Inc. (NYISO),[3] which became effective on April 1, 2003. On April 4, 2003, Niagara Mohawk responded by saying that it would continue to bill AES for station power under its retail tariff. The instant complaint then followed. As summarized in the December 23 Order (P 20), in its complaint, AES requested that the Commission to prohibit Niagara Mohawk from charging it retail rates for station power (either commodity or delivery) that the Somerset facility is self-supplying. With respect to the period between May 1999, when AES acquired the Somerset facility from NGE Generation, and April 1, 2003, when the Somerset facility began self-supplying station power pursuant to the terms of Section 4.24 of the NYISO Services Tariff, AES requested that the Commission use a monthly netting period (as is used in Section 4.24) to find that the Somerset facility had self-supplied its station power requirements in full.

6. The December 23 Order granted AES's complaint. Noting that Niagara Mohawk conceded that it was not directly interconnected with the Somerset facility, the Commission found that "Niagara Mohawk has not shown that it has ever sold or delivered station power to the Somerset facility, or that it is doing anything more than seeking to charge AES for services that AES never agreed to and that Niagara Mohawk never provided."[4] The Commission rejected Niagara Mohawk's position that Order No. 888 justifies its charging the Somerset facility for station power simply because the unit is within the geographical boundaries of its franchised service territory and despite the fact that the facility neither purchases station power from Niagara Mohawk nor uses Niagara Mohawk's local distribution facilities.[5]

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[3] The NYISO's station power provisions are contained in Section 4.24 of the NYISO Services Tariff. *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*).

Section 4.24 authorizes a merchant generator to self-supply its station power requirements if 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 the facilities of any transmission owners, or when its station power requirements are less than the amount of energy it is injecting into the transmission system. The operation of Section 4.24, including the one-month netting period over which net output is measured, is discussed at length in *KeySpan IV*, 107 FERC ¶ 61,142 at P 4-9.

[4] December 23 Order at P 33.

[5] *Id.* at P 33-34.

7. The Commission emphasized that Niagara Mohawk has not demonstrated that it is actually providing any type of station power service, either energy, standby, or delivery, to AES for the Somerset facility. The Commission also stated that, when the Somerset facility is off-line and is receiving station power from a third party, such delivery is provided only over 345 kV transmission facilities and no local distribution facilities are used for delivery.[6]

8. Moreover, the Commission found that AES demonstrated, and Niagara Mohawk did not dispute, that the Somerset facility has had a positive net output in every month between May 1999 and May 2003, and therefore was self-supplying station power in each of those months. The Commission held that it was reasonable to use a monthly netting interval to determine whether the Somerset facility had a positive net output, even though the Commission did not accept a monthly netting interval for the NYISO until April 1, 2003 The Commission provided several reasons for this finding. First, a monthly netting period for PJM was approved in 2001. Second, using a one-month period was appropriate because it produced a result consistent with the long-standing practice of New York's vertically-integrated utilities not charging one another for station power energy or delivery, thus eliminating, as far as possible, disparities between merchant generators and vertically-integrated utilities with respect to station power.[7]

9. The December 23 Order made the following findings of fact: (1) the Somerset facility is not directly connected to the Niagara Mohawk system, but rather to NYSEG's 345 kV system; (2) Niagara Mohawk never billed or charged NYSEG or NGE Generation for station power energy or delivery when those latter companies (a fellow vertically-integrated utility and its affiliate) owned the Somerset facility; (3) when it is off-line, the Somerset facility is physically capable of taking station power from the 345 kV transmission grid into which it injects energy, and station power is in fact taken from the 345 kV transmission grid when the facility is off-line; and (4) Niagara Mohawk never responded to AES's letter seeking verification that Niagara Mohawk acquired and paid for energy that the Somerset facility allegedly consumed as station power. Based on these findings, and others discussed in the December 23 Order, the Commission held that Niagara Mohawk has never sold or delivered station power to the Somerset facility, either when the facility was owned by NYSEG and NGE Generation or after the unit was sold to AES.[8]

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[6] *Id.* at P 34.

[7] *Id.* at P 34-35 & n.46.

[8] *Id.* at P 37.

10. In addition to these case-specific findings, the Commission rejected Niagara Mohawk's arguments that Order No. 888 authorizes its collection of stranded costs and benefits from AES, notwithstanding that Niagara Mohawk's only relationship with the Somerset facility is that the unit is located within the geographical boundaries of its service territory and that the merchant generator has chosen to utilize Section 4.24 of the NYISO Services Tariff and receives station power over transmission facilities only. On the contrary, the December 23 Order noted, Order No. 888 requires that the utility seeking stranded cost recovery is, in fact, providing some service, but here there is no proof that Niagara Mohawk has ever provided any kind of service to the Somerset facility, either before or after AES acquired it.[9]

11. The December 23 Order rejected Niagara Mohawk's reliance on Order No. 888 to justify its attempts to prevent generators like AES from using Section 4.24 on the grounds that the Commission, in Order No. 888, supposedly approved the assessment of stranded costs and benefits on the new owners of divested generation where no identifiable local distribution facilities are being used.[10] The Commission explained that the language on which Niagara Mohawk relies does not in fact apply where a divesting utility sells its generating units to a competing supplier (merchant generator), but rather applies to the situation where a retail customer becomes a 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.[11]

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[9] *Id.* at P 40-42.

[10] *Id.* at P 43. (The passage from Order No. 888 at issue is quoted in P 44 of the December 23 Order.)

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

12. The Commission 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.[12]

13. The December 23 Order concluded that "Order No. 888 is not authority for Niagara Mohawk's position that a merchant generator may be charged for delivery of station power even though, as is the case here, the generator uses none of Niagara Mohawk's local distribution facilities and, indeed, is not directly interconnected to any Niagara Mohawk local distribution facilities, and no local distribution service is actually provided."[13]

14. The December 23 Order also distinguished the D.C. Circuit's *Detroit Edison* decision,[14] finding that, while the court stated that the Commission cannot extend its jurisdiction to charges for local delivery service, here Niagara Mohawk was not providing any local delivery services to the Somerset facility. The December 23 Order explained that the netting provisions in the NYISO Services Tariff – unlike the tariff provisions at issue in *Detroit Edison* – do not provide for either transmission or local

[12] *Id.* at P 46 (footnotes omitted).

[13] *Id.* at P 47.

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

distribution charges, but only determine whether or not a merchant generator has self-supplied station power and the amount of the station power that is transmitted over NYISO facilities.[15]

Requests for Rehearing

15. Requests for rehearing were timely filed by the Public Service Commission of the State of New York (New York Commission); Northeast Utilities Service Company (NUSCO); the New York Transmission Owners (NYTOs); [16] and, collectively, Niagara Mohawk and the Transmission Owners (Niagara Mohawk).[17]

16. These parties contend, in brief, that the Commission exceeded its jurisdiction by allegedly not recognizing that states have jurisdiction over the local delivery of energy to end-users and by asserting the authority to approve tariff provisions that determine the charges applicable to the local delivery of electricity to end-users. They also allege that the Commission reversed prior determinations that states have jurisdiction to regulate charges to end-users and failed to provide an explanation for such reversal.

[15] December 23 Order at P 38 & n. 56 (citing to *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corporation*, Docket No. EL03-234-000, 105 FERC ¶ 61,336 at P 28 (2004) (*Nine Mile Point*).

[16] The NYTOs are Central Hudson Gas & Electric Corporation; Consolidated Edison Company of New York, Inc.; NYSEG; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation.

[17] NUSCO and the NYTOs each filed the same request for rehearing in both this proceeding and the *Nine Mile Point* proceeding. The New York Commission filed separate, but substantially similar, requests for rehearing in both proceedings, as did Niagara Mohawk (only the last few pages of each Niagara Mohawk pleading are different).

Discussion

Procedural Matters

17. NYTOs and the New York Commission raise issues related to the netting provisions of the NYISO Services Tariff[18] that constitute a collateral attack on the orders accepting those provisions,[19] and such issues are beyond the scope of this proceeding.

18. In addition, NUSCO seeks clarification of the December 23 Order's impact on the earlier *NU* order.[20] The issues that NUSCO raise do not share a factual basis with those presented in the instant complaint, and NUSCO's concerns are beyond the scope of this proceeding. Accordingly, we need not address those issues here.

Summary

19. We will deny rehearing. At the heart of this case is the fact that Niagara Mohawk is seeking to charge AES for services that AES does not want and that Niagara Mohawk is not providing. AES seeks an alternative source of station power for the Somerset facility under a wholesale tariff. This Commission has the authority to enforce its tariffs and to find that, where there is a conflict between a retail tariff and a wholesale tariff, the latter must prevail. These findings affect the retail tariff only to the extent that there is a conflict. Moreover, the Commission is not reversing or changing its holdings in Order No. 888 but is applying the requirements of that order to the facts of the dispute before it. Our action here does not permit merchant generators to bypass retail stranded costs and benefits charges for periods during which they actually purchase station power from a utility or have station power delivered over the local distribution facilities of that utility. Our action here does not constitute a reversal of, and in fact our rulings regarding station power are entirely consistent with, Order No. 888. The findings in the December 23 Order are the logical continuation of the analysis in our long line of station power cases, where we have held that jurisdiction over the provision of station power depends on how

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[18] *See* NYTOs at 13-22; New York Commission at 5-6.

[19] *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*).

[20] *See* NUSCO at 4, 6-12 (*citing Northeast Utility Services Company*, 101 FERC ¶ 61,327 (2002) (*NU*), *rev'd in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (*Warrior Run*), *reh'g denied*, 105 FERC ¶ 61,357 (2003), *order on remand*, 108 FERC ¶ 61,316 (2004), *reh'g pending*).

it is supplied, and that merchant generators may not be required to buy station power under a retail tariff.[21]

Niagara Mohawk Is Not Directly Connected to Nor Does It Provide Any Type of Retail Service to the Somerset Facility.

20. In the December 23 Order, we found that the Somerset facility is not directly connected with Niagara Mohawk and that at no time since AES acquired the facility has Niagara Mohawk sold or delivered station power to the Somerset facility.[22] Niagara Mohawk has conceded that it is not directly interconnected with the Somerset facility,[23] and the record in this proceeding demonstrates that AES does not seek any form of retail service – whether characterized as standby service or station power – from Niagara Mohawk. Nothing raised on rehearing by any party persuades us to the contrary.

21. The New York Commission posits that, even when a generator like the Somerset facility is self-supplying all of its station power requirements, it is nonetheless "still taking retail energy service within Niagara Mohawk's service territory." This is so, it argues, because Niagara Mohawk is the provider of last resort for all customers within its service territory, even for those who, like the Somerset facility, are not directly connected with Niagara Mohawk, and also provides metering and billing services.[24] We disagree with this argument. Even if we were to accept that Niagara Mohawk is a provider of last resort to a facility to which it is not directly connected (an issue we need not, and do not, reach) simply because the facility is located within the geographical boundaries of its service territory, a provider of last resort is not paid until and unless it actually becomes a provider, which is not the case here. Furthermore, the fact *per se* that a company ostensibly provides metering and billing services does not mean that its energy is being sold or its local distribution facilities are being used.

Interplay of Federal and State Jurisdiction

22. On rehearing, Niagara Mohawk and others acknowledge that the Commission has jurisdiction to regulate wholesale sales and unbundled transmission service (to both wholesale and end-use customers), and claim that the states have jurisdiction over both

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[21] *See PJM Interconnection, LLC*, 94 FERC ¶ 61,251 at 61,891-93 (*PJM II*), *order denying reh'g and providing clarification*, 95 FERC ¶ 61,333 (2003) (*PJM III*).

[22] December 23 Order at P 14, 33.

[23] *Id.* at P 27 & n. 37.

[24] New York Commission at 10 & n. 10.

sales and local delivery service to end-use customers, regardless of the classification of the facilities used to provide those services. Thus, according to these parties, any sale of and/or delivery of station power to the Somerset facility is subject to the jurisdiction of the New York Commission, and this Commission may not regulate the transaction. These parties claim that the December 23 Order allows end-users to bypass state jurisdiction by obtaining local delivery service under a Commission-jurisdictional transmission tariff, *i.e.*, the NYISO Services Tariff, thus impermissibly intruding upon state jurisdiction. Even for the quantities of station power that the Somerset facility self-supplies, Niagara Mohawk contends that it is a retail end-use customer that should take local delivery service under Niagara Mohawk's retail tariff.

23. The New York Commission contends that, while this Commission has jurisdiction to decide what is a wholesale sale, there is no such sale present in station use, and once that is decided, we lack the authority "to intrude upon a state's exercise of jurisdiction over the energy consumed in a retail sale."[25] The New York Commission reasons that, because energy is being consumed, it is being purchased and used at retail.[26] It relies on a Commission order -- which, we note, was subsequently reversed in pertinent part -- for the proposition that there is a retail sale when a transmission-level generator purchases its station use energy from an independent third party,[27] and then asserts that netting against generation produced at a remote location is a third-party retail purchase, even when the cost is accounted for through netting. Then, the New York Commission seeks to distinguish *Warrior Run* by stating that the service that the Somerset facility receives from Niagara Mohawk is a retail energy service and not a distribution service. The New York Commission concludes that *Warrior Run* is irrelevant because it does not cure the Commission's lack of jurisdiction over retail energy services.

24. Several parties also state that the Commission has been overruled by *Detroit Edison Co. v. FERC*[28] in its earlier attempt to provide for the retail sale of energy through a Commission-jurisdictional tariff. They assert that the distinction the Commission drew

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[25] *Id.* at 5.

[26] The New York Commission relies on a provision of the New York Public Service Law for the proposition that a retail sale results whenever there is a delivery of electricity from a remote location. *See id.* at 6-7 & n.5. On the contrary, the cited provision defines the term "electric corporation," not the term "retail sale."

[27] *Id.* at 7 & n. 6, *citing Northeast Utility Services Company*, 101 FERC ¶ 61,327 (2002) (*NU*), *rev'd in pertinent part, AES Warrior Run, Inc. v. Potomac Edison Co.*, 104 FERC ¶ 61,051 (*Warrior Run*), *reh'g denied*, 105 FERC ¶ 61,357 (2003), *order on remand*, 108 FERC ¶ 61,316 (2004), *reh'g pending*.

[28] 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*).

in the December 23 Order[29] with respect to *Detroit Edison* is not persuasive because "the Commission lacks jurisdiction over retail energy sales to transmission-level customers to the same extent as it lacks that jurisdiction over retail energy sales to distribution-level customers."[30] Niagara Mohawk and NYTOs argue that, although the NYISO tariff provision at issue is different from the tariff provision in *Detroit Edison*, the impact is the same, and the Commission is prohibited from establishing terms and conditions applicable to state-jurisdictional service.

25. NYTOs contend that the Commission suggested in the December 23 Order that its jurisdiction rests upon the type of charge at issue, or the type of customer receiving the service. NYTOs assert that there is no basis for these distinctions.

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

27. According to Niagara Mohawk, in the New York Commission proceeding, it was determined that such generators should not avoid paying for stranded costs even though they were not customers of the utility when such costs were incurred. Thus, Niagara Mohawk asserts that under New York law and regulations the Somerset facility is a retail delivery customer, even though it is not purchasing energy from Niagara Mohawk, and argues that the Commission's findings in the December 23 Order applying exclusive federal jurisdiction displace state authority. Niagara Mohawk cites *New York v. FERC*[31] for the principle that "courts apply a 'presumption against preemption" when displacement of actual, existing state regulation would result" and that "'the historic police powers of the State were not to be superceded . . . unless that was the clear and

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[29] December 23 Order at P 38 n.56 (referencing *Nine Mile Point***,** 105 FERC ¶ 61,336 at P 26, in which we explained that *Detroit Edison* involved tariff provisions that potentially allowed an unbundled retail customer to take distribution service over Midwest ISO's OATT, while NYISO's netting provision does not provide for either transmission or distribution charges but only determines whether or not a generator has self-supplied).

[30] New York Commission at 9.

[31] 535 U.S. 1, 18 (2002).

manifest purpose of Congress.'"[32] Finally, Niagara Mohawk contends that Congress intended in the FPA to withhold from the Commission the authority to override State jurisdiction over local distribution of electricity or local rates.

Commission Response

28. We note initially that the position that self-supply of station power is a sale for end use has previously been litigated and rejected. Raising the issue again on rehearing of the December 23 Order is a collateral attack on findings that the Commission made in earlier station power cases and is a collateral attack being made by the same parties that were active in those earlier proceedings. The same is true for the allegation that station power rules encroach on state jurisdiction over retail sales and local distribution. Specifically, both *PJM II* and *PJM III* involved, in addition to PJM's proposal to add station power rules to its tariff, a petition for a declaratory order and a complaint involving the station power practices of NYSEG and Niagara Mohawk in New York State. 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*. As discussed in *KeySpan IV*,[33] collateral attacks on final orders and relitigation of applicable precedent by parties that were active in earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency.[34] Nevertheless, we reiterate here that, although an off-line generator may *consume* energy as station power load, it is a separate question whether that consumed energy has been *sold at retail*. The self-supply of station power is distinguishable from a retail purchase of station power, and not all end use necessarily involves a sale for end use.

29. Furthermore, the Commission has explained previously that, when there is a conflict between station power provisions in Commission-jurisdictional and state-jurisdictional tariffs, the former must control.[35] That does not mean the Commission is approving or disapproving any rate, term, or condition of a retail tariff. Rather, we are only, and as narrowly as possible, harmonizing tariff provisions.

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[32] Niagara Mohawk at 9, *citing New York v. FERC*, 535 U.S. at 18.

[33] 107 FERC ¶ 61,142 at P 20-22.

[34] *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).

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

30. Niagara Mohawk's retail tariff (SC-7) impairs the ability of merchant generators to utilize the netting provisions of NYISO's Services Tariff, because SC-7 prevents them from self-supplying station power and forces them to pay for fictitious energy purchases when they are, in fact, self-supplying. The netting provisions of the NYISO Services Tariff calculate the transmission load for station power by calculating the net output of a wholesale generator's sales for resale that are injected into a transmission grid. Any provision in a state-regulated tariff that would contradict or impair such calculations, which is the effect of SC-7's calculation of energy purchases (since it calculates an amount different from the amount calculated under NYISO's Services Tariff), creates a conflict that must be resolved by the enforcement of the federally-regulated tariff. The necessity of this is demonstrated in *KeySpan IV*, wherein we explained how the New York Power Authority (NYPA) was subject to a state-regulated retail tariff with a contract demand ratchet that was triggered when a generator experienced a single hour of negative net output. Under that retail tariff, the ratchet, once triggered, made that amount of demand the contract (billing) demand for the next 18 months; thus, the operation of that retail tariff effectively prevented NYPA from using NYISO's Services Tariff for station power procurement and delivery for those 18 months.[36] We concluded that resolving the conflict in favor of the federally-regulated tariff ensured that NYPA would be able to use NYISO's Services Tariff's netting provision, so that its ratepayers could receive the benefits of the lower costs of self-supplied station power, or station power acquired from third parties.

31. What the Commission has done in the December 23 Order is not to intrude into state jurisdiction over retail rates or local distribution services, but only to determine based on applicable law and fact what type of services (wholesale or retail) are actually being provided and to act accordingly. As we illustrated in *KeySpan IV*, conflicts may arise. When they do, the Commission seeks to attempt to resolve such conflicts in the most narrowly tailored and careful manner. We have done so here. As we have emphasized from the start of the station power cases, our only jurisdiction is over the transmission of station power. The netting provisions at issue herein are designed to determine when, in fact, such transmission has taken place. That determination derives from the decades-old practice of negative generation, which we discussed at length in *PJM II* and *PJM III*.[37] The netting provisions determine the net output of a wholesale

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

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

merchant generator and whether it has self-supplied station power or has taken station power from another, and if so, what the transmission load is. Such determinations are solely within the jurisdiction of this Commission. To the degree that such calculations conflict with, and are undermined by, a state-regulated tariff, the federally-regulated tariff must control.[38] This is not an impermissible encroachment on the New York Commission's authority over retail rates.

32. We also have not interfered with or prevented stranded cost recovery, or even significantly impaired such recovery. Utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers[39] and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities, as we discuss further below. Further, utilities are free to seek, and states are free to approve, offsetting adjustments in other rates or to request that the recovery period be extended.

33. Niagara Mohawk claims that there is "no basis" for the December 23 Order's "assumption" that the same monthly netting interval must apply both to the calculation of station power requirements under the NYISO's tariff and under Niagara Mohawk's tariff SC-7. In support of its argument, Niagara Mohawk states the NYISO Services Tariff uses one month for calculating net output (which determines whether station power has been self-supplied or not), but simultaneously applies an hourly-based congestion management system to withdrawals and injections of station power energy.[40]

34. Niagara Mohawk is incorrect. It is irrelevant that congestion management is an hourly-based system while station power requirements are calculated monthly; they measure two different things, and thus their different time periods do not conflict. Indeed, if a generator supplies all of its station power requirements on site, the congestion management system is not applied, because the generator has not withdrawn or injected any station power energy into or from the grid. In contrast, having two different time

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[38] *See MISO*, 106 FERC ¶ 61,073 at P 45 (holding that, in the event of a conflict between federal and state tariff provisions, the federally-regulated tariff provision must control); *KeySpan IV*, 107 FERC ¶ 61,142 at P 42-43 (noting that, where the operation of a retail tariff effectively prevented a customer from utilizing NYISO's netting provision, the conflict must be resolved in favor of the wholesale tariff); *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094 at 61,360 (1992) (explaining that the Natural Gas Act preempts state and local law to the extent the enforcement of such laws conflict with the Commission's exercise of its jurisdiction).

[39] *See* 18 C.F.R. § 35.26(b)(1)(ii) (2004).

[40] Niagara Mohawk at 23-24.

periods in the NYISO Services Tariff and in SC-7 to measure the same thing – station power requirements – does create a conflict. This conflict can, and does, operate to prevent a generator from using the NYISO's station power procurement and delivery rules at all. We illustrated this conflict and how it is to be resolved in *KeySpan IV*, 107 FERC at P 43.

35. NYTOs claim that the Commission erred in the December 23 Order by finding that no local distribution facilities are involved in providing service to the Somerset facility. NYTOs state that this is a matter within the New York Commission's purview, and that the retail end-use meter being utilized, as well as the books, records and rate schedules of the local utility, are sufficient assets to invoke state jurisdiction. We disagree that it is solely the states that may make determinations about the nature of these facilities. This Commission must be able to assess whether facilities are transmission or local distribution facilities and thus whether they are subject to our jurisdiction.[41] Our authority to make this determination is not dependent on the ultimate outcome of the determination. In the December 23 Order (P 34), the Commission found, based on the record evidence, that the facilities used to serve the Somerset facility were solely transmission facilities. NYTOs cite no evidence to the contrary in their request for rehearing. The fact that the New York Commission may have overlapping authority to determine which facilities are local distribution facilities does not negate our authority with respect to transmission facilities.

36. Regarding *Warrior Run*, we note that the parties themselves cannot agree as to the nature of the service available under Niagara Mohawk's retail tariff. Niagara Mohawk characterizes its retail tariff as recovering just delivery charges.[42] According to the New York Commission, however, Niagara Mohawk provides only retail energy service. To the extent that delivery service is being provided, *Warrior Run* makes clear that this Commission has jurisdiction when deliveries are made over only Commission-jurisdictional, transmission facilities. To the extent Niagara Mohawk claims that it is

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[41] *See, e.g.*, *New York v. FERC*, 535 U.S. 1, 22-23 (2002) (noting that the Commission does not have jurisdiction over local distribution, but was within its authority to determine which facilities are local distribution facilities); *FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 (1964) (finding that "[w]hether facilities are used in local distribution . . . involves a question of fact to be decided by the FPC as an original matter"); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1417-19, 1421 (10th Cir. 1992) (finding that the Commission, in determining the scope of its jurisdiction in an analogous context, had the power to determine that a transaction was not local distribution, and that, where delivery occurred over interstate gas pipelines but a retail sale was "conspicuously missing," the state had no jurisdiction).

[42] *See* Niagara Mohawk's Answer at 3 (July 15, 2003).

providing retail energy service, the Somerset facility's self-supply of station power means that there is no sale by Niagara Mohawk to the facility, and thus no service being provided by Niagara Mohawk to the Somerset facility.

37. We continue to believe that *Detroit Edison* is distinguishable from the facts of this case. The jurisdictional question there was whether local distribution service was being provided under MISO's transmission tariff, which would enable an unbundled retail customer to bypass retail tariffs. Here, in contrast, the Somerset facility is not taking any state-jurisdictional, local distribution service from Niagara Mohawk.[43] Nor, for that matter, is it taking any local distribution service from NYISO. Indeed, no local distribution service is purported to be provided under NYISO's Services Tariff. Thus, we are not allowing the Somerset facility to bypass any truly applicable state-authorized local distribution charges. Rather, we are simply saying that the Somerset facility is taking only Commission-jurisdictional service and can be charged only a Commission-jurisdictional rate. Additionally, in *Detroit Edison*, there was no retail tariff provision that conflicted with a Commission-jurisdictional tariff provision, as is the case here.

38. Lastly, we note the New York Commission's new argument raised on rehearing that Niagara Mohawk is providing reliability-based services[44] to the Somerset facility and is providing meter-reading and billing services associated with retail sales made to the Somerset facility. Other than these unsupported assertions, the New York Commission provides no evidence that Niagara Mohawk is, in fact, providing these services under the retail tariff in question. Certainly, as a transmission-owning member of the NYISO, Niagara Mohawk contributes to system reliability. But Niagara Mohawk is compensated in full for those contributions through the transmission and ancillary services rates it collects via the NYISO Open Access Transmission Tariff (OATT). Even if we were to concede (which we do not) that station power delivered solely over local distribution facilities plays a role in system reliability, again, there is no evidence that Niagara Mohawk has ever sold or delivered over local distribution facilities station power to the

[43] We have consistently emphasized since *PJM II*, 94 FERC ¶ 61,251 at n.60, that any local distribution service must be paid for under a retail tariff.

[44] To the extent that the New York Commission (at 10-11) asserts that station power is needed for generating facilities to restart their generators, it is confusing restoration or blackstart service with station power service, *see PJM III*, 94 FERC at 61,896, and, in any event, the former is a wholesale, not a retail, service. *See* Order No. 888 at 31,711-12.

Somerset facility. Finally, given that we have found that the Somerset facility has self-supplied its station power requirements in full for all months in question, we disagree with the New York Commission's contention that Niagara Mohawk has performed any meter-reading or billing services for the facility.

Consistency with Precedent

39. In the December 23 Order, the Commission responded to arguments that Order No. 888 could be read to authorize a utility to collect charges for stranded costs and benefits through retail, local distribution rates from a merchant generator even where the utility is not providing a service over local distribution facilities. The Commission explained that it was not departing from its rationale in Order No. 888:

> 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.
>
> Second, the references in this passage to "no identifiable local distribution facilities" are addressing such situations as where large industrial or commercial customers took bundled retail electric service at relatively high voltages so that local distribution facilities (which typically are lower voltage facilities) may not be readily identifiable as among the facilities now used to provide service to them. The loss of these large industrial and commercial customers to competing power suppliers may be associated with legitimate stranded generation-based costs, and the possible inability to identify local distribution facilities involved in the utility's service to such customers should not be an obstacle to the inclusion of stranded costs in rates charged to those customers. But that is distinguishable from the situation in this proceeding, where the generation has been divested to a merchant generator, and rates to that merchant generator 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.[45]

40. On rehearing, the parties state that the Commission failed to provide a sound explanation for reversing Order No. 888. NYTOs claim that the Commission in the December 23 Order attempts to define the nature and extent of retail service, the extent to which local delivery facilities are involved, the scope of stranded costs that can be recovered in retail rates, and from whom they can be recovered, thus overstepping its jurisdictional authority. Niagara Mohawk argues that the December 23 Order is flatly inconsistent with Order No. 888's holding that "'even where there are no identifiable distribution facilities, states nevertheless have jurisdiction in all circumstances over the service of delivering energy to end users.'"[46]

41. NUSCO claims that the Commission reversed Order No. 888's ruling that there is always an element of local distribution service in any delivery of power to an end user, stating that Order No. 888 does not indicate that a utility must be providing a service in order for state jurisdiction to attach. NUSCO further contends that the December 23 Order does not explain why there is an element of local distribution service where power is delivered over transmission facilities to a customer other than a merchant generator but that there is not an element of local distribution service when the same service is provided to a merchant generator. According to NUSCO, the voltage level at which an end use customer receives its delivery service is unrelated to whether the customer caused generation stranded costs, and thus should pay stranded costs imposed by a state authority. NUSCO contends that there is no difference between a merchant generator and any other end use customer respecting whether they could cause stranded costs, and it is the prerogative of a state to determine who should pay stranded costs. Finally, NUSCO states that even if states are found to have no authority to assess stranded cost and benefit charges as part of local distribution charges, they will still be able to impose these charges based on their authority to regulate the end use consumption of power. If it is the Commission's intention to eliminate all state jurisdiction over end use self-supply, then NUSCO seeks rehearing.

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[45] December 23 Order at P 45-46 (footnotes omitted).

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

42. The New York Commission contends that the Commission's effort to distinguish station power use from the other holdings in Order No. 888 is irrational because a utility that has divested its generation is in even greater need of recovering its stranded costs. It also asserts that the premise upon which Order No. 888 was based, that customers leaving their utility systems will cause generation costs to become stranded, is exactly what the Commission is allowing merchant generators to do; "[i]t will enable them to leave Niagara Mohawk's system, obtain their generation from someone else, and potentially force Niagara Mohawk's other ratepayers to bear those stranded costs."[47]

43. Niagara Mohawk argues that the rules articulated in the December 23 Order are inconsistent with the Commission's prior decisions on the bounds of its jurisdiction over local delivery service; it states that Order No. 888 recognized the existence of local delivery service as a basis of state jurisdiction separate from the use of distribution facilities.[48] Niagara Mohawk further argues that the Commission ignores its statement in Order No. 888 that we will leave state authorities to deal with any stranded costs occasioned by retail wheeling, and it asserts that the December 23 Order's discussion of the need for stranded cost recovery intrudes into the area of retail ratemaking. Niagara Mohawk also reads the December 23 Order to suggest that a utility's divestiture of its generation disqualifies it from stranded cost recovery, which it states cannot be squared with Order No. 888, and it states the December 23 Order interprets Order No. 888 as excluding merchant generators from the ranks of large industrial or commercial customers.

44. Niagara Mohawk cites other Commission orders where it claims we reiterated that states have jurisdiction over some portion of energy delivery service to end users regardless of the type of facility used to make delivery and thus consistently establishing the dividing line between Commission and state jurisdiction.[49] It notes that Order No. 888 was concerned with ensuring that customers have no incentive to structure a purchase in order to avoid using "identifiable local distribution facilities" to bypass state

[47] New York Commission at 14.

[48] Niagara Mohawk at 16-17, *quoting* Order No. 888 at 21,650: "The authority of state commissions to address retail stranded costs is based on their jurisdiction over local distribution facilities and the service of delivering electric energy to end users."

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

jurisdiction and thus avoid being assessed charges for stranded costs and benefits, and argues that here, as there, the Commission should ensure that customers should not be able to bypass state tariffs.

Commission Response

45. In the December 23 Order, we explained that the Commission was referring in Order No. 888 to generation-based stranded costs, which may become stranded if, as a result of open access, former retail customers (such as industrial or commercial customers) leave a utility's system to take power service from a competing power supplier, and not the very different case of a merchant generator which has acquired the generating assets of the utility and which was not previously a retail customer of the utility. Merchant generators were never retail customers before Order No. 888 and, in fact, largely did not exist before Order No. 888. Thus, they are not the "retail-turned wholesale" customers considered in Order No. 888. And, where in Order No. 888, we stated that states have jurisdiction over the service of delivering energy to end users even when there are no identifiable local distribution facilities, we were addressing situations such as where large industrial or commercial customers took bundled retail electric service at high voltages (rather than the low voltages typically associated with local distribution facilities) so that local distribution facilities might not be readily identifiable, which is distinguishable from the circumstances in this proceeding.

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

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

48. We reject this allegation. We have not undermined any critical assurances made in Order No. 888. We have only stated that Order No. 888 cannot be relied upon to justify the utilities' efforts to burden competing suppliers with additional, and unjustified, costs that would make them less competitive as compared to the utilities. Our station power orders have clarified the class of customers from whom local distribution rates that include stranded costs and benefits are appropriately collected, *i.e.*, customers who are taking state-jurisdictional, local distribution service. As we explained in *KeySpan IV*,[50] we also have not interfered with or prevented stranded cost recovery, or even significantly impaired any such recovery, because utilities may still recover stranded costs and benefits from their retail-turned-wholesale customers and from those merchant generators that actually do purchase station power at retail or actually do take delivery over local distribution facilities. Nothing in our station power orders is to the contrary.

49. Thus, we have not reversed or changed our holdings in Order No. 888; we have only clarified that a small subset of merchant generators cannot, on the basis of what we said in Order No. 888, be charged retail rates given that they are not taking a retail service.[51] Even if the allegation that our interpretation of Order No. 888 somehow impairs stranded cost recovery or undermines prior understandings of Order No. 888 were correct (which we do not concede), the utilities are free to seek, and the state is free to approve, offsetting adjustments in other rates that recover stranded costs from appropriate classes of customers or to extend the recovery period for stranded costs.

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

51. Similarly, regarding NUSCO's contentions, we never held that there is an element of local distribution service where power is being delivered to a customer other than a merchant generator, while there is no such service present with respect to power being

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[50] 107 FERC ¶ 61,142 at P 49.

[51] We have clarified that Order No. 888 requires that a service must actually be provided before the rates for that service may properly recover stranded costs or benefits. *E.g.*, *Warrior Run*, 104 FERC ¶ 61,051 at P 17; *accord* December 23 Order at P 47. In other words, Order No. 888 is consistent with traditional cost-causation principles.

delivered to merchant generators. This construction is a misstatement of our order. As we discuss above, merchant generators are not retail-turned-wholesale customers; they did not have a prior relationship with a utility supplier. Any difference between the treatment of merchant generators and others arises because merchant generators never left utilities' systems and so did not cause the stranded costs sought to be recovered under retail tariffs. NUSCO completely overlooks these facts.

52. Finally, as discussed in *KeySpan IV*,[52] the *BART* orders are inapposite. Those orders involved the issue of whether Pacific Gas and Electric Company (PG&E) was charging BART state direct access charges in addition to the OATT's transmission rates for the delivery of federal preference power. The Commission found that PG&E was charging BART the appropriate OATT rate and suggested that BART take any concerns it had regarding the state charges to the California Commission. On rehearing, the Commission found that PG&E's local distribution facilities were, in fact, being used to wheel the preference power to BART's loads. Thus, those orders do not address the question that the New York Commission poses, *i.e.*, whether any retail charges would apply when a merchant generator does not either purchase energy at retail or use local distribution facilities. As we noted in earlier station power cases,[53] 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, such as the Somerset facility, is using the local distribution facilities of a New York utility, such as Niagara Mohawk.

Nature of Standby Service

53. Niagara Mohawk responds to the finding in the December 23 Order that no service is being provided by asserting that customers taking service under its SC-7 rates received unbundled standby service, "i.e., the continued availability of Niagara Mohawk's system to provide station service energy commodity . . . in the event that AES needs to buy such energy . . ."[54] NYTOs assert on rehearing that the Commission incorrectly assumed that the retail standby service offered in Niagara Mohawk's SC-7 tariff requires an actual delivery. According to NYTOs, the very nature of standby service requires that the utility stand ready to deliver station power service; since the Somerset facility has the potential to take such service, NYTOs argue that the Commission's finding that no service was being provided is incorrect. Moreover, they claim that the absence of any

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

[53] *See PJM III*, 95 FERC at 62,186.

[54] Niagara Mohawk at 21.

sale of energy does not negate the fact that Niagara Mohawk has incurred costs that are allocable to SC-7 customers for standing ready to provide delivery services.

54. The New York Commission argues that station power service is a retail energy service.[55] On the contrary, Niagara Mohawk describes station power service in terms of the receipt of "unbundled standby service, *i.e*., the continued availability of Niagara Mohawk's system to provide station service energy commodity (including its delivery) in the event that AES needs to buy such energy – for example, if both its units go off-line or for some other reason cannot supply each other with station power."

Commission Response

55. The parties assert for the first time on rehearing that Niagara Mohawk is, in fact, providing a capacity-based service, standby service, that is distinct from either retail energy sales or energy delivery. There is no indication that this assertion could not have been made in their original pleadings. Absent a showing of good cause, the Commission generally looks with disfavor on parties raising on rehearing issues that should have been raised earlier. As we recently observed, "[s]uch behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."[56] The Commission has the discretion to reject such arguments. Nevertheless, we will address the issue in this instance in order to clarify the record.

56. We note that the New York Commission argues that station power service is a retail energy service.[57] However, Niagara Mohawk describes station power service in terms of the receipt of "unbundled standby service, *i.e*., the continued availability of Niagara Mohawk's system to provide station service energy commodity (including its delivery) in the event that AES needs to buy such energy – for example, if both its units go off-line or for some other reason cannot supply each other with station power."[58]

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[55] New York Commission at 10.

[56] *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,024 at P 6; *see also Baltimore Gas & Electric Company*, 91 FERC ¶ 61,270 at 61,922 (2000); *Northern States Power Company (Minnesota)*, 64 FERC ¶ 61,172 at 62,522 (1993).

[57] New York Commission at 10.

[58] Niagara Mohawk at 21. This statement contains a factual error; the Somerset facility is a single, coal-fired generating unit. The sentence appears to have been taken from Niagara Mohawk's similar pleading in the *Nine Mile* proceeding, in which the facility at issue has two nuclear generating units.

NYTOs characterize the service provided by Niagara Mohawk as "retail station service, or standby station service" and state that the New York Commission requires each local franchise utility to stand ready to deliver local station service.[59] The fact that the parties cannot agree on the nature of the service purportedly being provided to the Somerset facility lends credence to the Commission's position that no service is actually being provided. Further, Niagara Mohawk's new stance can be taken as its concession that there must, indeed, be a service provided to the Somerset facility in order for Niagara Mohawk to assess charges.

57. Nevertheless, this discussion does not change that fact that AES does not want any service under Niagara Mohawk's SC-7 tariff, standby or otherwise. After acquiring the Somerset facility, AES chose not to sign a service agreement with Niagara Mohawk in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff. Nor has Niagara Mohawk actually provided service for which it may charge since the acquisition.

58. NYTOs argue that the absence of any sale of energy does not change the fact that Niagara Mohawk incurred costs that are allocable to SC-7 customers for standing ready to provide delivery service to them. Because AES chose not to sign a service agreement with Niagara Mohawk under SC-7, however, Niagara Mohawk is under no contractual obligation to stand ready to provide station service to the Somerset facility. Niagara Mohawk has not provided any evidence that it has provided such service or evidence with respect to any costs associated with standing ready.

59. As we commented in the December 23 Order, we cannot approve or disapprove a retail rate for standby service; however, it is within our purview to interpret and enforce the tariffs on file here at this Commission, including the netting provision of NYISO's Services Tariff. To the extent a retail tariff for standby service, or any other service, conflicts with NYISO's netting provision, the latter must control. If forcing AES to pay for retail standby service undercuts the NYISO netting provision or causes a generator to pay duplicative charges, then the federally-regulated tariff preempts the state-regulated tariff.

Discrimination

60. The New York Commission asserts that part of the Commission's rationale in granting AES's complaint was that charging AES for station power service for the Somerset facility would be discriminatory since Niagara Mohawk did not charge itself for those services when it owned the plants. The New York Commission contends that the arrangements in place before Niagara Mohawk divested its plants have no bearing on the present circumstances. It attests that Niagara Mohawk has now divested all of its

[59] NYTOs at 8.

generation, and all formerly vertically integrated utilities in New York also have or are in the process of doing so, unlike in PJM. According to the New York Commission, there thus could be no discrimination against non-utility owned generation facilities in New York. The New York Commission further attempts to distinguish the facts by noting that, when New York's utilities were integrated, they recovered station power costs in their bundled retail charges to their customers; "[t]hey did not suggest that their generators failed to consume energy for station use when out-of-service, and in fact did charge their ratepayers for the standby services that generators consumed."[60] Thus, it argues, no discrimination has occurred.

61. To the extent the New York Commission challenges findings in our orders approving NYISO's netting provisions, this is a collateral attack on our orders in the *KeySpan* proceeding, and we will not allow relitigation of our station power precedent. To the extent that we may have relied on the specter of discrimination in our December 23 Order, we reiterate our statement in *KeySpan IV* that the potential for discrimination between utilities and merchant generators in New York State still exists. We explained:

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

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

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[60] New York Commission at 16.

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

Other Issues

63. NYTOs characterize the use of a 30-day monthly netting period as a "fiction" and "accounting convention" that the Commission is improperly using as a "dividing line" between state and federal jurisdiction. They contend that "the delivery of energy for consumption at power stations is a retail transaction subject to exclusive state jurisdiction."[61] We disagree.

64. First, to the extent that NYTOs are arguing once again that the use of a monthly netting period (or any netting period) involves retail sales subject to exclusive state jurisdiction, they are engaging in a collateral attack on our earlier *PJM* orders. As we last explained in *KeySpan IV*,[62] netting is no more than the traditional accounting for station power as negative generation, that is, calculating the output of a particular generating facility net of station power requirements, rather than as gross output. We will not revisit this issue here.

65. Second, NYTOs are incorrect that the delivery of station power is subject to exclusive state jurisdiction. We flatly rejected that proposition in *PJM II*, in which we held "[i]n the event that the provision of station power involves the unbundled retail transmission of electric energy in interstate commerce in a retail choice state [as is New York], we would have jurisdiction over such transmission."[63] Significantly, we also emphasized that:

> [I]n a retail choice state, an end user is still buying retail transmission service and unbundled power supply as separate purchases (not as a single bundled purchase) even when one supplier sells both services. Once services are unbundled, they cannot be treated as re-bundled simply because one supplier is involved.[64]

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[61] NYTOs at 11-12.

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

[63] *PJM II*, 94 FERC at 61,889 n. 51. We also noted that where such delivery also involved the use of local distribution facilities, the state would regulate that aspect of the transaction. *Id.* at n.61.

[64] *Id.* at n.61.

66. NYTOs also cite to *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945) (*CLP*), contending that "the jurisdictional test of [FPA] Section 201(b) is 'an engineering and scientific, rather than a legalistic or governmental, test.'" This case does not support NYTOs' contention that this Commission lacks jurisdiction over the delivery of station power. As we explained in our discussion of *CLP* in Appendix G (legal analysis) of Order No. 888,[65] the Supreme Court noted in dictum in that case that once this Commission has jurisdiction over a public utility, the fact that there is also local regulation does not preclude exercise of our regulatory functions.[66] We also noted that, while the local distribution proviso of section 201(b) of the FPA must be given effect, the Supreme Court in *CLP* and other cases[67] has stated that whether facilities are used in local distribution is a question of fact to be decided by this Commission as an original matter.[68]

67. Niagara Mohawk argues that, by approving a one-month netting period for the months prior to April 2003 (the effective date of the station power provisions in the NYISO Services Tariff), the Commission has engaged in retroactive ratemaking and violated the filed rate doctrine. It also maintains that Part IV of the NYISO OATT incorporates by reference the delivery rates of Niagara Mohawk's retail rates, and that the Somerset facility should have paid those rates for station power delivery under the retail tariff, which does not provide the customer with the option to self-supply.[69]

68. This contention must fall on several counts. First, as we noted in the December 23 Order, AES did not sign a service agreement with Niagara Mohawk for retail service for the Somerset facility, and, in fact, refused to concede that it was receiving any form of station power service from Niagara Mohawk, even when it made a partial settlement to avoid the costs of litigation. Nor did AES sign a service agreement under the NYISO OATT for transmission of station power to the Somerset facility. On the contrary, we found in the December 23 Order that Niagara Mohawk did not sell or deliver station power to the Somerset facility during any month at issue during the complaint. Thus, the fact that Niagara Mohawk's retail delivery rates are incorporated by

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[65] Order No. 888 at 31,974.

[66] *CLP*, 324 U.S. at 533.

[67] *E.g.*, *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205 (1964).

[68] Order No. 888 at 31,980.

[69] Niagara Mohawk at 24-26.

reference in Part IV of the NYISO OATT is not relevant, given that there is neither a contractual relationship between AES and Niagara Mohawk nor the actual provision of a service.

69. Second, Niagara Mohawk misconstrues the nature of the Commission's finding on the appropriate netting period for the pre-April 2003 months. For there to be retroactive ratemaking or a violation of the filed rate doctrine, there must first be a rate on file. Indeed, Niagara Mohawk concedes that both the filed rate doctrine and the rule against retroactive ratemaking are grounded in enforcement of the terms and conditions of a filed rate schedule. But there is no such filed rate schedule here. The station power procurement and delivery provisions of the NYISO Service Tariff were not in effect prior to April 1, 2003. And while Niagara Mohawk's retail tariff was on file at that time, AES never signed a service agreement for retail service and we have found that no retail service was in fact provided. Where a customer is not taking service under a filed rate schedule, neither precedent properly applies. While Niagara Mohawk claims that we have "disregarded" the "express requirements" of both Niagara Mohawk's retail tariff and the NYISO tariff, in fact, neither of these filed rate schedule controls.

70. Rather, for the time period between AES's acquisition of the Somerset facility (May 1999) and the effective date of the station power provisions of the NYISO Service Tariff (April 2003), in the absence of a controlling rate schedule (either federal or state), the Commission must find an off-the-contract (or extra-contractual) solution to the parties' dispute. Here, the parties ask the Commission to choose between one of two time periods: the one-month netting interval advocated by AES and the shorter netting interval advocated by Niagara Mohawk. While both of these netting intervals are terms of filed rate schedules, the Commission was not, in fact, applying or enforcing the terms and conditions of either of those filed rate schedule, much less retroactively changing a filed rate schedule's term or condition or authorizing the charging of a rate other than a filed rate.

71. As we explained in the December 23 Order, AES made the more persuasive case in favor of the one-month netting interval. AES argued, and we agreed, that the one-month netting interval is consistent with what had been the long-standing netting practices of vertically-integrated utilities in New York, including Niagara Mohawk (later codified in the NYISO Services Tariff).[70] We also found it compelling that PJM had adopted a one-month netting interval in 2001, and we thus avoided the creation of an unnecessary seam between the two contiguous regional organizations.[71]

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[70] December 23 Order at P 35 n. 46.

[71] *Id.*

72. Niagara Mohawk argued that the shorter netting interval of its retail tariff was appropriate because it was, in fact, providing retail services to AES for the Somerset facility, notwithstanding AES's consistent refusal to sign a service agreement. However, we rejected Niagara Mohawk's position as contrary to our findings that Niagara Mohawk has not sold or delivered station power to the Somerset facility during any time since AES acquired the unit in May 1999. On the contrary, applying the one-month netting interval that was later codified in a filed rate schedule, and which had been used in neighboring PJM since 2001, was, we explained, the more reasonable solution to the parties' dispute.

73. Niagara Mohawk claims that the Commission is "intruding" on the jurisdiction of the New York Commission to establish state policies and also incorrectly found that Niagara Mohawk provides no service to AES. For the first time on rehearing, Niagara Mohawk contends that the NYISO OATT provides that withdrawals to serve load at the Somerset generating units would be subject to Niagara Mohawk's transmission service charge, even though the transmission facilities are owned by NYSEG.[72] According to Niagara Mohawk, it "in fact delivers power to the Somerset plant *using the transmission system* operated by the NYISO."[73]

74. We do not need to, nor will we, reach the question of whether Niagara Mohawk may be entitled to compensation under the NYISO OATT for *transmission services* related to the delivery of station power when the Somerset facility is remotely self-supplying or purchasing station power from a third party. This is a new and different issue not addressed in the December 23 Order, where we found that Niagara Mohawk has never sold or delivered station power over *local distribution facilities* to AES for the Somerset facility – findings that Niagara Mohawk now apparently concedes. As we stated in the December 23 Order: "when the Somerset unit is not in service and must receive station power from a third party, the delivery service is provided over only the 345 kV transmission facilities. Even in this case, there are no local distribution facilities used for delivery service."[74] The hypothetical questions of what compensation may be

[72] Niagara Mohawk at 26-28.

[73] *Id.* at 26 (emphasis added).

[74] December 23 Order at P 34.

due under the NYISO OATT, and to which transmission owners, if and when the Somerset facility has negative net output in the future are beyond the issues presented in this case.[75]

75. Niagara Mohawk also claims that, as the "exclusive franchised provider of retail electric service" in the town in which the Somerset facility is located, AES cannot contract with another utility for retail station power service.[76] It further contends that AES's "offer" to pay Niagara Mohawk for the power that the latter purchased for the Somerset facility functions as AES's recognition that Niagara Mohawk is the entity that delivers and bills for energy deliveries to the Somerset facility.[77]

76. In light of our findings that the Somerset facility has had positive net output for every month at issue in this proceeding, we need not reach the issue of whether any state law prohibits AES from purchasing station power from a supplier other than Niagara Mohawk.[78] As long as AES self-supplies the Somerset facility, it is not purchasing station power from any party, either Niagara Mohawk or another supplier. We also reject Niagara Mohawk's claim that AES has "recognized" that Niagara Mohawk in fact procured and delivers station power energy to the Somerset facility. Rather, AES challenged Niagara Mohawk to demonstrate that the utility actually had acquired and paid for such energy – a demonstration that Niagara Mohawk never provided.[79] A challenge to prove that purchases of energy occurred is not a concession that such purchases did actually occur.

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[75] In, in the future, this is issue is presented to us for decision, it would be germane to our disposition of the proceeding whether the prior owners of the Somerset facility (NYSEG and NGE Generation) had paid Niagara Mohawk a transmission service charge under the NYISO OATT.

[76] Niagara Mohawk at 27.

[77] *Id.* at 27 n. 64.

[78] Again, if, in the future, this issue is presented to us for decision, it would be germane to our disposition of the proceeding whether Niagara Mohawk similarly had claimed that this state law applied to the prior owners of the Somerset unit (NYSEG and NGE Generation).

[79] December 23 Order at P 18.

The Commission orders:

The Commission hereby denies the requests for rehearing of the December 23 Order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.