UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nine Mile Point Nuclear Station, LLC

v. Docket No. EL03-234-001

Niagara Mohawk Power Corporation

ORDER DENYING REHEARING

(Issued January 21, 2005)

1. On December 23, 2003, the Commission issued an order in this docket[1] granting a complaint filed by Nine Mile Point Nuclear Station, LLC (Nine Mile), which alleged that Niagara Mohawk Power Corporation (Niagara Mohawk) had improperly refused to implement the station power provisions of the New York Independent System Operator, Inc. (NYISO) Market Administration and Control Area Services Tariff (Services Tariff). This order denies rehearing. This action benefits customers by resolving disputes over station power-related services and ensuring that wholesale merchant generators may obtain least-cost station power for the ultimate benefit of the customers they serve.

Background

2. On September 26, 2003, Nine Mile filed a complaint pursuant to section 206 of the Federal Power Act (FPA), alleging that Niagara Mohawk had interfered with Nine Mile's ability to obtain station power service under the NYISO Services Tariff. The December 23 Order granted Nine Mile's complaint and directed Niagara Mohawk to take actions in conformance with the findings in the order.

3. Nine Mile stated that it had purchased a nuclear generating station in Oswego, New York from Niagara Mohawk in December 2000, that it had operated the two units at

[1] Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp., 105 FERC ¶ 61,336 (2003) (December 23 Order).

the station since that time, and that it had received station power service[2] under Niagara Mohawk's retail tariff SC-7.[3] Nine Mile stated that it sought to terminate service under the retail tariff effective as of September 17, 2003, in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff.[4] Nine Mile explained that it expected each generating unit to experience positive net output over the monthly netting period provided under the NYISO Services Tariff, and, to the extent a unit experienced a prolonged outage, it intended to self-supply that unit's station power remotely from power generated by the sister unit. According to Nine Mile, the output of each unit is delivered using only transmission facilities.[5] Nine Mile concluded that, under Commission precedent, it would be entirely self-sufficient with respect to station power and contended that only Commission-jurisdictional charges for the delivery of station power, if applicable, should be charged.

4. Nine Mile asserted that Niagara Mohawk did not respond to Nine Mile's notice of termination, but rather continued to assess retail charges on Nine Mile. Nine Mile further charged that Niagara Mohawk failed to assist NYISO in the administration of its station power rules by providing NYISO with meter information needed for accurate administration of the NYISO settlement process, and that NYISO consequently was unable to accurately account for and issue bills reflecting Nine Mile's self-supply of station power.

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

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

[4] NYISO, FERC Electric Tariff, Original Volume No. 2, Section 4.24. NYISO's Services Tariff provides that a generator may self-supply station power during any calendar month when its net output for that month is positive, or when its net output is negative and another generator owned by the same entity has positive net output in sufficient amount during that month to offset its negative net output (*i.e.*, remote self-supply).

[5] Nine Mile noted that one of Niagara Mohawk's accounts appears to be served at a voltage lower than transmission level and stated that, to the extent that account is self-supplied through the use of local distribution facilities, it would pay for the use of those facilities consistent with the NYISO tariff and Commission precedent. Complaint at 2, n.4.

5. Nine Mile requested that the Commission direct Niagara Mohawk to cease charging retail rates after September 16, 2003 to the extent Nine Mile's accounts were net positive for each month, through either on-site or remote self-supply of station power, and direct Niagara Mohawk to coordinate with NYISO to provide information needed to ensure that Nine Mile is charged accurately for its self-supply of station power.

6. In response, Niagara Mohawk stated that, since July 1, 2002, it had provided station power service under retail tariff SC-7, which applies to service provided to customers with on-site generation facilities, such as Nine Mile. Niagara Mohawk countered that the Commission and the courts have held that states have jurisdiction over the local delivery of power to end users in all circumstances. According to Niagara Mohawk, the Commission found in Order No. 888,[6] that recognizing state authority over the service of local delivery of electricity to end users, regardless of the classification of the facilities involved, ensured that retail customers would have no incentive to bypass state-authorized stranded cost and benefit charges by connecting directly to transmission facilities.[7] Niagara Mohawk concluded that Order No. 888's statement that states have jurisdiction in all circumstances over the service of delivering energy to end users included circumstances involving no "sale" of energy from one party to another.

7. In the December 23 Order, the Commission granted Nine Mile's complaint. The Commission found that Nine Mile chose to self-supply station power and take delivery under NYISO's Services Tariff, which determines whether a generator's net output is positive or negative on a monthly basis. The Commission noted that Nine Mile had maintained a net positive output every month and thus had self-supplied station power,

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[6] *See* Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom.* Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

[7] Order No. 888 at 31,783. Niagara Mohawk also quotes this excerpt: "Because [states'] authority is over services, not just the facilities, states can assign stranded costs and benefits based on usage (kWh), demand (kW), or any combination or method they find appropriate. They do not have to assign them to specific facilities." *Id*. The references to "usage" and "demand" indicate that the Commission anticipated that utilities would be providing some quantifiable service. However, as we explain below, in this instance, Niagara Mohawk is not providing any service on which payment for stranded costs can attach.

pursuant to NYISO's Services Tariff. The Commission further found that, as the delivery of station power did not make use of any Niagara Mohawk local distribution facilities, there was no delivery over Niagara Mohawk's local distribution facilities. Thus, the Commission concluded that Niagara Mohawk had no basis for requiring Nine Mile to buy or pay for the delivery of station power under its retail tariff. The Commission distinguished the instant case from *Detroit Edison* and held that the result is consistent with policy considerations discussed in previous station power cases.

8. The Commission ruled that Order No. 888 did not justify the imposition of any delivery charges other than transmission charges subject to the Commission's jurisdiction. The Commission explained that Order No. 888 does not authorize a utility to collect charges for stranded costs and benefits through retail, local distribution rates in the case of a merchant generator where that generator is not, in fact, using local distribution facilities. Further, the Commission stated:

> 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.[[8]]

9. In the December 23 Order, the Commission directed Niagara Mohawk to comply with its obligations under NYISO's Services Tariff to provide certain metering data and other information required for billing purposes. Niagara Mohawk reported on its compliance with this directive on February 6, 2004, and the Commission accepted the report by letter order dated March 22, 2004.

Requests For Rehearing

10. Niagara Mohawk filed a request for rehearing jointly with certain New York Transmission Owners (referred to herein as Niagara Mohawk or Joint Request for

[8] December 23 Order at P 35 (footnote omitted) (emphasis in original).

convenience).[9] The New York Transmission Owners (NYTOs) also filed a supplemental application for rehearing (without Niagara Mohawk) seeking rehearing of a number of issues in addition to those raised in the Joint Request. Requests for rehearing were also filed by the New York Public Service Commission (New York Commission) and Northeast Utilities Service Company (NUSCO).

11. 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 service of 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.

12. On January 30, 2004, Detroit Edison Company (Detroit Edison) filed a motion to intervene out of time stating that it may be directly affected by any Commission order that impacts its ability to assess charges under its state-jurisdictional retail electric tariff and thus that it has a direct and substantial interest in the Commission's decision in this proceeding. Detroit Edison argues that good cause exists to permit it to intervene out-of-time because it only recently became aware of the December 23 Order and the Commission's purported "establishment of a new set of jurisdictional rules regarding retail energy sales."[10] Detroit Edison asserts that its intervention raises no new issues and submits no new factual information but simply supports arguments and positions asserted by Niagara Mohawk and other parties. Detroit Edison states that it agrees to accept the record as it exists.

13. On February 17, 2004, Nine Mile filed an answer to Detroit Edison's motion to intervene out of time, contending that the motion should be rejected as procedurally flawed. Nine Mile argues that Detroit Edison has not met the requirements for intervention out of time because there is no reason that Detroit Edison should have just become aware of the Nine Mile complaint and because granting the intervention now will disrupt the proceeding, placing additional burdens on existing parties. Moreover, Nine Mile asserts that Detroit Edison's pleading is in essence a request for rehearing, and the Commission cannot accept a petition for rehearing outside the thirty day period provided in the FPA. Nine Mile also responds to Detroit Edison's arguments on substantive grounds.

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[9] These New York Transmission Owners are Central Hudson Gas & Electric Corp., Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corp., Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corp. The New York Transmission Owners seek rehearing individually and collectively.

[10] Motion at 3.

Discussion

Procedural Matters

14. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention. Detroit Edison has not met its burden of justifying late intervention. Accordingly, we will deny Detroit Edison's motion to intervene and reject its comments. As a result, we need not address the arguments raised in Nine Mile's answer.

15. NYTOs and the New York Commission raise issues related to the netting provisions of the NYISO Services Tariff[11] that constitute a collateral attack on the orders accepting those provisions,[12] and such issues are beyond the scope of this proceeding. In addition, NUSCO seeks clarification of the December 23 Order's impact on the *NU* order.[13] 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

16. We will deny rehearing. At the heart of this case is the fact that Niagara Mohawk is seeking to charge Nine Mile for services that Nine Mile does not want and that Niagara Mohawk is not providing. Nine Mile seeks an alternative source of station power 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

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[11] *See* NYTOs request for rehearing at 13-22; New York Commission request for rehearing at 14-16.

[12] *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*).

[13] *See* NUSCO request for rehearing at 4, 6-12.

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 it is supplied, and that merchant generators may not be required to buy station power under a retail tariff.[14]

Interplay of Federal and State Jurisdiction

17. 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 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 Nine Mile 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 Nine Mile self-supplies, Niagara Mohawk contends that Nine Mile is a retail end-use customer that should take local delivery service under Niagara Mohawk's retail tariff.

18. 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."[15] The New York Commission reasons that, because energy is being consumed, it is being purchased and used at retail.[16] 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

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[14] *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*).

[15] New York Commission at 5.

[16] The New York Commission also relies on a provision of the New York Public Service Law for the idea 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," rather than defining "retail sale."

station use energy from an independent third party,[17] 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 Nine Mile 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.

19. Several parties also state that the Commission has been overruled by *Detroit Edison Co. v. FERC*[18] 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 in the December 23 Order[19] 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."[20] 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.

20. 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.

21. 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 Nine Mile to elude paying charges for delivery service under the retail tariff will cause a significant

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[17] New York Commission at 7, *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*.

[18] 334 F.3d 48 (D.C. Cir. 2003) (*Detroit Edison*).

[19] *See* December 23 Order at P 28 (explaining 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).

[20] New York Commission at 9.

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 Nine Mile.

22. 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 Nine Mile 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*[21] 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 manifest purpose of Congress.'"[22] 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

23. 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*,[23] 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.[24]

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[21] 535 U.S. 1, 18 (2002).

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

[23] 107 FERC ¶ 61,142 at P 20-22.

[24] *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.*

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.

24. 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.[25] 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.

25. 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.[26] 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.

26. 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

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Brown, 585 F.2d 801, 806 (D.C. Cir. 1979).

[25] *Midwest Independent Transmission System Operator, Inc.*, 106 FERC ¶ 61,073 at P 45 (2004) (*MISO*).

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

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 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*.[27] The netting provisions determine the net output of a wholesale 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.[28] This is not an impermissible encroachment on the New York Commission's authority over retail rates.

27. 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[29] 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.

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[27] 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.

[28] *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).

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

28. Niagara Mohawk claims that there is "no basis" for the December 23rd 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.

29. 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 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*. [30]

30. NYTOs claim that the Commission erred in the December 23 Order by finding that no local distribution facilities are involved in providing service to Nine Mile. 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.[31] Our authority to make this determination is not dependent on the ultimate outcome of the determination. In the December 23 Order, the Commission found, based on the record

[30] 107 FERC ¶ 61,142 at P 43.

[31] *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).

evidence, that the facilities used to serve Nine Mile 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.

31. 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.[32] 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 providing retail energy service, Nine Mile's self-supply of station power means that there is no sale by Niagara Mohawk to Nine Mile, and thus no service being provided by Niagara Mohawk to Nine Mile.

32. 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, Nine Mile is not taking any state-jurisdictional, local distribution service from Niagara Mohawk.[33] 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 Nine Mile to bypass any truly applicable state-authorized local distribution charges. Rather, we are simply saying that Nine Mile 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.

33. Lastly, we note the New York Commission's new argument raised on rehearing that Niagara Mohawk is providing reliability-based services[34] to the Nine Mile facility

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[32] *See* Niagara Mohawk's Answer at 1-3 (October 20, 2003).

[33] 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.

[34] 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.

and is providing meter-reading and billing services associated with retail sales made to the Nine Mile 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 Nine Mile facility since Nine Mile sought to terminate service under the retail tariff. Finally, given that we have found that the Nine Mile 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 Nine Mile facility.

Consistency with Precedent

34. 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.
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> 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.[35]

35. 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.'"[36]

36. 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

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[35] December 23 Order at P 35-36 (footnotes omitted).

[36] Niagara Mohawk at 17, *citing* Order No. 888 at 31,849.

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.

37. 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."[37]

38. 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.[38] 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.

39. 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.[39] 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

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[37] New York Commission at 14.

[38] Niagara Mohawk at 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."

[39] *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

40. 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.

41. 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.

42. 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.

43. 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*,[40] 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.

44. 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.[41] 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.

45. Nor are we improperly distinguishing merchant generators from other retail customers, as Niagara Mohawk contends. Merchant generators like Nine Mile 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.

46. 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 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

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[40] 107 FERC ¶ 61,142 at P 49.

[41] 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 37. In other words, Order No. 888 is consistent with traditional cost-causation principles.

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.

47. Finally, as discussed in *KeySpan IV*,[42] 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,[43] 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 Nine Mile, is using the local distribution facilities of a New York utility, such as Niagara Mohawk.

Nature of Standby Service

48. 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 [Nine Mile] needs to buy such energy . . ."[44] 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 Nine Mile 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 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.

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

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

[44] Niagara Mohawk at 22.

49. The New York Commission argues that station power service is a retail energy service.[45] 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 [Nine Mile] 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." Yet, elsewhere, Niagara Mohawk describes Nine Mile as a retail end use customer not purchasing energy, but taking local delivery service.[46]

Commission Response

50. 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."[47] The Commission has the discretion to reject such arguments. Nevertheless, we will address the issue in this instance in order to clarify the record.

51. We note that the New York Commission argues that station power service is a retail energy service.[48] However, Niagara Mohawk describes Nine Mile as a retail end use customer not purchasing energy, but taking local delivery service.[49] Yet, elsewhere, 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 [Nine Mile] needs to buy such energy – for example, if both its units go off-line or for some other

[45] New York Commission at 10.

[46] Niagara Mohawk at 9.

[47] *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).

[48] New York Commission at 10.

[49] Niagara Mohawk at 9.

reason cannot supply each other with station power."[50] 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.[51] The fact that the parties cannot agree on the nature of the service purportedly being provided to Nine Mile 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 Nine Mile in order for Niagara Mohawk to assess charges.

52. Nevertheless, this discussion does not change the fact that Nine Mile does not want any service under Niagara Mohawk's SC-7 tariff, standby or otherwise. It terminated service effective as of September 17, 2003 in order to exercise its right to self-supply station power in accordance with the provisions of NYISO's Services Tariff. Nor has Niagara Mohawk actually provided service for which it may charge since that date. 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 Nine Mile chose to terminate its service agreement with Niagara Mohawk under SC-7, however, Niagara Mohawk is under no contractual obligation to stand ready to provide station service to Nine Mile. Niagara Mohawk has not provided any evidence that it has provided such service nor evidence with respect to any costs associated with standing ready.

53. 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 Nine Mile 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

54. The New York Commission asserts that part of the Commission's rationale in granting Nine Mile's complaint was that charging Nine Mile for station power service 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 generation, and

[50] *Id.* at 22.

[51] NYTOs at 8.

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."[52] Thus, it argues, no discrimination has occurred.

55. Niagara Mohawk notes that differences have arisen due to market restructuring that affect the comparability of the treatment of station power service before and after divestiture, asserting that there is nothing discriminatory about utilities adapting their business practices to the new market rules and new commercial environment. It concludes that a change in Commission rules over time does not produce discrimination, and in fact believes that the December 23 Order results in unfair discrimination between generators and other industrial customers.

56. 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

[52] *Id*. at 16.

> 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).

57. 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

58. 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."[53] We disagree.

59. 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*,[54] 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.

60. 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."[55] Significantly, we also emphasized that:

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[53] NYTOs at 11-12.

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

[55] *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.

> [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.[56]

61. 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,[57] 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.[58] 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[59] 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.[60]

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.

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

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

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

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

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