ORAL ARGUMENT IS SCHEDULED FOR APRIL 5, 2010

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 05-1327 and 08-1384

SOUTHERN CALIFORNIA EDISON COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties, intervenors, and amici appearing before the Commission and this Court are identified in the Brief for Petitioner.

B. Rulings Under Review

1. *Duke Energy Moss Landing LLC v. California Independent System Operator Corp*., 109 FERC ¶ 61,170 (2004) ("Complaint Order"), JA 1;

2. *Duke Energy Moss Landing LLC v. California Independent System Operator Corp*., 111 FERC ¶ 61,451 (2005) ("Complaint Rehearing Order"), JA 10;

3. *California Independent System Operator Corp*., 111 FERC ¶ 61,452 (2005) ("Tariff Order"), JA 23;

4. *California Independent System Operator Corp*., 125 FERC ¶ 61,072 (2008) ("Tariff Rehearing Order"), JA 45;

C. Related Cases

As explained on pages 11-12 and 23-31, this Court's decisions in *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006) and *Consol. Edison Co. of N.Y., Inc. v. FERC*, No. 05-1372, 2008 U.S. App. LEXIS 21926 (D.C. Cir. May 6, 2008) are directly related to the primary issue raised in this case.

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February 25, 2010

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GLOSSARY

Br.	Brief of Petitioner Southern California Edison Company
California ISO	California Independent System Operator Corporation
Duke Energy	Duke Energy Moss Landing LLC
Edison	Southern California Edison Company
Commission or FERC	Federal Energy Regulatory Commission
Complaint Order	*Duke Energy Moss Landing LLC v. California Independent System Operator Corp.*, 109 FERC ¶ 61,170 (2004), JA 1-9
Complaint Rehearing Order	*Duke Energy Moss Landing LLC v. California Independent System Operator Corp.*, 111 FERC ¶ 61,451 (2005), JA 10-22
Midwest ISO	Midwest Independent System Operator Corporation
New York ISO	New York Independent System Operator Corporation
Tariff	California Independent System Operator Corporation FERC Electric Tariff
Tariff Order	*California Independent System Operator Corp.*, 111 FERC ¶ 61,452 (2005), JA 23-44
Tariff Rehearing Order	*California Independent System Operator Corp.*, 125 FERC ¶ 61,072 (2008), JA 45-81

IN THE UNITED STATES COURT OF APPEALS
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Nos. 05-1327 and 08-1384

SOUTHERN CALIFORNIA EDISON COMAPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably exercised its statutory authority and applied its precedent in approving specific rules for the procurement and delivery of station power in California, including the appropriate interval for determining the amount of station power transmitted in interstate commerce.

STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum.

INTRODUCTION

This case concerns the supply of "station power" in California. Station power is the electrical energy used by generators to operate the electrical equipment on the generating facility's site, and to meet on-site heating, lighting and office equipment needs. When utilities were vertically integrated, station power was simply treated as "negative generation" and netted against the output of a generator. As a result, utilities typically did not charge themselves, their affiliates, or fellow utilities for station power.

But when traditional utilities began selling their generating assets to "merchant generators" in response to technological, competitive and regulatory developments, the treatment of station power became a disputed issue. These merchant generators – which lack transmission and distribution facilities and retail customers of their own – sought to obtain and account for station power by netting station power consumption against the facility's gross output, which was the procedure employed by vertically-integrated utilities.

The challenged orders are the culmination of eight years of work and more than fifteen orders – many of which have been affirmed by this Court – that establish policies designed to level the playing field between merchant generators and traditional utilities with respect to the procurement and delivery of station power. Those policies are now utilized by independent regional transmission

organizations in the Northeast, the Mid-Atlantic, and the Midwest. In the orders under review here, the Commission applied those policies in California through the Open Access Transmission Tariff (the "Tariff") administered by the California Independent System Operator Corporation ("California ISO").

The Court recently affirmed the Commission's approach to station power in New York. In *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006), the Court found that the Commission's station power policies did not encroach upon state jurisdiction over local distribution services and retail sales, and affirmed the Commission's approval of a monthly netting interval as reasonable. *Id*. at 828-30. *See also Consol. Edison Co. of N.Y. v. FERC*, No. 05-1372, 2008 U.S. App. LEXIS 21926 (D.C. Cir. May 6, 2008) (affirming Commission's enforcement of New York station power netting policies).

In this case, Southern California Edison Company ("Edison") challenges two sets of orders in which the Commission applied its station power policies to the California market. In the first, the Commission granted in part a complaint filed by Duke Energy Moss Landing LLC ("Duke Energy") against the California ISO, which alleged that the California ISO's then-current Tariff failed to conform to the Commission's station power policies. *Duke Energy Moss Landing LLC v. Cal. Indep. Sys. Operator Corp.*, 109 F.E.R.C. ¶ 61,170 (2004) ("Complaint Order") (R.16), JA 1, *clarified and reh'g denied*, 111 F.E.R.C. ¶ 61,451 (2005)

("Complaint Rehearing Order") (R. 43), JA 10. In the second, the Commission accepted tariff provisions submitted by the California ISO establishing procedures by which generators could self-supply station power as measured over a one-month netting interval and addressing the transmission of station power over its grid. *Cal. Indep. Sys. Operator Corp*., 111 F.E.R.C. ¶ 61,452 (2005) ("Tariff Order") (R. 44), JA 23, *clarified and reh'g granted in part and denied in part*, 125 F.E.R.C. ¶ 61,072 (2008) ("Tariff Rehearing Order") (R. 83), JA 45.

In accepting those procedures, the Commission – drawing upon its earlier station power orders – rejected Edison's arguments that the Commission was encroaching on state jurisdiction over retail sales and local distribution services, and carefully sought to harmonize the provisions of applicable state retail tariffs with the FERC-approved California ISO Tariff.

STATEMENT OF FACTS

I. STATUTORY FRAMEWORK

The Federal Power Act delineates federal and state regulation over electricity markets and services. Section 201(b) of the Act grants the Commission jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for

such transmission or sale." 16 U.S.C. § 824(b)(1).[1] *See New York v. FERC*, 535 U.S. 1, 19-20 (2002) (noting that the Federal Power Act "unambiguously authorizes FERC to assert jurisdiction over two separate activities – transmitting and selling," and that its transmission jurisdiction, unlike its sales jurisdiction, is not limited to the wholesale market). The States retain jurisdiction over "any other sale of electric energy" and "facilities used in local distribution" of electricity. 16 U.S.C. § 824(b)(1). *See also, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1280-82 (D.C. Cir. 2007) (explaining that the Commission has jurisdiction over wholesale transactions conducted over dual-use transmission/local distribution facilities).

With respect to transactions within its jurisdiction, the Commission is empowered under Sections 205 and 206 of the Federal Power Act to correct utility rates and practices that are unduly discriminatory or preferential. 16 U.S.C. §§ 824d(b), 824e(a). *See, e.g., New York*, 535 U.S. at 7.

II. BACKGROUND

A. Restructuring Of Electricity Markets

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled'

[1] Section 201(d), 16 U.S.C. § 824(d), defines a "sale of electric energy at wholesale" as a "sale of electric energy to any person for resale."

package to wholesale and retail customers in a limited geographical service area." *Pub. Util. Dist. No. 1 of Snohomish Co., Wa. v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). This began to change in 1996 when the Commission adopted Order No. 888, which directed public utilities subject to FERC's jurisdiction to offer non-discriminatory, open-access transmission service.[2] To implement this directive, FERC ordered the functional unbundling of wholesale generation and transmission services. *See New York*, 535 U.S. at 11. "Functional unbundling" requires each public utility to state separate rates for its wholesale generation, transmission, and ancillary services. Utilities also must take transmission service for their own wholesale transactions under the same general tariff applicable to others. *Id*.

At the same time FERC was developing its open access reforms, the California legislature restructured the California power industry through the passage of Assembly Bill 1890. Among other things, the bill required the three largest California investor-owned utilities – San Diego Gas & Electric, Pacific Gas & Electric, and Edison – to divest most of their electricity generation facilities.

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[2] *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 F.E.R.C. ¶¶ 61,009 and 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 F.E.R.C ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

See In re Cal. Power Exch. Corp., 245 F.3d 1110, 1114-15 (9th Cir. 2001) (discussing A.B. 1890). These utilities retain some generation assets, but now operate primarily as owners of transmission and distribution facilities and the providers of retail service. The "merchant generators" that purchased the generation facilities divested by the utilities have no retail service obligation and sell wholesale power at market-based rates under FERC-approved tariffs. *See, e.g., PJM Interconnection, LLC*, 94 F.E.R.C. ¶ 61,251, 61,883 n.12 (2001) *("PJM II")* (defining "merchant generator" as a "non-vertically integrated owner of generating facilities" that includes both independent and affiliated power producers).

The non-profit California ISO operates the wholesale transmission network in California. *See, e.g., Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 397 (D.C. Cir. 2004) (discussing role of California ISO). As administrator of an Open Access Transmission Tariff approved by FERC, the California ISO assures that all entities receive reliable, non-discriminatory access to the grid. *See, e.g., Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 296-97 (D.C. Cir. 2005) (discussing California ISO tariff).

B. Treatment Of Station Power

Station power is "the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's

site, and for operating the electric equipment" at the site. Tariff Rehearing Order at P 2, JA 47. A generating facility may "self-supply" its station power by (a) redirecting some of its outbound generated electricity for its station power needs (*i.e.*, "on-site" self-supply), or (b) obtaining station power from an off-site generating facility that is owned by the same company (*i.e.*, "remote" self-supply). *Id*. But in certain circumstances, a generating facility may be incapable of self-supplying station power either on-site or remotely and therefore must look to a third-party provider for its station power needs (*i.e.*, "third-party" supply). *Id*.

1. The historical treatment of station power

When utilities were vertically integrated, the treatment of station power was not an issue. Utilities have a longstanding practice of treating station power as "negative generation" and netting station power needs when measuring the output of a generator. That is, utilities historically have not charged themselves, their affiliates, or their fellow utilities for station power, even for periods when the generating unit was not operating. Instead, they have simply treated the generator as if it produced only its net output – that is, its gross power output minus the station power utilized. *Id*. at P 3, JA 47.

2. The Commission's station power policies

The treatment of station power became a disputed issue upon the entry of non-traditional merchant generators into the market. Merchant generators sought

to obtain and account for station power service in the same manner employed by traditional utilities – by netting station power needs against gross output. *Id*. at P 4, JA 49. If netting were not allowed, a generator that was unable to self-supply station power "behind the meter" (*i.e*., on-site) would have to purchase station power from a third party, typically the former owner of the generating unit, at state-approved retail rates.

In a series of orders involving the PJM Interconnection,[3] New York Independent System Operator ("New York ISO"),[4] and Midwest Independent Transmission System Operator, Inc. ("Midwest ISO"),[5] the Commission established its policies relating to station power procurement and delivery. Those policies permit merchant generators to self-supply station power (either on-site or

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[3] *PJM Interconnection, LLC*, 93 F.E.R.C. ¶ 61,061 (2000) ("*PJM I"*), *order on pet. for dec. order*, 94 F.E.R.C. ¶ 61,251 ("*PJM II"*), *order on reh'g*, 95 F.E.R.C. ¶ 61,333 (2001) ("*PJM III"*), *order on rate change app*., 95 F.E.R.C. ¶ 61,470 (2001) ("*PJM IV"*).

[4] *KeySpan-Ravenswood, Inc. v. N.Y. Indep. Sys. Operator Inc*., 99 F.E.R.C. ¶ 61,167 (2002) ("*KeySpan I"*), *order on reh'g*, 100 F.E.R.C. ¶ 61,201 (2001) ("*KeySpan II"*), *order on compliance filing*, 101 F.E.R.C. ¶ 61,230 (2002) ("*KeySpan III"*), *reh'g denied*, 107 F.E.R.C. ¶ 61,142 (2004) ("*KeySpan IV"*), *clarified* 108 F.E.R.C. ¶ 61,164 (2004), *aff'd sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006); *N.Y. Power Auth. v. Consol. Edison Co. of N.Y., Inc*., 112 F.E.R.C. ¶ 61,304 (2005), *clarified and reh'g denied*, 116 F.E.R.C. ¶ 61,240 (2006), *aff'd sub. nom Consol. Edison Co. of N.Y. v. FERC*, No. 05-1372 (D.C. Cir. May 6, 2008) (unpublished).

[5] *Midwest Indep. Transmission Sys. Operator, Inc*., 106 F.E.R.C. ¶ 61,073 (2004), *order on reh'g*, 110 F.E.R.C. ¶ 61,383 (2005).

remotely) so long as the generator's net output is positive over a reasonable netting interval. *See* Tariff Rehearing Order at ¶ 5, JA 48. For example, in the *PJM* orders, FERC initially permitted the independent operator of the grid in the Mid-Atlantic region to allow netting on an hourly basis. *See PJM II*, 94 F.E.R.C. at 61,892.[6] Thus, under the terms of the then-current PJM tariff, a generator that withdrew energy from the grid sufficient to meet its station power needs for fifty minutes, but then injected a greater amount of energy during the next ten minutes, would be "net positive" over the netting interval.

Because a self-supplying generator is utilizing its own generating facilities, there is no "sale" within the contemplation of section 201 of the Federal Power Act. 16 U.S.C. § 824(b)(1). There thus is no federal regulation over the on-site self-supply of station power since there is no sale at wholesale, which is defined by the Act as "a sale of electric energy to any person for resale." *Id*. § 824(d). Nor is there any state regulation of on-site self-supply because there is no retail sale, *i.e*., a sale for end use. *See, e.g., PJM II*, 94 F.E.R.C. at 61,889-91 (discussing state and federal regulatory regime applicable to station power). If, on the other hand, a generator obtains station power from a third party, then there is a distinct sale between two different corporate entities. In such circumstance, there is a retail sale

[6] Subsequently, PJM proposed a monthly netting interval, which the Commission approved. *PJM IV*, 95 F.E.R.C. at 62,685.

that is subject to state regulation. *Id*.; *see also PJM III*, 95 F.E.R.C. at 62,186.[7]

Additional regulation attaches if the generator meets its station power needs through remote self-supply or third-party supply and does not own, or does not have the right to use, the grid connecting its facility to the source of the station power. If the generator requires service over FERC-jurisdictional transmission facilities to receive station power, then that service is taken under the FERC-jurisdictional open access transmission tariff. *PJM III*, 95 F.E.R.C. at 62,186. If the generator requires access to local distribution facilities to receive station power, then it takes that service under a state-jurisdictional local distribution tariff. Whether station power supply implicates transmission or local distribution service is a case-specific matter. *Id*. *See also* Tariff Rehearing Order at PP 2-6 (discussing FERC station power policies established in *PJM* and other orders), JA 47-49.

3. The *Niagara Mohawk* decision

In *Niagara Mohawk*, this Court addressed a challenge to the Commission's

[7] In the *PJM* proceedings, PJM initially proposed a tariff provision that would allow generators to purchase station power from the wholesale market that it administered. The Commission ordered this provision to be struck from the tariff after finding that, to the extent the provision of station power involves a sale at all, it is properly characterized as a retail sale (*i.e.*, a sale for end use). *PJM II*, 94 F.E.R.C. at 61,892 ("because the amendments define station power as including those instance when a generator has a negative net output, and necessarily is obtaining its station power requirements through third-party supply, they encompass transactions involving sales for end use, which is not appropriate for a wholesale rate schedule").

station power policies. In that case, the petitioners (traditional utilities) argued that the netting provision in the New York ISO's tariff "encroache[d] upon state jurisdiction over local distribution services and retail sales." 452 F.3d at 827. The Court recognized that "in drawing the jurisdictional lines in this area, some practical accommodation is necessary." *Id*. at 828. Noting the petitioners' acknowledgment that the Commission has the authority to permit some netting, and thus to effectively eliminate some potential retail sales, the Court concluded that "we see no principled reason why monthly netting violates the Act." *Id*. at 827. In doing so, the Court rejected the contention that Order No. 888 requires the Commission to recognize that a self-supplying generator takes local distribution service, and therefore can be assessed retail charges, "even if, in fact, it does not physically use a utility's local distribution facilities." *Id*. at 829.

The Court also found that a monthly netting interval was reasonable, even though injections and withdrawals of power from the grid in New York are priced on an hourly basis. *Id*. at 829-30. The Court held that FERC reasonably treated these hourly charges as "an accounting entry rather than an actual sale of power." *Id* at 830. *See also Consol. Edison*, 2008 U.S. App. LEXIS 21926, at *1 (affirming FERC orders enforcing station power policies upheld in *Niagara Mohawk*).

III. THE PROCEEDINGS BELOW AND ORDERS ON REVIEW

A. The Complaint Proceeding And Order

Duke Energy, a merchant generator interconnected to the transmission system controlled by the California ISO, instituted this proceeding by filing a complaint alleging that the provisions of the then-current California ISO Tariff failed to comply with the Commission's station power policies. At the time, the Tariff's "Permitted Netting" provisions allowed generators to net their station power on-site at a single generation facility only when the generator is running as measured over a netting interval of one hour or less (and prohibited netting at all other times). *See* Complaint Order at 3-4, JA 2-3. *See also* Tariff Rehearing Order at P 23 n.34 (discussing Permitting Netting), JA 54. The California ISO agreed that its Tariff did not conform to the Commission's station power policies, and requested a stakeholder process to develop appropriate tariff revisions. Complaint Order at P 8, JA 4.

In acting on the complaint, the Commission rejected Edison's contention that the Commission's station power policies encroach upon state jurisdiction over retail sales and local distribution of energy. The Commission explained that "the fundamental questions about the appropriate treatment of station power" were answered in its *PJM* series of orders, and further addressed in the *New York ISO* and *Midwest ISO* orders. *Id*. at P 20, JA 6-7. Those orders established that the

Commission's jurisdiction is over the transmission of station power and addressed whether the supply of station power involves a retail sale or an element of local distribution. *Id*. at P 21, JA 7. Relying upon prior orders which "fully articulated [FERC's] station power policies," the Commission declined to "revisit these fundamental station power issues." *Id*.

The Commission went on to find that the California ISO "does not currently meet the Commission's station power precedent" as it unduly restricted the ability of merchant generators to self-supply their station power requirements. *Id*. at P 19, JA 6. Accordingly, the Commission directed the California ISO, "after working with market participants," to file proposed tariff revisions. *Id*. The Commission announced that it would "not preside over a market participant meeting," *id*. at P 22, JA 7, but rather would allow California ISO and its stakeholders to develop appropriate tariff revisions "necessary for the [California ISO's] specific operational characteristics." *Id*. at P 23, JA 8. The Commission further stated that it would not mandate a one-month netting interval. *Id*. But because such an interval had "evolved into the standard," the Commission "would require a strong justification for proposing a different netting interval." *Id*.

B. The Complaint Rehearing Order

Edison sought rehearing of the Complaint Order, which the Commission denied on June 22, 2005. In denying rehearing, the Commission noted that

Edison's arguments sought to revisit "fundamental principles of station power" established in "settled precedent." Complaint Rehearing Order at P 10, JA 13-14. The Commission again explained that it possesses "jurisdiction, in the first instance, to determine its jurisdiction." *Id*. at P 12, JA 14. And thus it has "the authority to determine whether transactions involving station power . . . are subject to Commission jurisdiction pursuant to section 201(b)(1) of the Federal Power Act." *Id*. The Commission reiterated that "our jurisdiction is over the transmission of station power. The use of a reasonable netting interval is designed to determine when, in fact, such transmission has taken place." *Id*. at P 14, JA 15.

C. The Station Power Protocol

On April 18 and May 3, 2005, the California ISO filed its Station Power Protocol, designated as Amendment No. 68 to its Tariff. *See* Amendment No. 68 (R. 22 and 24), JA 125-26. The California ISO advised that the Protocol was developed through an extensive stakeholder process designed to ensure "that all parties had an opportunity to contribute to the ISO's Station Power proposal and to make certain that any California-specific issues were considered." *Id*. at 3, JA 127.

In the Station Power Protocol, the California ISO established a voluntary program through which eligible generators could self-supply station power over a monthly netting interval. *Id*. at Org. Sheet No. 948, SPP 1.3.2 ("Self-supply of Station Power shall be strictly voluntary"), JA 223. Under the Protocol:

- If a generator supplies more electric power to the grid than it takes in station power during the month (*i.e*., it is "net positive"), the generator has self-supplied all of its station power. *See id*. at Orig. Sheet No. 949, SPP 3.1, JA 224.

- If one of a generator's units withdraws more power from the grid than it supplies during the month, but the aggregate net output of the units in its "Station Power Portfolio" – a designated group of units owned by the same entity – is sufficient to cover that shortfall, the generator has remotely self-supplied station power from another of its units, and no sale of station power has occurred. But because the station power was transmitted to the grid from one of a generator's units to another, transmission charges under the FERC-jurisdictional Tariff would apply, as well as scheduling charges. *Id*. at Orig. Sheet Nos. 349B and 949, JA 212, 224. (Depending on the facts, local distribution charges under a state tariff may also apply.)

- If a generator withdraws more station power from the grid than it supplies during the month, the generator has purchased the amount of the deficiency from a third party in a retail sale. Transmission of such purchased power over the California ISO's system is subject to the applicable transmission charges under the Tariff, as well as scheduling charges. *Id*. at Orig. Sheet No. 949, SPP 3.1, JA 224. (Depending on the facts, local distribution charges under a state tariff may also apply.)

The Station Power Protocol also carried forward the preexisting Permitted Netting provisions as an option for generators. *Id*.

D. The Tariff Order

On June 22, 2005, the Commission conditionally accepted the California ISO's proposal to utilize a monthly netting interval to determine whether or not station power had been self-supplied and thus, importantly, the corresponding transmission load (and also ordered certain revisions to the Station Power Protocol that are not at issue in this appeal). Tariff Order at PP 1, 62, JA 23, 43. In doing

so, the Commission explained that the Station Power Protocol does not "conflict with state law or state tariffs relating to the rates, terms or conditions of retail sales because . . . when a generator is self-supplying, no sale has occurred." Tariff Order at P 17 (citing *AES Somerset, LLC v. Niagara Mohawk Power Corp*., 110 F.E.R.C. ¶ 61,032 (2005) affirmed in *Niagara Mohawk*), JA 29. And when a merchant generator's net output is negative during a netting interval, "and thus a third party sale has in fact occurred, state law and the relevant tariff language would apply." *Id*.

E. Edison's Proposed Retail Tariff Revisions

While rehearing of the Tariff Order was pending, Edison filed proposed tariff revisions with the California Public Utilities Commission. In its filing, Edison sought authority to eliminate certain retail charges imposed upon generators who self-supply station power under the Permitted Netting provisions of the California ISO Tariff, while imposing other retail and load-based (*i.e*., demand-based) charges – such as a Competition Transition Charge (implemented to recover stranded costs associated with the restructuring of the electric industry) and a Department of Water Resources Power Charge (implemented to recover costs associated with power procurement during and after the California Energy Crisis) – upon generators making use of the Station Power Protocol. *See* Attachment A to Motion for Clarification of Constellation Generation Group *et al*., at 4 (R. 65),

JA 297.

In response, certain generators asked the Commission to clarify that its station power orders preclude Edison from imposing retail and other load-based charges on merchant generators that take no service from Edison while self-supplying station power under the California ISO Station Power Protocol.

F. The Tariff Rehearing Order

In a rehearing order issued October 17, 2008, the Commission again rejected challenges to its jurisdiction from Edison and others. The Commission explained that its "jurisdiction extends to the transmission of station power," and an examination of whether a merchant generator's net output is positive over a reasonable netting interval "is critical to determining its transmission load." Tariff Rehearing Order at PP 84, 87, JA 73, 74 (citing *Niagara Mohawk*).

The Commission also clarified that its earlier station power orders preclude Edison from imposing retail and other load-based charges on merchant generators that self-supply their station power under the terms of the California ISO Tariff without making use of state-jurisdictional local distribution services. *Id*. at P 1, JA 46. The Commission explained that self-supplying generators are not taking any retail services and, as a result, "any load-based charges for this self-supply are costs that have no relationship to any service provided by another party." *Id*. at P 76, JA 70. To permit such charges would "impair[] the ability of merchant

generators to utilize the netting provisions" of the California ISO Tariff. *Id.* (internal quotations omitted).

SUMMARY OF THE ARGUMENT

Edison's challenge to the Commission's authority to approve the Station Power Protocol and, in doing so, determine whether any retail sale of station power occurs, is resolved by this Court's decision in *Niagara Mohawk*. In both cases, the station power procedures, as well as the arguments raised with respect to the Commission's authority to approve them, are the same in all relevant respects. The determination in *Niagara Mohawk* that the Commission's approval of a monthly netting interval for station power was a valid exercise of its authority under the Federal Power Act thus governs here.

Edison's efforts to avoid the preclusive effects of *Niagara Mohawk* are unavailing. Contrary to Edison's contention, *Niagara Mohawk* did not rest entirely on the petitioners' consent to FERC jurisdiction. Rather, the Court found that the petitioners' admission that an hourly netting interval represented a practical methodology for determining whether a merchant generator purchased its station power at retail undermined the logic of their argument for state jurisdiction. This admission – rather than freeing the Court from its obligation to independently determine FERC's statutory authority – provided the necessary factual predicate for the Court to determine, as a matter of law, that FERC's transmission

jurisdiction gave it the statutory authority to approve a netting interval.

That determination was correct as the Station Power Protocol at issue here is contained in a tariff filed with the Commission and administered by the California ISO, a FERC-jurisdictional entity. The netting provisions establish a formula for determining a wholesale generator's net output – *i.e.*, the amount of energy injected into the grid for transmission and interstate commerce – and the transmission load associated with its station power needs. Both aspects fall within the "clear and specific grant of jurisdiction to FERC over interstate transmissions." *New York*, 535 U.S. at 22 (internal quotations omitted). In short, the Protocol permits a determination of when (and how much) FERC-jurisdictional transmission service is provided to merchant generators in connection with their station power requirements and when (and how much) FERC-jurisdictional rates may be charged.

The Station Power Protocol approved and enforced by the Commission does not impermissibly encroach upon state jurisdiction over retail sales and local distribution services; rather, it determines when a wholesale merchant generator is receiving a FERC-jurisdictional service. The fact that FERC's test for identifying jurisdictional service has the effect of delineating state jurisdiction does not strip the Commission of its authority to act. The Supreme Court and this Court have recognized that, by enacting the Federal Power Act, Congress allowed FERC

effectively to delineate state regulatory authority when the Commission acts within its own jurisdiction.

Edison's proposed regulatory regime, whereby differing state and federal netting intervals are utilized in tandem to determine the sale and transmission of station power, would result in different rates, terms and conditions for the same use of the same facilities by the same generators. And, as the Commission found, permitting Edison to charge for retail sales of station power under a shorter netting interval would undermine the effectiveness of the netting provisions in the California ISO Tariff. Rather than promoting competition by eliminating the disparities between merchant generators and traditional utilities, Edison's approach would require merchant generators to pay for energy purchases they do not want or take. Merchant generators thus would be deprived of the ability to obtain least-cost station power which, in turn, would harm the customers they serve.

Finally, the Commission reasonably found that Edison may not impose retail and load-based charges upon merchant generators that self-supply their station power under the California ISO Tariff. If a merchant generator self-supplies its own station power needs, and does not need local distribution service to connect to the source of the station power, it is not taking retail service subject to state regulation. In such circumstances, the charges specified in the California ISO Tariff apply to the exclusion of any retail tariff.

ARGUMENT

I. STANDARD OF REVIEW

The Court's review of FERC orders is governed by the arbitrary and capricious standard of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A). Under that standard, the Commission's decision must be reasoned and responsive. *E. Tx. Elec. Coop., Inc. v. FERC*, 218 F.3d 750, 753 (D.C. Cir. 2000). If the Court can "discern a reasoned path" to the decision, the challenged orders will be upheld. *Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008). The Commission's factual findings, if supported by substantial evidence, are conclusive. 16 U.S.C. § 825*l*(b). *See also Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) (noting "highly deferential" review of agency ratemaking decisions).

Where, as here, there is a question of whether federal power may be exercised under a federal statute in a manner that implicates traditional state regulation, the question before the Court is whether Congress has conferred power upon the federal agency to act as it has. No presumption against preemption attaches. *New York*, 535 U.S. at 18. *See also Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 312 (4th Cir. 2009). Instead, the familiar two-step *Chevron* analysis applies, which first looks to "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*., 467

U.S. 837, 842 (1984). If it has, then the Court will "give effect to the unambiguously expressed intent of Congress." *Id*. at 843. But if the statute is silent or ambiguous, then the Court will defer to the Commission's interpretation, so long as it is reasonable and based on a permissible construction of the statute. *Rhinelander Paper Co. v. FERC*, 405 F.3d 1, 6 (D.C. Cir. 2005).

II. PRINCIPLES OF *STARE DECISIS* REQUIRE DISMISSAL OF EDISON'S CLAIM THAT FERC'S APPROVAL OF A MONTHLY NETTING INTERVAL EXCEEDS ITS JURISDICTION UNDER THE FEDERAL POWER ACT.

Edison's fundamental contention is that the Commission lacks jurisdiction to approve the monthly netting provisions contained in the Station Power Protocol and, in doing so, find that no retail sale of station power takes place when a generator is net positive over the monthly netting interval. This is the precise issue decided by this Court in *Niagara Mohawk*. Principles of *stare decisis* thus mandate dismissal of Edison's petition in this regard.

A. Edison's Statutory Arguments Were Resolved By This Court In *Niagara Mohawk*.

1. The station power policies at issue in this case are the same as those addressed in *Niagara Mohawk*.

This case, like *Niagara Mohawk*, concerns a challenge to the station power provisions of a tariff administered by a regional system operator. The station power provisions in this case, like those at issue in *Niagara Mohawk*, provide that generators self-supply their station power needs when their output over a one-

month netting interval exceeds the amount of power taken from the grid. *Compare* Tariff Order at PP 5-6 (discussing California ISO station power provisions), JA 25, *with Niagara Mohawk*, 452 F.3d at 823 (describing New York ISO station power provisions).

Likewise, the petitioner in this case, like those in *Niagara Mohawk*, is a traditional utility.[8] Edison, like the utility-petitioners in *Niagara Mohawk*, claims that the Commission's station power orders "prevent [it] from charging for retail sales of energy that would be recognized under shorter netting intervals." Br at 2.[9] *Compare with Niagara Mohawk*, 452 F.3d at 827 ("we are given to understand that" the amount of "retail sale of station power . . . left under a monthly netting regime . . . would not be significant").

2. The statutory arguments raised by Edison are the same as those raised in *Niagara Mohawk*.

Edison's statutory objections to the Commission's orders are the same as those raised by the *Niagara Mohawk* petitioners. Edison's fundamental contention

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[8] Notably, unlike *Niagara Mohawk*, which included a state petitioner (the New York Public Service Commission) arguing in favor of state retail jurisdiction, here the state commission – the California Public Utilities Commission – has withdrawn its challenge to the Commission's station power orders. *See* Jan. 7, 2009 Order in Case No. 05-1331 (granting California's motion for voluntary dismissal).

[9] Shorter netting intervals provide a merchant generator with fewer opportunities to generate and inject into the grid sufficient energy to meet its station power requirements.

is that, "[i]n pre-empting state rules that define retail sales of energy, FERC has exceeded congressional limits on its authority." Br. at 17. This is the same claim made by the *Niagara Mohawk* petitioners: "according to petitioners the monthly netting policy unlawfully extends federal jurisdiction over local distribution services and retail sales." *Niagara Mohawk*, 452 F.3d at 827.

In support, Edison, like the *Niagara Mohawk* petitioners, argues that "the supply of station power energy to generators for their end use falls within the states' exclusive jurisdiction under the FPA." Br. at 22. *Compare with* Joint Brief of Petitioners and Intervenor In Support of Petitioners, filed Feb. 7, 2006, in D.C. Cir. Case No. 04-1227 ("Niagara Mohawk Brief") at 28 ("FPA Section 201(b)(1) . . . specifically denies FERC authority over retail sales of power and over local delivery of such power to end-users."). Edison, like the *Niagara Mohawk* petitioners, argues that, "[w]hile FERC may use netting to determine whether a transmission sale to a generator occurred, the FPA does not authorize FERC to determine whether retail energy was sold to generators for station power." Br. at 25. *Compare with* Niagara Mohawk Br. at 27 (the utility-petitioners "do not quarrel with FERC's authority to define the terms of its own jurisdictional services . . . . However, FERC has no authority to require the states to apply such rules . . . ."). And Edison, like the *Niagara Mohawk* petitioners, contends that the specific characteristics of the local markets militate against the

imposition of a monthly netting regime. *Compare* Br. at 34-41 *with Niagara Mohawk*, 452 F.3d at 829-30 (discussing arguments relating to the characteristics of the New York ISO market).

3. In *Niagara Mohawk*, the Court determined that the Commission's station power policies are consistent with the Federal Power Act.

In addressing these arguments, the *Niagara Mohawk* Court recognized that, under the Federal Power Act, "jurisdiction over [the] sale and delivery of electricity is split between the federal government and the states." 452 F.3d at 824. But in determining on which side of the "jurisdictional line[]" the regulation of station power falls, "some practical accommodation is necessary." *Id*. at 828.

Recognizing the need for a reasonable and practical means of determining whether station power had been self-supplied or purchased at retail, and the corresponding transmission load placed on the ISO's grid, the *Niagara Mohawk* petitioners agreed that "an hourly netting tariff would not violate the Act." *Id*. The Court found that this admission undermined the assertion of state jurisdiction over station power because, "if hourly netting is perfectly consistent with the statute, [there is] no principled reason why monthly netting violates the Act." *Id.*

The *Niagara Mohawk* court thus determined that the Commission's approval of a monthly netting interval for determining whether or not station power was self-supplied and thus the transmission load in New York, was a lawful exercise of

its jurisdiction under the Federal Power Act. Under the doctrine of *stare decisis*, that decision conclusively resolves Edison's claim that the Commission exceeded its jurisdiction in approving an identical netting interval in California. *See Neal v. United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."); *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005) ("[T]his Court is bound to follow circuit precedent until it is overruled either by an *en banc* court or the Supreme Court.").

B. Edison Cannot Avoid The Preclusive Effect Of *Niagara Mohawk*.

1. The *Niagara Mohawk* Court did not base its ruling entirely upon the petitioners' consent to jurisdiction.

Edison contends that *Niagara Mohawk* does not resolve the question of FERC's statutory authority to approve monthly netting because that decision rested "wholly" on the concession that an "hourly netting tariff to determine retail sales would not violate the Federal Power Act." Br. at 31-32. But this misconstrues the nature of the concession made in *Niagara Mohawk* and the holding in that case.

The *Niagara Mohawk* petitioners conceded that netting over a one-hour interval was a reasonable and practical method to establish whether merchant generators self-supplied or purchased station power at retail. *Niagara Mohawk*, 452 F.3d at 828. This admission undermined the logic of their contention that a monthly netting interval would violate the Federal Power Act, and provided the

necessary factual predicate for the Court to determine, as a matter of law, that FERC's transmission jurisdiction gives it the statutory authority to approve a reasonable netting interval. *Id*. at 828.

The admission did not free the Court from its independent obligation to determine FERC's statutory authority. As the *Niagara Mohawk* petitioners argued in their petitions for rehearing and rehearing *en banc*,[10] parties may not confer jurisdiction upon an agency through consent – a general principle of law that the Court plainly understood. *See Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 542 n.3 (D.C. Cir. 1988) ("Agency jurisdiction, like subject matter in the federal courts, cannot be achieved by consent of the parties."). Indeed, in examining the Commission's specific authority under the statutes it administers, courts (including this one) have found that the Commission cannot base its jurisdiction to act simply on the implied or express consent of a party. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908, 924 (9th Cir. 2005) (holding that, under Federal Power Act, "FERC's regulatory authority is bound by statute, and utilities [cannot] waive that authority to opt in or out of FERC jurisdiction"); *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005)

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[10] *See* Petition For Panel Rehearing And Petition For Rehearing En Banc Of Petitioners And Intervenor In Support of Petitioner, filed Aug. 4, 2006, in D.C. Cir. No. 04-1227, *et al*. at 5-10 (arguing that "the panel failed to base its decision on an analysis of the statutory basis for FERC's exercise of jurisdiction").

(holding that, under Natural Gas Act, FERC's "jurisdiction cannot arise from the absence of objection, or even from affirmative agreement").

In any event, when considering the Commission's statutory authority in *Niagara Mohawk*, the Court did not simply stop with the petitioners' acknowledgement that some degree of netting was necessary. Rather, the Court – before proceeding to the petitioners' Administrative Procedure Act claim – considered the assertion that Order No. 888, which acknowledged the states' jurisdiction over local delivery services, limited the Commission's authority to implement a station power netting interval. The Court concluded that nothing "in Order 888 . . . buttresses petitioners' jurisdictional argument." *Niagara Mohawk*, 452 F.3d at 829. Moreover, in the underlying orders here, the Commission noted that Edison raised no challenge to the Commission's authority to allow Permitted Netting (which involves a netting interval of one hour or less), which is akin to the *Niagara Mohawk* petitioners' acknowledgement that some degree of netting is necessary. Tariff Rehearing Order at P 75, JA 70.

2. The Court subsequently reaffirmed the Commission's jurisdiction.

Two years after *Niagara Mohawk*, this Court, in *Consol. Edison Co. of N.Y.*, reaffirmed that the Commission's implementation of station power netting provisions does not impermissibly intrude upon state jurisdiction. In the underlying orders in that case, the Commission rejected the contention that it had

exceeded its statutory authority in determining that the self-supply of station power under the New York ISO's FERC-jurisdictional tariff did not implicate state-jurisdictional services. *See Entergy Nuclear Operations, Inc. v. Consol. Edison Co. of N.Y., Inc.*, 112 F.E.R.C. ¶ 61,117, PP 13-32 (2005). The Commission explained that it has "in the first instance the authority to determine the scope of [its] jurisdiction and to determine, specifically, whether any jurisdictional activities are occurring." *Id*. at P 23. And in precluding the imposition of state-jurisdictional charges upon a self-supplying merchant generator, "we are simply saying that [the merchant generator] is taking only Commission-jurisdictional service and can be charged only a Commission-jurisdictional rate." *Id*. at P 30 (internal quotations omitted).

On appeal, the petitioners again argued that the Commission exceeded its statutory authority in determining whether the self-supply of station power involved state-jurisdictional services. *See* Brief of Petitioner Consolidated Edison Co. of N.Y., filed Mar. 10, 2008, in Case No. 05-1372, at 27-32. The Court rejected this contention "for the reasons stated in the FERC orders." *Consol. Edison*, 2008 U.S. App. LEXIS 21926, at *1.

3. The characteristics of the California ISO energy market do not compel a different result.

In an effort to evade the preclusive effect of *Niagara Mohawk*, Edison argues that the California ISO energy market has different characteristics than the

New York market. Br. at 34-41. But such distinctions are only relevant to the question of whether it is reasonable to utilize a monthly netting interval in California – an issue Edison does not raise here. *See* Br. at 37 ("SCE is not challenging the reasonableness of the retail transmission netting interval here"). *See also Niagara Mohawk*, 452 F.3d at 829-30 (considering characteristics of the New York ISO market when determining whether a monthly netting interval was unreasonable under the Administrative Procedure Act). The details of the California ISO energy market are irrelevant to the central question of whether FERC has the statutory authority to approve netting in that region. And in any event, as explained in Part V, the characteristics of the California ISO energy market do not undermine the Commission's approval of a monthly netting interval.

III. THE COMMISSION REASONABLY EXERCISED ITS STATUTORY AUTHORITY IN APPROVING THE STATION POWER PROTOCOL.

If the Court determines that Edison's jurisdictional arguments are not foreclosed by *Niagara Mohawk*, the Commission's approval of the Station Power Protocol should nonetheless be upheld. The monthly netting interval contained in the California ISO Tariff measures not only whether a merchant generator has self-supplied or made third-party purchases of station power, but also, importantly, the corresponding station power transmission load – *i.e.*, the amount of power injected into the California ISO grid for transmission in interstate commerce – a matter

plainly within the Commission's jurisdiction. The Station Power Protocol permits the identification of whether, and what amount of, FERC-jurisdictional services are being provided to a merchant generator associated with its procurement of station power. In doing so, the Commission has respected the complementary roles of the FERC and the states under the Federal Power Act.

A. The Commission Has Jurisdiction To Determine Its Jurisdiction.

Citing a 45-year old decision, Edison contends that the Federal Power Act creates a "bright line" between wholesale and retail jurisdiction and, as a result, the Commission's determination that the provision of station power does not involve the wholesale sale of electricity "should be the end of the matter." Br. at 23. *See also id*. at 25. But as this Court more recently observed, "while the electricity world once neatly divided into spheres of retail versus wholesale sales, and local distribution versus transmission facility, such is no longer the case." *Transmission Access Policy Study Group*, 225 F.3d at 691 (cited with approval on *certiorari* in *New York*, 535 U.S. at 16). Thus, "some practical accommodation is necessary" when "drawing jurisdictional lines." *Niagara Mohawk*, 452 F.3d at 828. And it is the Commission that is authorized to draw those jurisdictional lines in the first instance. *See, e.g., New York*, 535 U.S. at 22-23 (noting that, while the Commission does not have jurisdiction over local distribution, it has the authority to determine which facilities are local distribution facilities outside its jurisdiction);

Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 210 (1964) (finding that "whether facilities are used in local distribution . . . involves a question of fact to be decided by the [agency] as an original matter"). *See also* Complaint Rehearing Order at P 12 ("The Commission has authority, in the first instance, to determine its jurisdiction."), JA 14.

B. The Federal Power Act Authorizes The Commission To Approve The Station Power Protocol.

The Station Power Protocol is contained in a tariff filed with the Commission and administered by the California ISO, a FERC-jurisdictional public utility. The Protocol's netting provisions establish a formula for determining a merchant generator's net output – *i.e.*, the amount of energy injected into the interstate transmission grid – and whether it has self-supplied station power or taken station power from another, and the associated transmission load. *See* Tariff Rehearing Order at P 87 (noting that determining a generator's net output "is critical to determining its transmission load"), JA 74. The Federal Power Act contains "'a clear and specific grant of jurisdiction' to FERC over interstate transmissions." *New York*, 535 U.S. at 22 (discussing 16 U.S.C. § 824(b)). On the basis of this authority, the Commission reviewed and approved the Station Power Protocol. *See* Complaint Rehearing Order at P 14 ("As we have emphasized from the start of the station power cases, our jurisdiction is over the transmission of station power."), JA 15. As the Commission explained:

> Under Section 201 of the FPA . . . we have undoubted jurisdiction over transmission of electric energy in interstate commerce, and in order to determine when (and how much) jurisdictional transmission service is provided and thus when (and how much) jurisdictional transmission rates may be charged, we must also determine when station power is self-supplied (either on-site or remotely) or purchased from a third party, and when it is not.

Tariff Rehearing Order at P 72 n.69, JA 68.

Consistent with the Commission's station power policies, the Station Power Protocol determines whether a merchant generator has self-supplied its station power on-site by injecting more energy into the transmission grid than it takes during the netting interval, and any associated station power transmission load. *See* Amendment No. 68 at Orig. Sheet No. 949, SPP § 3.1, JA 224. When it has injected more than it takes, the generator is not involved in a sale of any kind because it "'is not using another's generating facilities.'" *See* Complaint Rehearing Order at P 17 (quoting *PJM II*, 94 F.E.R.C. at 61,890), JA 17. *See also* Tariff Order at P 16 ("the Commission has consistently held that the self-supply of station power is not a sale"), JA 28-29.

Similarly, when the generator consumes more energy than it produces, but other generators owned by the same company produce enough energy to cover that shortfall and their own station power needs, the generator has remotely self-supplied its station power needs. *See* Amendment No. 68 at Orig. Sheet No. 949, SPP § 3.1, JA 224. Here again, no sale takes place as the generator is "not

consuming another party's energy." *PJM II*, 94 F.E.R.C. at 61,891. But like a merchant moving inventory among its stores, while there is no sale of a commodity, there may be delivery charges owed to those whose facilities were used to transmit the station power. Typically, this is accomplished via the interstate transmission system "under the transmission provider's open access tariff." *Id*. at 61,891 n.60.

By contrast, the Protocol provides that, when a generator takes more energy from the grid than it injects over a netting interval, the shortfall has been purchased from third parties. *See* Amendment No. 68 at Orig. Sheet No. 949, SPP § 3.1, JA 224. In such a case, the generator is necessarily "using another party's generation facilities," and "there is a sale for end use that [the Commission] do[es] not regulate." *PJM II*, 94 F.E.R.C. at 61,891. *See also* Tariff Order at P 17 (when a merchant generator has "a negative net output during a netting interval, and thus a third party sale has in fact occurred, state law and the relevant retail tariff would apply"), JA 29. If the delivery requires unbundled transmission service, it would be provided under the transmission provider's FERC-jurisdictional open access transmission tariff. *PJM II*, 94 F.E.R.C. at 61,891 n.60. If the delivery requires unbundled local distribution service, that service would be provided under a retail distribution tariff subject to state regulation. *Id*.

Rather than encroaching on state jurisdiction over retail rates or local

distribution services, the Commission has simply identified what types of services are being provided in order to determine, in a "narrowly tailored and careful manner," whether and how to exercise its jurisdiction over transmission service. Complaint Rehearing Order at P 14 (citing *PJM II*, 94 F.E.R.C. at 61,891 and other earlier orders), JA 15.

C. The Commission's Exercise Of Jurisdiction Is Consistent With Applicable Precedent.

Edison argues that, because one of the uses of netting is to define when retail sales occur, the Commission's approval of such netting conflicts with the Supreme Court's decision in *New York*. Br. at 25-30. Edison is incorrect.

In *New York*, the Supreme Court determined that there is no statutory limitation on FERC's ability to define its jurisdiction over transmission in interstate commerce, 535 U.S. at 16, and that FERC's transmission jurisdiction extends at least as far as unbundled retail transmission. *See id*. at 27 (FERC jurisdiction "could very well" extend further to regulation of bundled retail transactions upon a finding of "undue discrimination in the retail electricity market"). Indeed, while the Supreme Court recognized that FERC does not have jurisdiction over local distribution services and facilities, it found that FERC may draw jurisdictional lines identifying its own authority which delineate state authority, without impermissibly intruding into a sphere of state jurisdiction. *Id*. at 22-23.

The Supreme Court also recognized this principle in *S. Cal. Edison Co.*, when it held that the Federal Power Act authorizes the Commission to decide whether "facilities are used in local distribution," which "involves a question of fact to be decided by [FERC] as an original matter." 376 U.S. at 210 n.6. The Commission possesses this definitional authority even though "[s]ection 201(b) of the Act expressly excludes [FERC] jurisdiction 'over facilities used in local distribution.'" *Id*.

Here, the monthly netting interval in the California ISO Tariff is likewise used to define when FERC-jurisdictional transmission service is needed by distinguishing between on-site self-supply, which does not require any transmission, on the one hand, and remote self-supply and third-party supply, which would typically require FERC-jurisdictional transmission service, on the other. Thus, a monthly netting interval does "not intrude into state jurisdiction over retail rates and local distribution services, but only . . . determine[s] based on applicable law and fact what type of services (wholesale or retail) are actually being provided." Complaint Rehearing Order at P 14, JA 15.

In identifying and distinguishing between state- and federal-jurisdictional services, the Commission is not asserting authority to "prescribe critical terms of retail electricity sales" as Edison claims, Br. at 25. *See New York*, 535 U.S. at 22-23 (noting distinction between defining non-jurisdictional facilities and regulating

those facilities). In fact, the Commission carefully recognized the "limits of [its] authority," noting that when a third-party sale of station power has in fact occurred, "state law and the relevant retail tariff would apply." Tariff Rehearing Order at P 39, JA 59.

This Court also has recognized that the Commission's regulation of jurisdictional transactions is not invalidated by the fact that it may impact matters regulated by the states. For example, in *National Ass'n of Regulatory Comm'rs*, the Court addressed challenges to the Commission's Order No. 2003 rulemaking, which required all public utilities to adopt a standard agreement to govern interconnecting their transmission facilities with large generators. Certain utilities claimed that in regulating facilities jointly owned by private firms and states – the latter of which are exempted from federal regulation by Section 201(f) of the Federal Power Act, 16 U.S.C. § 824(f) – the Commission "usurp[ed] jurisdiction not provided by Congress." 475 F.3d at 1279. The Court found, however, that the Federal Power Act authorized the Commission to "regulate a public utility, notwithstanding incidental effects on nonjurisdictional entities." *Id*. at 1281. *See also id*. at 1280 (the Commission's exercise of its "indisputable authority" over jurisdictional firms "may, of course, impinge as a practical matter on the behavior of non-jurisdictional ones").

The Court recently reiterated this same principle in *Conn. Dept. of Pub. Util.*

Control v. FERC, 569 F.3d 477 (D.C. Cir. 2009), when it upheld the Commission's authority to review a mechanism in the New England ISO's tariff which addressed the amount of "installed capacity" that must be maintained by market participants in order to ensure the reliable operation of the bulk power system. The state petitioner argued that the Commission's approval of the tariff provision amounted to an impermissible regulation of generation facilities, which are excluded from the Commission's jurisdiction under Section 201 of the Act, 16 U.S.C. § 824(b)(1). *Id*. at 481. The Court rejected this claim. Because the capacity requirement affected FERC-jurisdictional rates, the Commission could properly regulate it, even if the requirement, in practice, could motivate the construction of generation facilities – a matter reserved for the states. *Id*. Such an indirect impact does not constitute "direct regulation" in violation of the Federal Power Act. *See id*. at 482.

The Commission's approval of the California ISO's Station Power Protocol falls comfortably within the jurisdictional boundaries set by *New York, S. Cal. Edison, National Ass'n of Regulatory Util. Comm'rs*, and *Conn. Dep't of Pub. Util. Control*. Here, the tariff provisions reviewed by the Commission define a FERC-jurisdictional transaction – the amount of load placed upon the interstate transmission system by merchant generators. While this definition includes a determination of whether, in the first instance, a retail sale of energy has occurred, such an indirect impact upon state jurisdiction does not divest the Commission of

its authority to act. The Commission's exercise of jurisdiction under the Federal Power Act is thus reasonable and worthy of this Court's deference. *See, e.g., Pub. Util. Comm'n of Cal. v. FERC*, 143 F.3d 610, 615 (D.C. Cir. 1998) ("We defer to FERC's interpretation of its authority to exercise jurisdiction if it is reasonable.") (internal quotations omitted).

IV. THE STATION POWER PROTOCOL DOES NOT IMPERMISSIBLY PREEMPT STATE RETAIL TARIFFS.

A. The Station Power Protocol Does Not Regulate The Rates, Terms Or Conditions Of Retail Sales.

Edison contends that FERC has impermissibly preempted state regulation of retail sales of energy. *E.g.*, Br. at 30. But as the Commission explained, its station power policies do "not conflict with state law or state tariffs relating to the rates, terms or conditions of retail sales because . . . when a generator is self-supplying, no sale has occurred." Tariff Order at P 17, JA 29. And when a third-party sale has occurred under the Station Power Protocol, "state law and the relevant retail tariff would apply." *Id.*

In addition, the Station Power Protocol is entirely voluntary. A generator is free to purchase all of its station power from third parties and may very well choose to do so if that is a cheaper option. But forcing a self-supplying merchant generator to also pay retail rates to utilities, as advocated by Edison, would require it to bear "a cost that has no relationship to any service purportedly being provided

by another party." Tariff Rehearing Order at P 76 (quoting *Niagara Mohawk*, 452 F.3d at 826), JA 70. These costs would ultimately be passed onto consumers, which is precisely what the netting of station power is designed to avoid. *See id*.; *see also* Complaint Rehearing Order at P 1 ("This order benefits consumers by ensuring that wholesale generators may obtain least-cost station power for the ultimate benefit of the consumers they serve."), JA 10.

B. The Jurisdictional Line Drawn By The Commission Must Govern.

Edison concedes that "FERC has authority to set a netting interval for transmission service," but then argues that only states can establish the netting interval for retail sales. Br. at 32; *see also id*. at 21-25. Again, however, by enacting the Federal Power Act, Congress allowed FERC effectively to delineate state regulatory authority when the Commission acts within its own jurisdiction. *See supra* at pp.36-40 (discussing *New York* and other precedent). *See also Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 49-50 (2003) (state action or tariff cannot frustrate the effectiveness of a FERC-approved tariff).

1. The use of different netting intervals for the same transaction – the provision of station power – leads to conflicts between the California ISO Tariff and retail tariffs.

Edison claims that there are no irreconcilable conflicts between an hourly netting interval for determining when retail energy sales occur and a monthly netting interval for the related transmission services. Br. at 26-28. Edison

contends that it is permissible for a generator to be deemed to have purchased energy (*i.e.*, when it is net negative for any hour within a month), but not transmission service (*i.e.*, when it is net positive for a month).

This ignores the Commission's finding that "having two different time periods . . . to measure the same thing – station power requirements – does create a conflict." *Nine Mile Point Nuclear Station v. Niagara Mohawk Power Corp.,* 110 F.E.R.C. ¶ 61,033, at P 29 (2005) ("*Nine Mile II*"). The Commission determined that "there must be consistency between the amount of energy purchased and the quantity of transmission used." *Nine Mile Point Nuclear Station v. Niagara Mohawk Power Corp.,* 105 F.E.R.C. ¶ 61,336, at 62,554 n.32 (2003) ("*Nine Mile I*").[11] Such consistency ensures that "customers are not over-billed and service providers are accurately compensated." *Id.*

The utilization of a FERC-approved netting interval for transmission tariffs, along with a different state-approved netting interval for retail power sales and local distribution tariffs, would result in different rates, terms and conditions for a single transaction and, consequently, inconsistent and possibly duplicative charges. And when "there is a conflict between station power provisions in Commission-jurisdictional and state-jurisdictional tariffs, the former must control." Complaint

[11] Both *Nine Mile I* and *Nine Mile II* were affirmed by this Court in *Niagara Mohawk*.

Rehearing Order at P 13, JA 14-15. To hold otherwise would undermine the very purpose of the Station Power Protocol and would allow state ratemaking determinations to intrude on FERC ratemaking jurisdiction.

2. Differing station power netting intervals hinder the pro-competitive aims of the Commission's station power policies.

As the Commission found, allowing state retail sales and local distribution tariffs, with an hourly netting interval for station power, to operate in tandem with a federal transmission tariff, employing a monthly netting interval for station power, would "force merchant generators to pay . . . for fictitious energy purchases." Tariff Rehearing Order at P 76, JA 70. This "impairs the ability of merchant generators to utilize the netting provisions of the ISO's station power protocol [and] prevents them from self-supplying station power." *Id*.

Such a result undermines the very purpose of the Commission's station power policies – which is to "ensure that wholesale generators do not bear a cost that has no relationship to any service purportedly being provided by another party" *id*. – by requiring generators to incur costs not borne by traditional, transmission-owning utilities (like Edison). *See also* Tariff Rehearing Order at P 63 (noting Commission's "efforts to promote the competitive supply of electricity and to eradicate unduly discriminatory practices by transmission-owning

utilities"), JA 65.[12] By contrast, resolving the conflict in favor of the California ISO Tariff ensures that merchant generators are free to utilize the Station Power Protocol if they so desire, "so that [their] ratepayers can receive the benefits of the lower costs of self-supplied station power, or station power purchased from third parties, which is a pro-competitive result." *KeySpan IV*, 107 F.E.R.C. at P 42.

"Courts have consistently held that when state regulation . . . would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme." *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982). Thus, in *United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), the Court rejected the argument that the Commission's ban on certain natural gas purchase transactions "constitute[d] a regulation of the retail sale of natural gas, which Congress reserved to the jurisdiction of the state regulatory bodies." *Id*. at 1156. The Court found the ban to be a valid exercise of the Commission's gas transportation jurisdiction and held that conflicting state regulations must yield as they offered "a ready means of circumventing" the

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[12] Edison claims that the Commission's approval of the Station Power Protocol cannot be justified as an effort to remedy discrimination "[b]ecause FERC lacks jurisdiction over retail sales of power." Br. at 30. The Commission's station power policies, however, are designed to "eradicate unduly discriminatory practices by transmission-owning utilities." Tariff Rehearing Order at P 63, JA 65. *See New York*, 535 U.S. at 27 (noting FERC's jurisdiction to remedy discrimination in wholesale and retail transmission markets).

Commission's regulatory goals. *Id*. *See also id*. at 1155-1157. The Court concluded that the "FERC's effort to avoid [such] circumvention" represented "a reasonable accommodation of conflicting policies that were committed to its care under the Natural Gas Act." *Id*. at 1157 (internal quotations omitted).

Here too, the Commission's approval of the Station Power Protocol represents a reasonable application of its transmission jurisdiction to a "complex factual situation." *KeySpan IV*, 107 F.E.R.C. at P 42. In doing so, the Commission was "only, and as narrowly as possible, harmonizing tariff provisions." Complaint Rehearing Order at P 13, JA 15.

V. THE CHARACTERISTICS OF THE CALIFORNIA ISO ENERGY MARKET DO NOT INVALIDATE THE COMMISSION'S APPROVAL OF A MONTHLY NETTING INTERVAL.

Although Edison concedes that it "is not challenging the reasonableness" of the monthly netting interval contained in the California ISO Tariff, Br. at 37,[13] it extensively discusses "settlements" and alternative netting intervals purportedly utilized in the California ISO energy market. *Id*. at 34-41. Edison argues that these characteristics distinguish this case from *Niagara Mohawk* and "undercut" the Commission's basis for "pre-empting state regulation." *Id*. at 37.

But even if Edison's characterization of the California ISO energy market

[13] Edison reiterates its waiver of any challenge to the reasonableness of a monthly netting interval in footnote 21 of its Brief: "Again, [Edison] does not challenge the monthly netting interval for transmission."

were correct – and it is not – it has nothing to do with the *authority* of the Commission under the Federal Power Act to approve the monthly netting interval proposed by the California ISO and to enforce it to the exclusion of conflicting state retail tariffs. Indeed, the portion of *Niagara Mohawk* that Edison seeks to distinguish did not concern *whether* the Commission could approve monthly netting, but rather whether "the Commission's approval of monthly netting [was] *unreasonable*" under the Administrative Procedure Act. 452 F.3d at 829 (emphasis added).

Whatever label is placed upon them, Edison's arguments are insufficient to disturb the challenged orders.

A. Edison Mischaracterizes The "Settlement" Process In The California ISO Market

Relying heavily upon a Commission decision in an unrelated case, *San Diego Gas & Elec. Co. v. Sellers of Energy*, 125 F.E.R.C. ¶ 61,214 (2008), Edison contends that purchases and sales of energy in the California ISO wholesale market are "settled" on an hourly basis and that the Commission, therefore, should be barred from approving a monthly netting interval for the "sale" of station power. Br. 34-38. But *San Diego* had nothing to do with how a merchant generator should treat its own output in determining its station power needs, nor did it involve an analysis of the term "sale" as used the Federal Power Act.

At issue in *San Diego* was the proper method for calculating refunds owed

by and to participants in the wholesale electricity market during the California energy crisis. 125 F.E.R.C. at PP 9-15. The Commission found that the parties' entitlement to, and liability for, any refund amounts should be netted hourly, rather than at the conclusion of the nine-month refund period. The Commission determined that this was consistent with the manner in which the California ISO Tariff calculated amounts owed in the normal course – *i.e*., the monthly bill reflects a single amount owed based on a netting of purchases and sales priced on an hourly basis. *Id*. at P 17.

The use of an hourly settlement period for "purchases" and "sales" of wholesale energy in the California ISO market does not strip the Commission of the authority to approve a monthly netting interval for station power. As this Court recognized in *Niagara Mohawk*, "FERC reasonably regards that hourly charge as an accounting entry rather than an actual sale of power, and it does not follow that hourly netting of power necessarily dictates hourly netting for" determining a merchant generator's net output and thus its station power transmission load. *Niagara Mohawk*, 452 F.3d at 830. *See also* Tariff Rehearing Order at P 110 (same), JA 80.

B. The Existence Of Other Netting Intervals For Other Services In The California ISO Tariff Does Not Undermine FERC's Authority To Approve Monthly Netting For Station Power.

Edison also contends that the Commission's authority to approve a monthly

netting interval for station power is undercut by the fact that the California ISO Tariff nets ancillary transmission services on an hourly basis. Br. at 38-41.

1. Edison failed to raise its argument before the Commission.

Edison filed two rehearing petitions and two responses to motions for clarification in the underlying proceedings. In none of those filings did Edison contend that the existence of alternative netting intervals in the California ISO Tariff divested FERC of the authority to approve a monthly netting interval for station power in California.[14] Edison's failure to raise this issue before the Commission bars this Court from considering it.

Under section 313(b) of the Federal Power Act, no objection to the Commission's orders is properly subject to judicial review unless it has "been urged before the Commission in the application for rehearing." 16 U.S.C. § 825*l*(b). The Court has often held that the Act's rehearing requirement is a jurisdictional bar. *See, e.g.*, *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005); *Niagara Mohawk*, 452 F.3d at 830 n.9 (discrimination argument "foreclosed because it was not raised below").

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[14] *See* Request for Rehearing and Clarification, filed Dec. 20, 2004 (R. 17), JA 100; Motion for Clarification and Request for Rehearing, filed July 22, 2005, (R. 47), JA 249; Response to Motion For Clarification, filed July 26, 2007 (R. 69), JA 324; Response to Motion For Clarification, filed Dec. 2, 2008 (R. 88), JA 356.

2. The hourly charge for ancillary services does not control the netting interval for station power.

Even if it were properly before the Court, Edison's argument fails to establish that the Commission lacks authority to approve a monthly netting interval for station power in the California ISO market. The ancillary services referenced by Edison are, by definition, ancillary to the base transmission service. The California ISO chose to price these transactions, as it does for energy, on an hourly basis. The Commission generally affords filing ISOs flexibility in determining the appropriate settlement, netting, or billing period for their services, so long as it does not produce an unjust or unreasonable result. *See Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1062 (D.C. Cir. 2008) (recognizing, in affirming FERC orders approving Midwest ISO filing on transmission cost allocation, FERC's "established practice" of giving deference to "regional choices"). Here, the fact that these other transactions are priced on an hourly basis does not undermine the operation of the Station Power Protocol, including its monthly netting interval – as would be the case if Edison were permitted to charge net positive merchant generators for retail sales throughout the monthly netting interval.

In the end, the California ISO, under the Tariff as it existed when the Commission approved the Station Power Protocol, tallied the market participants' credits and debits for all transactions (including hourly services) and issued invoices on a monthly basis. *See* Tariff, Third Replacement Volume No. 1, First

Rev. Sheet No. 250 (discussing monthly invoicing procedures), JA 377.[15] Thus, the determination of whether all transaction entries ultimately gave rise to an obligation to pay was made on a monthly basis, just as it was done for station power. *Niagara Mohawk*, 452 F.3d at 830 (noting, in approving monthly netting, that New York ISO's "billing and accounting practices are *month*-based").

C. The Commission Properly Approved The California ISO's Proposal Of A Monthly Netting Interval.

In light of the momentary fluctuations in energy production that are inherent in generation, as well as the very nature of the grid – where energy is commingled instantaneously upon its generation – some time period must be used in order to determine whether a sale of station power has occurred and in what quantity. *See, e.g.*, *New York*, 535 U.S. at 8 (describing commingling of energy in the grid); *PJM II*, 94 F.E.R.C. at 61,892 (Commission traditionally has "taken the practical point of view that net output should be measured over a reasonable time period, so as to take into account fluctuations in electric production"). Indeed, Edison has not challenged the Commission's authority to approve the "Permitted Netting" provisions of the California ISO Tariff, which net station power on an interval of one hour or less. *See* Tariff Rehearing Order at P 75, JA 70. And Edison

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[15] Currently, the California ISO Tariff employs a bi-weekly invoicing procedure. *See* Tariff, Fourth Replacement Volume No. 1, §§ 11.29-11.30 (available at http://www.caiso.com/2457/2457df5b5dba0.pdf.)

acknowledges that its own retail tariff utilizes a netting interval to determine whether a retail sale of energy has occurred. Br. at 2. Nor is it disputed that netting is consistent with the historical treatment of station power by traditional utilities in California. *See* Tariff Order at P 16 n.11, JA 28.

Despite Edison's repeated assertion that FERC "directed" monthly netting, *see, e.g*., Br. at 38, it was in fact the California ISO that proposed monthly netting. *See Niagara Mohawk*, 452 F.3d at 829 ("it will be recalled that FERC did not mandate a one month netting period; it only approved NYISO's choice"). That proposal came after an "extensive stakeholder process," in which participants were given every opportunity to develop the station power policies that were best suited for the specific operational characteristics of the California ISO market. California ISO Compliance Filing, dated Mar. 16, 2006, at 4 (R. 54), JA 265. During that process, the California ISO considered arguments from Edison and others for a shorter netting interval, but found that they did not warrant departure from a monthly interval. *See* Amendment No. 68 at 8 (R. 22), JA 132. The Commission accepted that netting interval as reasonable for California. *See Pub. Serv. Comm'n of Wis*., 545 F.3d at 1062 (holding that the Commission acted reasonably in giving respect to the regional and independent perspective, and the collaborative stakeholder process, of the ISO). Netting reasonably comports with "the traditional accounting for station power as net, or negative, generation," Complaint

Rehearing Order at P 15, JA 15, and a one month netting interval is the same as that utilized in the East and Midwest. *See* Tariff Rehearing Order at P 110, JA 80.

At best, Edison's argument regarding the characteristics of the California ISO market demonstrates the potential reasonableness of some other, shorter netting interval – something the Commission has acknowledged in earlier orders. *PJM II*, 94 F.E.R.C. at 61,892 (approving hourly netting interval). *See also Ark. Electric Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002) (inquiry on review is whether Commission's approach is reasonable, not whether another approach is more reasonable). But it does not establish that the Commission lacked authority to approve the California ISO's monthly netting proposal.

VI. THE COMMISSION REASONABLY DETERMINED THAT MERCHANT GENERATORS SELF-SUPPLYING UNDER THE CALIFORNIA ISO TARIFF COULD NOT BE ASSESSED CHARGES BY EDISON THAT ARE NOT RELATED TO ANY SERVICE PROVIDED.

Edison contends that, even if the self-supply of station power does not involve a retail sale, it should be permitted to impose certain stranded cost charges upon merchant generators who choose the self-supply option under the California ISO Tariff.[16] Br. at 41. The primary charges sought to be imposed by Edison are a

[16] In *Niagara Mohawk*, the Court described "stranded costs" as "costs, such as those associated with long-term contractual commitments or large capital expenditures, that utilities had incurred with the expectation that the industry would remain bundled and that have now become 'stranded' with the utilities." 452 F.3d at 825.

"Competition Transition Charge" – which is designed to recover utility investments that have become threatened by the subsequent restructuring of the energy market – and a "Department of Water Resources Power Charge" – designed to recover costs arising from the 2000-2001 Western power crisis, which Edison has described as a form of stranded cost. *See* Complaint Rehearing Order at P 22, JA 18. *See also* Attachment A to Motion for Clarification of Constellation Energy Group, *et al*. at 4 (R. 65), JA 297.

The Commission held that its rulings preclude utilities from imposing additional retail and load-based charges upon merchant generators who self-supply their station power under the California ISO Tariff using only FERC-jurisdictional transmission facilities for any remote self-supply. The Commission reasonably found that Edison's attempt to impose such charges "amount[ed] to a backdoor attempt to circumvent not only [the Commission's] jurisdiction, but also the clear meaning and intent of [its] station power orders and *Niagara Mohawk*." Tariff Rehearing Order at P 71, JA 68.

A. The Proposed Charges Are Not A Consumption Tax.

In response, Edison points to California's ability to impose taxes upon consumption, even in the absence of a sale. Br. 42-45. But Edison is a publicly-traded, FERC-regulated company, not the State. *Id*. at 2. And it cites no energy consumption tax that would be implicated by a merchant generator's self-supply of

station power. Instead, the state tariff provisions at issue seek to impose retail charges upon the sale or delivery of energy. Neither occurs with respect to a merchant generator which self-supplies its station power under the California ISO Tariff using only FERC-jurisdictional transmission facilities.[17] Tariff Order at PP 20-22, JA 30-31.

The challenged orders "do not seek to preempt states' lawful imposition of taxes." Tariff Rehearing Order at P 83, JA 73. "[B]ut such taxes are not implicated by" Edison's proposed charges. *Id*. Instead, Edison "seeks to impose retail charges on generators that are self-supplying consistent with a federally-approved rate schedule." *Id*. A generator that self-supplies under the California ISO Tariff is not engaging in any "state-jurisdictional retail sale (indeed, no sale at all)." *Id*. And thus when self-supply does not involve a "use of state-jurisdictional local distribution facilities . . . [Edison] cannot lawfully assess retail charges." *Id*. To permit such charges would "prevent a merchant generator from fully-exercising its right to self-supply under the [California ISO] Station Power Protocol." *Id*.

[17] If the merchant generator used Edison's transmission facilities for either remote self-supply or third-party sales, Edison would be compensated at the California ISO Tariff transmission rate. Depending on the facts, state-regulated local distribution service might also occur.

B. Merchant Generators That Self-Supply Under The California ISO Tariff Are Not Properly Characterized As "Former" Utility Customers.

Edison also contends that it should be permitted to assess retail and load-based charges upon merchant generators who take no service from the utility, but instead self-supply their station power needs under the California ISO Tariff, because such generators were formerly required to purchase station power from Edison. Br. at 41, 46-50. Citing to Order No. 888, Edison claims that "FERC itself has long recognized [that prior sales] can form the basis of a right to impose charges, such as stranded costs." Br. at 41.

In Order No. 888 (affirmed in all relevant respects by this Court and, ultimately, by the Supreme Court), the Commission explained that former retail customers of utilities who previously purchased bundled sales and services might try to avoid state-imposed stranded cost charges by taking distribution service under FERC-jurisdictional transmission tariffs in lieu of state-jurisdictional tariffs. To address this concern, the Commission concluded that, notwithstanding its exclusive jurisdiction over all transmission of electric energy in interstate commerce, states could add stranded cost charges to rates for local distribution service, even if there is no actual use of a utility's local distribution facilities. Order No. 888 at 31,783.

In *Niagara Mohawk*, however, this Court recognized that merchant

generators, which purchased their facilities from vertically-integrated utilities "are deemed to have paid a premium to cover some part of these stranded costs, and thus are in a quite different position from a retail user." 452 F.3d at 829. The Court found that the Commission may, in its discretion, choose not to extend Order No. 888's "fiction" – that an end user takes local distribution service even if it does not use a utility's facilities – to merchant generators. *Id*. And "[t]he Commission has chosen not to do so." Tariff Rehearing Order at P 86, JA 74.

The Competition Transition Charge illustrates the point. It was specifically designed to recover infrastructure costs incurred by utilities to meet electricity demand that became stranded as a result of the restructuring of the energy market. *Pac. Gas & Electric Co.*, 77 F.E.R.C. ¶ 61,204, at 61,794 (1996). The merchant generators – who are a "new creature in the market," *Niagara Mohawk*, 452 F.3d at 829 – did not play any role in the projected demand for electricity. And given that they are deemed to have already paid a premium in the purchase price of their generating units, any further recovery would amount to a windfall. *See Nine Mile I*, 105 F.E.R.C. at P 35.

The Commission's orders simply hold that, to the extent that only FERC-jurisdictional transmission facilities are used in the delivery of self-supplied station power, a utility cannot charge state-jurisdictional retail charges. Retail and load-based charges for "this self-supply are costs that have no relationship to any

service provided by another party." Tariff Rehearing Order at P 76, JA 70. And while Order No. 888 creates a limited exception allowing retail charges not linked to any identifiable services to be assessed to former retail customers, the Commission reasonably declined to extend that exception to merchant generators. *Niagara Mohawk*, 452 F.3d at 829 (finding that it was "reasonable" for the Commission to "carve out" merchant generators from the "fiction" created in Order No. 888).

To permit such charges would also hinder the pro-competitive and least-cost energy goals of the Commission's station power policies by imposing "load-based charges for fictitious energy purchases." Tariff Rehearing Order at P 76, JA 70. In contrast, the challenged orders leave Edison free to assess these charges against merchant generators who actually do purchase station power at retail from it or actually do take delivery over any Edison local distribution facilities. *See, e.g.*, *KeySpan IV*, 107 F.E.R.C. at P 49. Moreover, "utilities are free to seek and the state is free to approve adjustments in other rates that recover stranded costs from appropriate classes of customers, or to extend the stranded cost recovery period." Tariff Rehearing Order at P 108, JA 79. But when a merchant generator is neither purchasing its station power at retail (*i.e.*, when it is net positive) nor utilizing local distribution facilities for the delivery of station power, the charges specified in the California ISO Tariff apply to the exclusion of any retail tariff.

CONCLUSION

For the reasons stated, the petitions for review should be denied, and the Commission's orders affirmed, in all respects.

Respectfully submitted,

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February 25, 2010

Southern California Edison Co. v. FERC **Docket Nos. EL04-130**
D.C. Cir. Nos. 05-1327*, et al.* **ER05-849**

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 13,382 words, not including the (i) cover page, (ii) certificates of counsel, (iii) table of contents and authorities, (iv) glossary, (v) the certificates of counsel, and the (vi) addenda.

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ADDENDUM

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The Administrative Procedure Act, 5 U.S.C. § 706, provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 201 of the Federal Power Act, 16 U.S.C. § 824 provides:

Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy
It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b (a)(2), 824e (e), 824i, 824j, 824j–1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b (a)(2), 824e (e), 824i, 824j, 824j–1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes

specified in the preceding sentence.

(c) Electric energy in interstate commerce
For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined
The term "sale of electric energy at wholesale" when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined
The term "public utility" when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e (e), 824e (f),[1] 824i, 824j, 824j–1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt
No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records
(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—
(A) an electric utility company subject to its regulatory authority under State law,
(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

Section 205 of the Federal Power, 16 U.S.C. § 824d, provides:

Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission,

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or

(2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into

effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Section 206(a) of the Federal Power, 16 U.S.C. § 824e(a), provides:

Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, provides:

Review of orders

(a) Application for rehearing; time periods; modification of order
Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review
Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before

the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Southern California Edison Co. v. FERC **Docket Nos. EL04-130**
D.C. Cir. Nos. 05-1327*, et al.* **ER05-849**

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 25th day of February 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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