ORAL ARGUMENT DATE NOT YET SCHEDULED

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

Nos. 04-1227, *et al.*

NIAGARA MOHAWK POWER CORP., *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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WASHINGTON, DC 20426

FEBRUARY 7, 2006

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent Federal Energy Regulatory Commission hereby certifies as follows:

A. Parties and *Amici*

All parties and intervenors appearing before the Commission and this Court are listed in Petitioners' briefs. There are no *amici*.

B. Rulings Under Review

The following eight orders of the Federal Energy Regulatory Commission are under review here:

1. *Keyspan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) ("*KeySpan III*"), R1.66, J.A. 146, *reh'g denied*, 107 FERC ¶ 61,142 (2004) ("*KeySpan IV*"), R1.86, J.A. 530;

2. *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003) ("*Nine Mile I*"), R2.17, J.A. 463, *reh'g denied*, 110 FERC ¶ 61,033 (2005) ("*Nine Mile II*"), R2.29, J.A. 553;

3. *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 (2003) ("*AES I*"), R3.25, J.A. 471, *reh'g denied*, 110 FERC ¶ 61,032 (2005) ("*AES II*"), R3.33, J.A. 565; and

4. *Niagara Mohawk Power Corp. v. Huntley Power LLC, et al.*, 109 FERC ¶ 61,169 (2004) ("*Huntley I*"), R4.52, J.A. 543, *reh'g denied*, 111 FERC ¶ 61,120 (2005) ("*Huntley II*"), R4.56, J.A. 580.

C. Related Cases

As explained on page 24, a number of additional FERC orders address the same issue of station power supply and netting. These orders have produced at

least three additional appeals to this Court: *Southern California Edison Co., et al. v. FERC*, D.C. Cir. Nos. 05-1327, *et al*.; *Consolidated Edison Co. of New York, Inc. v. FERC*, D.C. Cir. No. 05-1372; and *LG&E Energy LLC v. FERC*, D.C. Cir. No. 05-1403.

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Solicitor

February 7, 2006

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GLOSSARY

AES I	*AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 (2003), R3.25, J.A. 471
AES II	*AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,032 (2005), R3.33, J.A. 565
Commission or FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Huntley I	*Niagara Mohawk Power Corp. v. Huntley Power LLC, et al.*, 109 FERC ¶ 61,169 (2004), R4.52, J.A. 543
Huntley II	*Niagara Mohawk Power Corp. v. Huntley Power LLC, et al.*, 111 FERC ¶ 61,120 (2005), R4.56, J.A. 580
ISO	Independent System Operator
KeySpan I	*KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 (2002), R1.32, J.A. 97
KeySpan II	*KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 100 FERC ¶ 61,201 (2002), J.A. 102
KeySpan III	*Keyspan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002), R1.66, J.A. 146
KeySpan IV	*Keyspan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 107 FERC ¶ 61,142 (2004), R1.86, J.A. 530

Merchant generator	owner of generating facilities which sells wholesale power at market-based rates under FERC-approved tariffs
New York ISO	New York Independent System Operator, the operator of the electric transmission grid in New York
New York PSC or NYPSC	New York Public Service Commission
Nine Mile I	*Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003), R2.17, J.A. 463
Nine Mile II	*Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 110 FERC ¶ 61,033 (2005), R2.29, J.A. 553
P	paragraph number in FERC order
PJM	Pennsylvania-New Jersey-Maryland Interconnection, the operator of the electric transmission grid in the mid-Atlantic region
PJM II	*PJM Interconnection, L.L.C., et al.*, 94 FERC ¶ 61,251 (2001)
PJM III	*PJM Interconnection, L.L.C., et al.*, 95 FERC ¶ 61,333 (2001)
PJM IV	*PJM Interconnection, L.L.C., et al.*, 95 FERC ¶ 61,470 (2001)
R1	record in underlying *KeySpan* proceeding
R2	record in underlying *Nine Mile* proceeding
R3	record in underlying *AES* proceeding
R4	record in underlying *Huntley* proceeding

Services Tariff	New York ISO Market Administration and Control Area Services Tariff
Station Power	the power that electricity generators need internally to operate their generating facilities
TO	transmission owner

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Respondent.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review untimely collateral attacks on earlier, final orders of the Federal Energy Regulatory Commission ("FERC" or "Commission"), in which Petitioners fully participated, making fundamental decisions on the supply and netting of "station power" in New York electricity markets that were applied in the later orders on appeal.

2. Assuming jurisdiction, whether the Commission reasonably exercised its

statutory authority and applied its precedent in approving and enforcing specific rules for the supply and netting of station power in New York.

STATUTES AND REGULATIONS

Pertinent sections of the Federal Power Act ("FPA") and the Commission's implementing regulations are set out in the Addendum to this brief.

COUNTER-STATEMENT OF JURISDICTION

Contrary to the argument of Petitioners (*see* TO Br. 65-69; NYPSC Br. 32-34), this Court lacks jurisdiction to consider the most significant issues they raise. *See infra* pages 27-35. The challenged orders, addressing and enforcing the specific rules for the supply and netting of station power in New York, follow and rely upon earlier orders establishing fundamental rules for the supply and netting of station power. Petitioners were active participants in the earlier, now final, proceedings, which addressed station power supply in New York (and other regions). The later orders, now presented for review, repeatedly acknowledge that petitioners were engaging in collateral attacks on fundamental decisions earlier made by the Commission as to station power supply. Petitioners are not injured by the Commission's restatement and reapplication in later orders of fundamental decisions made in earlier orders, such as whether the self-supply of station power represents a state- or FERC-regulated sale or whether merchant generators are able to net station power over a reasonable period of time.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case concerns the supply of "station power" in New York. Station power is the power that electricity generators need internally to operate their generating facilities. This was not an issue when utilities were vertically integrated, operating generation, transmission, and distribution facilities necessary to serve retail customers. This became an issue after traditional utilities, responding to technological, competitive, and regulatory developments, began to sell their generating assets to "merchant generators," which lack transmission and distribution facilities or retail customers of their own.

The instant appeals, concerning four pairs of FERC orders concerning station power practices in New York, seek review of simply eight orders in a long series of FERC orders addressing the respective roles of federal and state regulators. The eight orders on review cited frequently to, and applied basic rules for station power supply established by the Commission in, three earlier orders: *PJM Interconnection, L.L.C., et al*., 94 FERC ¶ 61,251 (2001) ("*PJM II*"); *PJM Interconnection, L.L.C., et al*., 95 FERC ¶ 61,333 (2001) ("*PJM III*"); and *PJM Interconnection, L.L.C., et al*., 95 FERC ¶ 61,470 (2001) ("*PJM IV*").

In the *PJM* station power orders, the Commission ruled that merchant generators are not required to purchase, under state retail tariffs, their station power

requirements solely from the former owner of the generating facilities. Rather, consistent with its efforts to promote the competitive supply of electricity and to eradicate unduly discriminatory practices by transmission-owning utilities, the Commission ruled that merchant generators can self-supply their own station power requirements from their own generating facilities. If merchant generators do self-supply their own station power, as measured over a reasonable period of time, then there is no sale (retail or wholesale) and thus federal and state regulation does not attach to the commodity. *E.g.*, *PJM II*, 94 FERC at 61,890-91. If, however, merchant generators need transmission and/or local distribution service to accommodate self-supply or third party-supply of station power, then that service is subject to federal and/or state regulation. *E.g.*, *PJM III*, 95 FERC at 62,186

Petitioners participated actively in the *PJM* proceedings and sought to determine whether the Commission's fundamental rulings as to station power applied to New York utilities and markets. The Commission confirmed that it did, *see id*. at 62,189-90, though it did not require an exact match of specific implementing tariff requirements in both the PJM (mid-Atlantic) and New York regions.

In another earlier, now-final order, the Commission, acting on a complaint filed by a New York generator, clarified that "the fundamental questions about the

appropriate treatment of station power were answered" in the *PJM* orders. *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 at 61,679 (2002) ("*KeySpan I*"), R1.32, J.A. 97. The Commission explained that it already had determined that self-supplying merchant generators in New York must, consistent with the *PJM* orders, be allowed to net station power against gross output "over some reasonable time period" in order to determine whether the generators are taking a service they must pay for. *Id*. at 61,679-80. All that was left to decide, in a subsequent compliance proceeding, was to determine a "reasonable time period" for netting station power and to determine the precise terms of a New York tariff to implement the Commission's earlier directives.

The challenged eight New York station power orders followed. In the first group, two compliance orders implementing the Commission's earlier directives in *KeySpan I*, the Commission accepted specific tariff provisions submitted by the New York Independent System Operator ("New York ISO"). *See* "Order on Compliance Filing," *Keyspan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) ("*KeySpan III*"), R1.66, J.A. 146, and "Order Denying Rehearing", 107 FERC ¶ 61,142 (2004) ("*KeySpan IV*"), R1.86, J.A. 530. The New York tariff procedures, like the PJM tariff procedures, allow merchant generators to net station power against gross output over a one-month

period. In accepting those procedures, the Commission – relying upon its earlier *PJM* and *KeySpan* orders -- rejected the arguments of New York transmission owners and the New York Public Service Commission ("New York PSC" or "NYPSC") in favor of shorter netting periods, and rejected their arguments that the Commission was encroaching on state jurisdiction over retail sales and local distribution service.

The other six orders on review concern implementation and enforcement of the New York station power tariff procedures. In four, the Commission granted the complaints of New York merchant generators that a New York transmission owner was hindering their ability to obtain station power service under the procedures earlier adopted by the Commission. *See* "Order Granting Complaint," *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp*., 105 FERC ¶ 61,336 (2003) ("*Nine Mile I*"), R2.17, J.A. 463, and "Order Denying Rehearing," 110 FERC ¶ 61,033 (2005) ("*Nine Mile II*"), R2.29, J.A. 553; "Order Granting Complaint," *AES Somerset, LLC v. Niagara Mohawk Power Corp.,* 105 FERC ¶ 61,337 (2003) ("*AES I*"), R3.25, J.A. 471, and "Order Denying Rehearing," 110 FERC ¶ 61,032 (2005) ("*AES II*"), R3.33, J.A. 565. In two, the Commission denied the complaint of a New York transmission owner concerning alleged nonpayment by New York merchant generators for station power service. *See* "Order Denying Complaint," *Niagara Mohawk Power Corp. v. Huntley Power*

LLC, et al., 109 FERC ¶ 61,169 (2004) ("*Huntley I*"), R4.52, J.A. 543, and "Order Denying Rehearing," 111 FERC ¶ 61,120 (2005) ("*Huntley II*"), R4.56, J.A. 580.

In all six implementation orders, the Commission referred to its fundamental station power findings in the *PJM* and *KeySpan* orders and refused to entertain collateral attacks by Petitioners on those earlier, final orders.

II. STATEMENT OF FACTS

A. Statutory Framework

The FPA delineates federal and state regulation over electricity markets and services. In relevant respect, FPA section 201(b) confers on the FERC 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, e.g., New York v. FERC*, 535 U.S. 1, 19-20 (2002) (noting that statutory text "unambiguously authorizes FERC to assert jurisdiction over two separate activities – transmitting and selling," and that its transmission jurisdiction, unlike its sales jurisdiction, contains no limitation to the wholesale market). FPA section 201(b) reserves for the states jurisdiction over "any other sale of electric energy" and "facilities used in local distribution." 16 U.S.C. § 824(b)(1). *See also, e.g., Detroit Edison Co. v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003) (explaining that FERC has jurisdiction when a local distribution

[1] FPA 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."

facility is used in a wholesale transaction, but not when used in an unbundled retail transaction).

As for transactions within its jurisdiction, the Commission is empowered under FPA sections 205 and 206 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 v. FERC*, 535 U.S. at 7.

B. Restructuring of Electricity Markets

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001); *see also, e.g.*, *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (noting "bad old days" when there was little competition among utilities). In recent years, however, driven by technological advances and legislative and regulatory initiatives promoting increased entry into wholesale electricity markets, electric utilities increasingly have "unbundled" their service offerings to their customers. This has led to an increasingly competitive market for the sale of electric energy and power. *See New York v. FERC*, 535 U.S. at 5-14 (describing developments).

To foster these developments, so that the benefits of a competitive market

are realized by customers, the Commission, in its Order No. 888 rulemaking, directed utilities to offer non-discriminatory, open access transmission service. [2] To implement this directive, the Commission ordered the functional unbundling of wholesale generation and transmission services. *Id*. at 11. "Functional unbundling" requires each utility to state separate rates for its wholesale generation, transmission and ancillary services, and to take transmission of its own wholesale sales and purchases under a single general tariff applicable equally to itself and to others. *Id*.

To further the development of competitive markets, the Commission in Order No. 888 encouraged, but did not direct, the development of independent system operators ("ISOs") of regional, multi-system grids. *See* FERC Stats. & Regs., Regs. Preambles at 31,730-32. [3]

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[2] *See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 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).

[3] After several years of experience reviewing initial ISO proposals, the Commission, in Order No. 2000, directed all transmission owning utilities to make filings to either participate in a regional transmission organization ("RTO") or explain efforts to participate in a RTO. *See Regional Transmission Organizations*,

C. Development of New York Markets

New York markets and utilities restructured in response to the Commission's (and New York State's) pro-competitive initiatives. This Court is familiar with many issues arising during the recent transitional period. *See Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005) (approval of rate design for installed capacity market); *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005) (mitigation of prices charged by New York generators and marketers); *PSEG Energy Resources & Trade, LLC v. FERC*, 360 F.3d 200 (D.C. Cir. 2004) (same); *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003) (price cap for New York City capacity market); *Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964 (D.C. Cir. 2003) (price spikes in operating reserves markets).

Going beyond the "functional unbundling" directive of Order No. 888, New York utilities, at the direction of the New York PSC, have largely divested themselves of their generation facilities. *See, e.g.*, *PJM III*, 95 FERC at 62,189-90. These utilities, referred to collectively as "transmission owners" or "TOs," now operate primarily as the owners of the transmission and distribution facilities and providers of retail service. *See* TO Br. at 12-13. The purchasers of the divested

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Order No. 2000, FERC Stats. & Regs., Regs. Preambles ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,092 (2000), *dismissed sub nom. Public Utility District No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

generation facilities, referred to collectively as "merchant generators," have no retail service obligation and sell wholesale power at market-based rates under FERC-approved tariffs. *See, e.g., PJM II*, 94 FERC at 61,883 n.12 (defining "merchant generator" as a "non-vertically integrated owner of generating facilities" that includes both independent and affiliated power producers).

The non-profit New York Independent System Operator ("New York ISO") operates the bulk power transmission network in New York. As administrator of an Open Access Transmission Tariff ("Transmission Tariff") approved by the FERC, the New York ISO assures that both New York transmission owners and merchant owners receive reliable, non-discriminatory access to the grid. The New York ISO also administers several competitive, bid-based electricity markets under the Market Administration and Control Area Services Tariff ("Services Tariff") approved by the FERC. *See, e.g., PSEG Energy*, 360 F.3d at 201; *Consolidated Edison*, 347 F.3d at 966-67.

D. 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 that is on the generating facility's site." *PJM II*, 94 FERC at 61,889. When utilities were vertically-integrated, the treatment of station power was not an issue. As the parties established, and as the

Commission found, in the *PJM* proceeding, utilities in PJM (the mid-Atlantic states), New York, and elsewhere have a long-standing practice of treating station power as "negative generation" and netting station power needs when measuring the output of a generator. In other words, utilities historically have not charged themselves, their affiliates, or their fellow utilities for station power, even during periods when the generating unit was not operating. *See PJM II*, 94 FERC at 61,882, 61,886, 61,889-90 & n.56.

The treatment of station power became an issue upon the entry of non-traditional merchant generators into the market. Merchant generators sought to obtain and account for necessary station power service in the traditional manner employed by traditional utilities – by netting station power needs against gross output. *See PJM III*, 95 FERC at 62,189. Specifically, merchant generators sought the same opportunity to "self-supply" their own station power needs. Some protested when the former owners of their generating facilities sought to charge them for station power services they did not want under retail, state-approved tariffs.

E. Earlier *PJM* Proceeding

In its *PJM* orders, the Commission first addressed whether merchant generators should, like traditional utilities, have the same ability to self-supply station power and net that supply against gross output. In those orders, the

Commission addressed three filings: (1) tariff amendments proposed by PJM Interconnection (the operator of the grid in the mid-Atlantic states) to govern station power supply to merchant generators; (2) a petition for a declaratory order by a New York transmission owner that the Commission disclaim jurisdiction over the supply of station power; and (3) a petition for a declaratory order by New York merchant generators that they, like traditional utilities, can obtain and account for station power through self-supply and netting. *See PJM II*, 94 FERC at 61,882-88.

The Commission found that the appropriate treatment of station power depends on the supply of that power. If a merchant generator self-supplies its own station power requirements – i.e., if its gross output exceeds or equals its station power requirements – then the generator may net its station power requirements against the generating facility's gross output. [4] *PJM II*, 94 FERC at 61,882; *see also PJM III*, 95 FERC at 62,189-90 (netting of self-supply is just as appropriate in New York as in PJM region). The Commission found that a merchant generator is entitled to the same competitive choices, and thus the same netting practice,

[4] A generator can self-supply its own station power requirements in two ways. One, when the generator is operating, the generator can self-supply all of its station power requirements from generation located "behind the meter." In other words, the station power is not metered, as it does not pass through the metering point between the generator's facility and the network to which it is interconnected. Two, when the generator is not operating or is not supplying enough energy to meet the generator's station power needs, the generator can self-supply by obtaining its station power requirements from another (remote) generator owned by the same company. *See PJM II*, 94 FERC at 61,890.

historically afforded other utilities. *PJM III*, 95 FERC at 62,189. A merchant generator denied the opportunity to self-supply, and forced to purchase station power from the former owner of the generating facility under a retail tariff, would be unable to compete on equal terms and would be subject to undue discrimination. *PJM II*, 94 FERC at 61,893. In other words, the Commission's decision to allow station power netting is entirely consistent with the pro-competitive, anti-discriminatory goals of Order No. 888. *PJM III*, 95 FERC at 62,184-85.

Because a self-supplying generator is consuming its own generation, there is no sale within the contemplation of FPA section 201, 16 U.S.C. § 824(b). *See supra* pages 7-8 (statutory text). Thus, there is no federal regulation over the self-supply of station power (because there is no sale for resale) and there is no state regulation over the supply (because there is no sale for end use). *PJM II*, 94 FERC at 61,889-91, 61,894-96; *PJM III*, 95 FERC at 62,186. If, on the other hand, a generator procures necessary station power from a third-party, then there is a distinct sale between distinct corporate entities. Third-party supply, unlike self-supply, is a retail sale that is subject to state regulation. *Id.*

Additional regulation attaches if the generator meeting its station power needs through remote self-supply or third-party supply does not own, or does not have rights to use, the grid connecting its facility to the source of the station power. If the generator requires unbundled transmission service to receive station power,

then that service is taken under the FERC-jurisdictional open access transmission tariff. *PJM III*, 95 FERC at 62,186. If the generator requires access to local distribution to receive station power, then it takes that service under a state distribution tariff. Whether station power supply implicates transmission or local distribution service is a case-specific matter depending on the facts. *Id*.

The Commission recognized that there may be times (e.g., during an outage) when the gross output of a self-supplying generator falls below its station power requirements. *PJM II*, 94 FERC at 61,891-92; *PJM III*, 95 FERC at 62,187-88. The Commission nevertheless determined that a generator "may net against its gross output as measured over a specific time period." *PJM II*, 94 FERC at 61,891. Initially, PJM proposed, and the Commission accepted as reasonable, a one-hour period over which to measure netting. In *PJM IV*, PJM increased to one month the period over which to net station power supply. 95 FERC at 62,683-84. In support, PJM explained that a one-month netting period coincides with monthly billing cycles, and that a shorter netting period would be administratively cumbersome. *Id*. The Commission found that a one-month netting period is reasonable and entirely consistent with the holdings of *PJM II* and *III*. *Id*. at 62,685.

F. Earlier *KeySpan* Proceeding

In early 2001, KeySpan-Ravenswood, Inc. ("KeySpan"), a New York

merchant generator, filed with the Commission a complaint against the New York ISO. *See* R1.1, J.A. 1. KeySpan alleged that the New York ISO was not permitting the netting of station power and asked for the implementation, in the ISO's tariff, of station power principles announced in the *PJM* proceeding. Numerous parties, including petitioners, filed comments on KeySpan's filing.

In response, the Commission recognized "at the outset" that the "fundamental questions about the appropriate treatment of station power were answered" in the recent *PJM* proceeding. *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 99 FERC ¶ 61,167 at 61,679 (2002) ("*KeySpan I*"), R1.32, J.A. 100. The Commission reiterated, based on its *PJM* findings, the jurisdictional parameters of station power supply: "[W]hile neither self-supply nor third-party supply of station power involve[s] a sale subject to Commission jurisdiction, . . . the delivery of station power could be transmission under our jurisdiction, or involve local distribution subject to state jurisdiction, or both." *Id*. If station power supply implicates FERC-jurisdictional (unbundled retail) transmission, then the New York ISO must account for such service in its FERC-filed tariff. *Id*. at 61,679-80, J.A. 100-01.

In addition, the New York ISO "must allow self-supplying merchant generators to net station power against gross output over some reasonable time period in order 'to ensure that they do not bear a cost that has no relationship to

any 'service' purportedly being provided by another party.'" *Id*. at 61,680, J.A. 101 (quoting *PJM II*, 94 FERC at 61,893) (emphasis added). For this reason, the Commission directed the New York ISO to file a revised tariff to reflect the transmission of station power. That tariff revision, the Commission explained, need not "track aspects of PJM's proposal which would be inappropriate for New York." *Id*. at 61,680, J.A. 101. For example, the New York ISO need not accept the one-month netting of station power adopted in the *PJM* proceeding if another time period is more appropriate in New York. [5] *Id*.

G. *KeySpan* Compliance Proceeding

As directed by the Commission in *KeySpan I*, the New York ISO made a "compliance filing" to revise its tariff to allow for the netting of station power. *See* R1.40, J.A. 105. The New York ISO proposed to add a new section (section 4.24) to its Services Tariff that, it claimed, was consistent with the Commission's decisions in the *PJM* proceeding on station power supply and delivery. *See id*. at Attachment 1, J.A. 118. Among its provisions, the revised tariff would permit the netting of station power by self-supplying merchant generators over a one-month period, just like the tariff accepted in the *PJM* proceeding. Use of the same one-

[5] Only one party – KeySpan – sought rehearing of *KeySpan I*. On rehearing, the Commission set for hearing and settlement judge procedures the issue of whether the facilities used to deliver station power to KeySpan are FERC-jurisdictional transmission facilities. *See KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc*., 100 FERC ¶ 61,201 (2002) ("*KeySpan II*").

month netting period, the New York ISO explained, would, among other things, avoid creating a seam between the two adjacent ISOs.

Numerous parties responded to the New York ISO's filing. New York merchant generators generally supported the filing; the New York PSC and New York transmission owners generally opposed it.

The Commission accepted the New York ISO's filing. *Keyspan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002) ("*KeySpan III*"), R1.66, J.A. 146, *reh'g denied*, 107 FERC ¶ 61,142 (2004) ("*KeySpan IV*"), R1.86, J.A. 530. The Commission determined that the challenges to the filing were, in most respects, collateral attacks on the "fundamental principles" of station power procurement established in the *PJM* proceeding. 107 FERC at PP 2, 20-22, 27-28, 37-38, J.A. 530, 533-36. The Commission reiterated that it allows merchant generators to self-supply their own station power needs, and to net station power uses over a reasonable period of time, in order to enable merchant generators to procure station power competitively. The netting of station power is thus entirely consistent with the pro-competitive, anti-discriminatory initiatives in Order No. 888; it also allows merchant generators to enjoy the historical netting practice of traditional utilities. 101 FERC at P 23, J.A. 149; 107 FERC at PP 38, 41, 44-49, 66, J.A. 536-39, 542.

As the Commission previously explained in its *PJM* orders, there is no sale

when a self-supplying generator consumes its own generation. Thus, there is no retail sale subject to state regulation and no wholesale sale subject to FERC regulation. 101 FERC at P 21, J.A. 148; 107 FERC at PP 29-36, J.A. 535-36. If, however, a generator requires delivery service over local distribution lines to reach self-supplied or third-party-supplied station power, that service must be taken under a state retail distribution tariff. Any transmission service must be taken under a FERC open access transmission tariff. 101 FERC at PP 20-21, J.A. 148; 107 FERC at P 52, J.A. 540.

The Commission found the New York ISO station power procedures to be entirely compatible with its earlier-announced principles concerning station power procurement and consumption. While the Commission had not required that New York ISO station power procedures match PJM procedures exactly, the Commission found the New York ISO's implementation of PJM procedures – in particular, the one-month netting period -- to be reasonable. 101 FERC at P 24, J.A. 149; 107 FERC at PP 28, 53, J.A. 535, 540.

H. *Nine Mile* Proceeding

The approved New York ISO station power procedures became effective in April 2003. Several months later, on September 26, 2003, Nine Mile Point Nuclear Station, LLC ("Nine Mile"), a New York merchant generator, filed a complaint against Niagara Mohawk Power Corporation ("Niagara Mohawk"), a

New York transmission owner. *See* R2.1, J.A. 339. Nine Mile owns and operates two units at a nuclear generating station that it purchased from Niagara Mohawk in December 2000. Nine Mile sought to terminate service under Niagara Mohawk's retail tariff and instead self-supply all its station power needs under the New York ISO station power procedures. Other merchant generators supported Nine Mile's complaint; Niagara Mohawk, other New York transmission owners, and the New York PSC opposed it.

The Commission granted Nine Mile's complaint. *See Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp*., 105 FERC ¶ 61,336 (2003) ("*Nine Mile I*"), R2.17, J.A. 463, *reh'g denied*, 110 FERC ¶ 61,033 (2005) ("*Nine Mile II*"), R2.29, J.A. 553. Niagara Mohawk has no right "to charge Nine Mile for services that Nine Mile does not want and that Niagara Mohawk is not providing." 110 FERC at P 16, J.A. 555. Nine Mile, like all merchant generators, has the right to self-supply its own station power needs and to net that amount, over a reasonable period of time, against its gross output. The contrary argument of New York transmission owners, backed by the New York PSC, that they are making a retail sale subject to state jurisdiction is nothing more than a collateral attack on fundamental station power decisions made in the *PJM* proceeding and the *KeySpan* proceeding (which relied on the *PJM* orders). 105 FERC at PP 18-21, 30, J.A. 466, 468; 110 FERC at PP 23, 56, 59, J.A. 557, 563-64. The New York

transmission owners and the New York PSC cannot rely upon FERC precedent – especially Order No. 888 – to justify "burden[ing] competing suppliers with additional, and unjustified, costs that would make them less competitive as compared to the utilities." 110 FERC at P 43, J.A. 561; *see also, e.g.*, *id*. at P 56, J.A. 563 (explaining that, despite generation divestment, "potential for discrimination between utilities and merchant generators in New York State still exists").

I. *AES* Proceeding

A second New York merchant generator – AES Somerset, LLC ("AES") – filed a complaint against Niagara Mohawk. *See* R3.1, J.A. 260. AES owns and operates a generating facility that is in the geographic service territory of, but is not physically interconnected with, Niagara Mohawk. Like Nine Mile, AES sought to terminate service and avoid payment under Niagara Mohawk's retail tariff and instead self-supply its station power needs under the New York ISO station power procedures. Other merchant generators supported AES' complaint; Niagara Mohawk, other New York transmission owners, and the New York PSC opposed it.

The Commission granted AES' complaint. *See AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 (2003) ("*AES I*"), R3.25, J.A. 471, *reh'g denied*, 110 FERC ¶ 61,032 (2005) ("*AES II*"), R3.33, J.A. 565.

Relying on its earlier *PJM* and *KeySpan* orders, where fundamental decisions about station power supply in New York were made, the Commission determined that there is no retail sale, and thus no retail charge is permissible, when the generator's net output, measured over one month, is positive: "To allow Niagara Mohawk to charge AES for station power would prevent AES from self-supplying its own station power and, in effect, would compel it to take and pay for a fictitious service from a utility to which it is not even interconnected and whose local distribution facilities it is not using. Such a result is inimical to competition." 105 FERC at P 38, J.A. 477; *see also*, *e.g.*, 110 FERC at P 19, J.A. 568 (AES should not have to pay for services it "does not want and that Niagara Mohawk is not providing").

J. *Huntley* Proceeding

Employing a different tactic, Niagara Mohawk, the respondent in the *Nine Mile* and *AES* complaint proceedings, decided to file its own complaint against New York merchant generators. *See* R4.1, J.A. 151. The six respondents to the complaint (collectively, "Huntley"), own and operate generating facilities that are interconnected with Niagara Mohawk's transmission system. Niagara Mohawk alleged that the generators have been taking, but not paying for, retail station power service. Niagara Mohawk sought from the Commission certain findings to allow a pending state court proceeding to enforce payment to move forward.

The various parties (again, transmission owners on one side, merchant generators on the other) filed a joint stipulation of facts and individual briefs with the Commission. After reviewing the submissions, the Commission denied Niagara Mohawk's complaint. *See Niagara Mohawk Power Corp. v. Huntley Power LLC, et al.*, 109 FERC ¶ 61,169 (2004) ("*Huntley I*"), R4.52, J.A. 543, *reh'g denied*, 111 FERC ¶ 61,120 (2005) ("*Huntley II*"), R4.56, J.A. 580.

The Commission reviewed its increasingly long line of station power cases, starting with the *PJM* orders, and again determined that Niagara Mohawk has made no retail sales of station power and no deliveries of station power over its local distribution facilities. 109 FERC at PP 20-41, J.A. 546-50; 111 FERC at P 19, J.A. 583. Therefore, Niagara Mohawk has no basis for charging, at any time (even prior to implementation of the New York ISO station power rules), for station power that generators themselves self-supply. *See* 111 FERC at PP 41-48, J.A. 587-88 (there is no retroactive ratemaking or violation of the filed rate doctrine when the Commission acts to ensure that customers are not charged for service they did not take under a filed rate schedule). The Commission is not, as New York transmission owners and the New York PSC have continued to argue, intruding into state jurisdiction over retail rates or local distribution services. Rather, the Commission is acting "only to determine based on applicable law and fact what type of service (wholesale or retail) is actually being provided" and to

resolve conflicts between federal and state jurisdiction "in the most narrowly tailored and careful manner." 111 FERC at P 22, J.A. 584.

K. Other Station Power Proceedings

While the instant New York station power cases were underway, the Commission continued to issue station power orders for New York and other regions. The Commission continues to implement its fundamental findings on station power supply (i.e., a generator that self-supplies as measured over a reasonable period of time is not taking retail service unless it uses local distribution facilities for delivery) made in the earlier *PJM* and *KeySpan* proceedings. *See, e.g.*, *AES I*, 105 FERC at P 7 n.7 (citing various orders), J.A. 472. [6]

[6] Some of the Commission's station power orders, relying on the earlier *PJM* and *KeySpan* proceedings, have resulted in additional appeals to this Court. *See Duke Energy Moss Landing v. California Independent System Operator, Inc.*, 109 FERC ¶ 61,170 (2004), *reh'g denied*, 111 FERC ¶ 61,451 (2005), *appeal pending sub nom. Southern California Edison Co., et al. v. FERC*, D.C. Cir. Nos. 05-1327, *et al*. (California); *Entergy Nuclear Operations, Inc., et al. v. Consolidated Edison Co. of New York, Inc.*, 110 FERC ¶ 61,312 (2005), *reh'g denied*, 112 FERC ¶ 61,117 (2005), *appeal pending sub nom. Consolidated Edison Co. of New York, Inc. v. FERC*, D.C. Cir. No. 05-1372 (New York); *Midwest Independent Transmission System Operator, Inc., et al.*, 106 FERC ¶ 61,073 (2004), *reh'g denied*, 110 FERC ¶ 61,383 (2005), *reh'g denied*, 112 FERC ¶ 61,211 (2005), *appeal pending sub nom. LG&E Energy LLC v. FERC*, D.C. Cir. No. 05-1403 (Midwest).

SUMMARY OF ARGUMENT

Petitioners' challenge to Commission orders approving and implementing New York station power rules is, in most respects, an impermissible collateral attack on earlier findings. The challenged orders applied the fundamental station power findings made in the earlier *PJM* proceeding. The earlier *PJM* proceeding established that a merchant generator can net station power needs against gross output over a reasonable period of time, and that a self-supplying merchant generator is taking retail service only if it uses local distribution facilities. New York transmission owners and the New York PSC participated actively in the *PJM* proceeding. Indeed, the Commission in that proceeding acted on two complaints concerning station power practices in New York, and clarified that its findings were applicable in New York. Moreover, the Commission in *KeySpan I* – an order that petitioners did not challenge – directed the New York ISO to make a filing to comply with its fundamental *PJM* findings.

The challenged orders simply implement and enforce the unchallenged, earlier orders. All that petitioners can challenge now is whether a one-month netting period is a reasonable netting period, and any issues concerning enforcement of the specific New York station power rules.

As for the merits, the Commission explained, in both the earlier *PJM* and *KeySpan* orders and the later *KeySpan*, *Nine Mile*, *AES*, and *Huntley* orders, why it

is reasonable for a merchant generator to net its station power needs over one month. Station power netting represents historical industry and regulatory practice; there is no legitimate reason to treat merchant generators any differently than other utilities procuring station power. Station power netting promotes competition and avoids undue discrimination. The New York station power rules approved and enforced by the Commission do not encroach on state jurisdiction over retail sales and local distribution services; rather, they determine when a wholesale merchant generator is receiving a FERC-jurisdictional service.

Station power netting is also entirely consistent with the Commission's policy and precedent, including its Order No. 888 rulemaking promoting competition in wholesale power markets. 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, and need not pay for, a retail service subject to state regulation. In this circumstance, a merchant generator should not be forced to transact unwillingly with the former owner of its generating facilities, but rather should be free to obtain competitively, by self-supply or third-party supply, lower-cost sources of station power.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO REVIEW PETITIONERS' UNTIMELY COLLATERAL ATTACKS ON EARLIER FINAL ORDERS MAKING FUNDAMENTAL DECISIONS ON STATION POWER SUPPLY IN NEW YORK

The *KeySpan* orders approving station power rules in New York rely heavily on findings made in the earlier *PJM* orders. The *Nine Mile*, *AES*, and *Huntley* orders acting on complaints concerning implementation and enforcement of the New York station power rules rely heavily on findings made in the earlier *PJM* orders and the *KeySpan* orders implementing the *PJM* findings. Indeed, all of the orders on review (especially the rehearing orders) recognize, repeatedly and emphatically, that the New York transmission owners and the New York PSC are making impermissible "collateral attacks" on "fundamental" findings, made in earlier final orders, concerning the netting of station power needs and the respective roles of federal and state regulators. *See, e.g.*, *KeySpan IV*, 107 FERC at PP 20-22, 37-38, 50, 53, J.A. 533-34, 536, 539-40; *Nine Mile II*, 110 FERC at PP 15, 23, 56, 59, J.A. 555, 557, 563-64; *AES II*, 110 FERC at PP 28, 61, 64, J.A. 570, 576-77; *Huntley II*, 111 FERC at PP 19, 56, J.A. 583, 589.

Specifically, the Commission found in the instant orders on review that it had earlier established "the fundamental principles of station power procurement and delivery" in *PJM II-IV*. *KeySpan IV*, 107 FERC at P 2 n.2, J.A. 530. Those fundamental principles are that: (1) the self-supply of station power, in contrast to

third-party supply, is not a retail sale (sale for end use) subject to state regulation; (2) merchant generators may net station power needs against gross output over a reasonable period of time; (3) any transmission service necessary to accommodate the self-supply or third-party supply of station power must be taken under FERC-jurisdictional open access transmission tariffs; and (4) any local distribution service necessary to accommodate the self-supply or third-party supply of station power must be taken under state retail distribution tariffs. *See, e.g., id.* at PP 21-22; *see also supra* pages 13-15 (discussing *PJM* findings). Moreover, the Commission earlier found that these fundamental principles are entirely consistent with the pro-competitive, anti-discriminatory goals of FERC Order No. 888, and that the potential for discrimination between utilities and merchant generators in New York State, despite generation divestment, still exists. *See*, *e.g.*, *id*. at P 41 (tracing these findings back to "first station power decision (*PJM II*)"), J.A. 537.

As the Commission explained, "[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative (and judicial) efficiency." *KeySpan IV*, 107 FERC at P 22, J.A. 534; *Nine Mile II*, 110 FERC at P 23, J.A. 557; *AES II*, 110 FERC at P 28, J.A. 570; *Huntley II*, 111 FERC at P 19, J.A. 583; *see also, e.g.*, *Nine Mile II*, 110 FERC at P 56 (Commission "will not allow relitigation of our station power precedent"), J.A. 563.

While the Commission reiterated and applied the fundamental station power principles earlier announced in the *PJM* orders, to respond to the arguments raised by the New York transmission owners and the New York PSC in the instant orders, it did not depart from them in any respect. In contrast, the Commission allowed the parties in the *KeySpan* proceeding to litigate the reasonableness of specific New York tariff procedures implementing the *PJM* fundamental findings. The Commission did not direct the New York ISO "to blindly duplicate PJM's station power rules." *KeySpan IV*, 107 FERC at P 28, J.A. 535. Rather, the Commission allowed the New York ISO "to fine-tune its own station power rules to reflect New York State's unique circumstances." *Id*. As the Commission explained: "Parties are within their rights to object to a difference (or similarity) between the PJM and NYISO station power rules . . . , but that is distinguishable from relitigating whether netting involves a retail sale; the latter, unlike the former, is a fundamental – and previously decided – principle of station power procurement and delivery that would not vary with each case." *Id*. at P 22 n.26, J.A. 534.

In these circumstances, collateral attacks on the Commission's implementation of fundamental station power findings made in earlier, final orders are jurisdictionally barred. Section 313 of the FPA, 16 U.S.C. § 825*l*(b), grants jurisdiction to review Commission orders only if an "aggrieved" party files for judicial review within 60 days of the rehearing order. A petition for review is not

timely when filed only in response to later orders that merely apply, without modification, the findings of the earlier "aggrieving" orders. *See, e.g., City of Nephi v. FERC*, 147 F.3d 929, 934-35 (D.C. Cir. 1998); *Georgia Industrial Group v. FERC*, 137 F.3d 1358, 1363-64 (D.C. Cir. 1998); *Transwestern Pipeline Co. v. FERC*, 988 F.2d 169, 174 (D.C. Cir. 1993).

The relevant inquiry in determining whether there is an impermissible collateral attack on earlier orders, as the Court recently explained in *Southern Co. Services, Inc. v. FERC*, 416 F.3d 39 (D.C. Cir. 2005), is "whether those orders gave 'sufficient notice' of the rule to which" the petitioner now objects. *Id*. at 44 (quoting *Dominion Resources, Inc. v. FERC*, 286 F.3d 586, 590 (D.C. Cir. 2002)). If the later challenged orders revise the earlier orders, they may be reviewed. *Southern Co*., 416 F.3d at 44. If, however, they merely clarify the earlier orders, they may not be reviewed. *Id*. An objection is barred as an untimely collateral attack if "a reasonable firm in [petitioner's] position 'would have perceived a very substantial risk that the [earlier order] meant' what the Commission now says it meant." *Dominion Resources*, 286 F.3d at 589 (quoting *ANR Pipeline Co. v. FERC*, 988 F.2d 1229, 1234 (D.C. Cir. 1993)).

Here, the *PJM* orders plainly put the New York transmission owners and New York PSC on notice as to station power rules that would apply in New York. As the Commission repeatedly recognized in the orders on review, the aggrieving

orders, making fundamental decisions on the procurement and netting of station power in New York, were the *PJM* orders, not later orders. The *PJM* orders are not, as petitioners submit (TO Br. 15, 65-69; NYPSC Br. 32-34), mere precedent without applicability to New York. To the contrary, the *PJM* orders established fundamental rules for station power procurement and netting for both the PJM region and New York. New York transmission owners and the New York PSC were active parties in the *PJM* proceeding. They participated in order to confirm applicable station power policy for New York, not simply to comment on station power tariff procedures in a neighboring region. *See*, *e.g.*, *PJM III*, 95 FERC at 62,189-90 (examining, at the request of the New York PSC, whether "self-supply [is] appropriate in regions other than PJM").

Indeed, in the *PJM* proceeding, the Commission acted in response to two New York-related filings. In one, a New York transmission owner (New York State Electric & Gas Corp.) requested that the Commission disclaim jurisdiction over so-called "standby service" provided under a retail tariff on file with the New York PSC, under which the transmission owner sought to charge New York merchant generators for station power. In the other, a New York merchant generator claimed that a New York transmission owner (Niagara Mohawk) was improperly charging for station power when the merchant generator preferred to self-supply its station power needs. *See PJM II*, 94 FERC at 61,884-88 (discussing

support and opposition to New York petitions); *see also*, *e.g.*, *KeySpan IV*, 107 FERC at PP 21-22 (explaining active involvement of New York transmission owners and New York PSC in *PJM* proceedings to determine station power policy in New York), J.A. 533-34.

In both cases, the Commission rejected the argument of New York transmission owners and the New York PSC that the self-supply of station power in New York contemplates a retail sale subject to New York State regulation. *See PJM II*, 94 FERC at 61,892-93 ("[T]urn[ing] now to the two petitions for declaratory orders . . . we emphasize that all generators that are self-supplying station power may net their station power requirements against gross output. . . ."). The Commission's station power findings are just as applicable to New York as PJM. The Commission received "extensive evidence that the prevailing (if not exclusive) historical practice" of utilities in PJM and New York is to net station power needs. *Id*. at 61,890 n.56. Moreover, the fact that New York utilities may be, after generation divestment, less vertically-integrated than PJM utilities, while "not irrelevant to our analysis," is not controlling:

> The New York Commission fails to persuade us that it would make any sense at all to adopt one practice for the provision of station power in New York and another practice in neighboring states. While we took notice of the concerns of merchant generators regarding what they view as a competitive advantage enjoyed by vertically-integrated utilities, our findings in *PJM II* are not based solely, or even principally, on whether incumbent utilities remain vertically-integrated or have divested their generation assets. Rather, to

> determine the scope of our jurisdiction over the provision of station power, we examined the 'varying circumstances under which station power is used, how it is provided, and what facilities are used in its provision. . . .'
>
> [T]he New York Commission's proposal would result in differing practices between two contiguous control areas, New York and PJM, that are tightly interconnected and trade frequently. It is more appropriate to reduce the number of differing practices between New York and PJM, rather than to increase them.

PJM III, 95 FERC at 62,190 (quoting *PJM II*, 94 FERC at 61,889).

In these circumstances, petitioners are mistaken in claiming (*e.g.*, TO Br. 15) that the *PJM* orders failed to establish station power policy for New York, and were limited solely to the PJM region. To the extent that New York transmission owners and the New York PSC are aggrieved by the fundamental findings on station power supply made in the *PJM* orders and applied in those orders to New York, in response to the arguments of the New York transmission owners and PSC, they should have filed for judicial review of those orders. But they did not. As a result, their collateral attack on the fundamental findings of those orders, later applied in the instant orders, is untimely and jurisdictionally barred.

Any doubt as to the meaning of the Commission's actions is dispelled by another order that they failed to challenge. In *KeySpan I*, the Commission granted a complaint, over the objections of New York transmission owners and the New York PSC, that self-supplying New York merchant generators must be afforded the opportunity "to net station power against gross output over some reasonable time

period" to avoid paying a charge for a service they are not receiving. 99 FERC at 61,679-80 (citing various *PJM* orders), J.A. 100-01. In making this determination, the Commission was explicit "that the fundamental questions about the appropriate treatment of station power were answered in *PJM II* and *PJM III*." *Id*. at 61,679, J.A. 100. As decided in those earlier orders, the self-supply of station power by New York merchant generators is subject to New York State regulation to the extent it involves local distribution, and subject to FERC regulation to the extent it involves unbundled transmission. *Id*. at 61,679-80, J.A. 100-01. [7]

The only issue left for later adjudication in the *KeySpan* proceeding was the reasonableness of specific tariff revisions that the New York ISO was directed to make. In later making the FERC-directed "compliance filing," the New York ISO's discretion was limited to determining the extent to which the station power tariff filing accepted in the *PJM* proceeding is appropriate in New York. For example, the New York ISO was allowed to consider whether the one-month netting period approved for use in PJM, or perhaps a longer or shorter netting period, is appropriate in New York. *Id*. at 61,680, J.A. 101. The New York ISO was not allowed, however, to depart from the fundamental principles of station

[7] Whether the delivery of station power involves transmission or local distribution is a matter of fact to be decided in each individual case. In *KeySpan II*, on the request for rehearing of the complaining merchant generator, the Commission set for hearing "whether the facilities used to deliver station power are transmission facilities and, if so, what Commission-jurisdictional rates are appropriate for delivery of station power over those facilities." 100 FERC at P 1.

power supply (including netting over a reasonable period of time) established in the *PJM* orders. *See KeySpan IV*, 107 FERC at PP 23-28 (New York ISO made its compliance filing "under compulsion of a Commission order" in *KeySpan I*; to the extent transmission owners are relitigating fundamental station power principles, they "are actually seeking untimely rehearing of" *KeySpan I*), J.A. 534-35.

The New York transmission owners and New York PSC, despite clear notice of the Commission's intentions, did not seek rehearing of *KeySpan I*, which explicitly applied the fundamental *PJM* station power findings to the Commission's assessment of New York station power tariff requirements. *See ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 286 (1987) (stating that if there is any ambiguity as to the order's effect, "the remedy for . . . ambiguity is to petition . . . for reconsideration"). Thus, it is far too late for them to relitigate these fundamental issues in *KeySpan III* and later orders, and to present them now for judicial review. The only issues that are appropriately before the Court, and that were not treated as collateral attacks below, are those that deal with the implementation and enforcement of specific New York tariff requirements for station power supply. [8]

[8] Thus, while the *PJM* and *KeySpan I* orders conclusively determined that self-supplying merchant generators may net station power over a reasonable period of time, *e.g.*, *KeySpan I*, 99 FERC at 61,680, J.A. 101, later orders conclusively determined that one month is, in fact, a reasonable netting period in New York, as it is in PJM.

II. ASSUMING JURISDICTION, THE COMMISSION REASONABLY EXERCISED ITS AUTHORITY AND PRECEDENT IN APPROVING AND ENFORCING SPECIFIC STATION POWER RULES IN NEW YORK

A. Standard of Review

Judicial review of Commission decisions falls under the familiar arbitrary and capricious standard of 5 U.S.C. § 706(2)(A). *See*, *e.g.*, *Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The relevant inquiry for the reviewing court is whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Commission's factual findings, if supported by substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 825*l*(b); *see also, e.g., Sithe*, 165 F.3d at 948 ("highly deferential" review of agency ratemaking decisions).

As explained below, the Commission's approval and enforcement of station power rules for New York, based on its fundamental findings in its earlier *PJM* orders, respects the roles of federal and state regulators under the FPA, is responsive to the arguments of the various parties, and is supported by substantial evidence in the record.

B. The Commission's Approval and Enforcement of Station Power Rules for New York Respects the Statutory Roles of the FERC and the States

Petitioners' principal argument is that the Commission, in approving and enforcing rules for the supply and netting of station power in New York, has impermissibly encroached on state jurisdiction over retail sales and local delivery services. *See* TO Br. 4, 26-28 (Commission using an "accounting fiction" to "cancel out" such services); NYPSC Br. 18-19 (Commission "redefining" state-regulated services).

This is the same argument that petitioners made, unsuccessfully, in the now-final *PJM* proceeding, concerning station power supply in New York. As explained above, this argument is an untimely collateral attack on now-final orders. *See, e.g.*, *Nine Mile II*, 110 FERC at P 23 ("the position that self-supply of station power is a sale for end use has previously been litigated and rejected"), J.A. 557.

If, however, the Court decides to review the merits of this argument, it must find that the Commission has respected the complementary roles of the FERC and the states under the FPA. In approving the New York station power rules in the *KeySpan* proceeding, and enforcing those rules in the *Nine Mile*, *AES*, and *Huntley* proceedings, the Commission explained why, in response to petitioners' arguments, it is carrying out its own authority under the statute, not encroaching on the state's authority. *See, e.g.*, *Nine Mile II*, 110 FERC at P 26 (the Commission is

not "intrud[ing] into state jurisdiction over retail rates or local distribution services," but only "determin[ing] based on applicable law and fact what type of services (wholesale or retail) are actually being provided"), J.A. 557.

1. The Self-Supply of Station Power to Wholesale Generators Does Not Implicate a Sale Subject to State or FERC Jurisdiction

In the very first case (*PJM II*) to consider the jurisdictional implications of station power supply by wholesale merchant generators, the Commission made the fundamental decision that the drawing of jurisdictional boundaries depends on the circumstances of station power supply: "[W]e must examine the varying circumstances under which station power is used, how it is provided, and what facilities are involved in its provision." *PJM II*, 94 FERC at 61,889.

Looking to the terms of the FPA, the Commission determined that its initial inquiry involves determining whether a particular station power supply implicates a "sale." *Id*. This is because section 201(b) of the FPA grants the Commission exclusive jurisdiction over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1); *see also supra* pages 7-8 (examining statutory provisions). The states are afforded jurisdiction over "any other sale of electric energy." *Id*. FPA section 201(d), in turn, defines the phrase "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale." *Id*. § 824(d).

In determining the meaning of "sale," the Commission differentiated

between merchant generators that self-supply their own station power needs, and those that procure their station power needs from third parties. A self-supplying generator is not engaging in a sale, the Commission reasoned, because it "is not using another's generating facilities." *PJM II*, 94 FERC at 61,890. The self-supplying generator is using only its own generating resources; "it is not causing another to incur costs associated with the usage of the other's generating resources that would warrant a form of consideration." *Id*.

In contrast, a merchant generator that procures station power from a third party is, in fact, entering into a sale that implicates state jurisdiction. In this circumstance, the generator is not self-supplying its own station power needs, but rather "is using another party's generating facilities." *Id*. at 61,891. Third-party supply, unlike self-supply, is a retail sale that is subject to state regulation. *Id*. [9]

In later orders, approving and enforcing station power rules in New York (and other regions in other orders), the Commission consistently has affirmed and applied these fundamental *PJM* findings. A self-supplying generator, unlike a generator procuring station power from a third party, "does not engage in a sale at retail or any other kind of sale. . . ." *KeySpan III*, 101 FERC at P 21, J.A. 149; *see*

[9] In finding that the third-party supply of station power implicates a retail sale subject to state regulation, the Commission rejected the contrary argument of generators that it should assume jurisdiction over such a sale under its authority in FPA section 205, 16 U.S.C. § 824d, to regulate all utility rates and practices that "affect or relate to" wholesale services provided by wholesale merchant generators. *See PJM II*, 94 FERC at 61,894-96; *PJM III*, 95 FERC at 62,186-87.

also, e.g., *KeySpan IV*, 107 FERC at PP 33-35, J.A. 536; *Nine Mile II*, 110 FERC at P 23, J.A. 557; *AES II*, 110 FERC at P 19, J.A. 568. The Commission approved the New York ISO's station power rules, found in section 4.24 of its Services Tariff, because its tariff, limiting station power supply only to self-supplying merchant generators that do not purchase station power at retail, is consistent with the Commission's *PJM* findings. *KeySpan IV*, 107 FERC at P 31, J.A. 535.

New York transmission owners and the New York PSC argued to the Commission, as they do again on appeal, that there must be a sale when a generator obtains station power when it is, momentarily or for an extended period of time, out-of-service. The Commission rejected this argument. "The self-supply of station power is distinguishable from a retail purchase of station power, and not all end use necessarily involves a sale for end use." *Nine Mile II*, 110 FERC at P 23, J.A. 557. An out-of-service generator may be "consuming" station power, "but it is a separate question whether that consumed energy has been *sold at retail*." *KeySpan IV*, 107 FERC at P 35, J.A. 536. A "sale" involves "two legally distinct entities, with a transfer of title or possession." *Id*. [10] The self-supply by a generator of its own station power needs, in contrast, "involves only one entity and

[10] In support, the Commission looked to the statutory definition of the phrase "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale." *KeySpan IV*, 107 FERC at P 35 n.40 (quoting 16 U.S.C. § 824(d) (emphasis added), J.A. 536. The Commission construed that language as requiring "two separate and legally distinct parties" for either a retail or a wholesale sale. *Id*.

no transfer of title or possession." *Id*. As a result, station power self-supply, unlike third party-supply, does not implicate a retail sale. *Id*. In the absence of a retail sale, a self-supplying generator should not have to pay for a service it does not want and is not receiving. *E.g.*, *Nine Mile II*, 110 FERC at P 16, J.A. 555; *AES II*, 110 FERC at P 19, J.A. 568.

In these circumstances, the Commission's interpretation of its own statutory jurisdiction is reasonable, fully explained, and entitled to judicial deference. *See, e.g.*, *Detroit Edison Co. v. FERC*, 334 F.3d 48, 53 (D.C. Cir. 2003) (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)).

2. The Self-Supply of Station Power to Generators May, Depending on the Facts, Implicate Local Distribution Subject to State Regulation or Transmission Subject to FERC Jurisdiction

While there is no sale implicating state or federal jurisdiction when a generator self-supplies its own station power needs, the physical delivery of station power is another matter. To the extent a generator meets its station power needs through self-supply or third-party supply, but does not own or have rights to use the grid that connects its facility to the source of the station power, it must make appropriate arrangements for transmission and/or local distribution services. *PJM III*, 95 FERC at 62,186; *see also PJM II*, 94 FERC at 61,891 n.60; *PJM IV*, 99 FERC at 61,679.

If the generator takes unbundled transmission service, that service must be

provided under the transmission provider's FERC-jurisdictional open access transmission tariff. *E.g.*, *PJM II*, 94 FERC at 61,891 n.60. If the generator takes unbundled local distribution service, that service must be provided under a retail distribution tariff subject to state regulation. *Id*.

Thus, the Commission has not encroached on state jurisdiction over local distribution, just as it has not encroached on state jurisdiction over retail sales. *E.g*., *Nine Mile II*, 110 FERC at P 26, J.A. 557. The determination whether a generator is taking, and must pay for, local distribution under a state tariff, just like whether a generator is taking and must pay for transmission service under a FERC tariff, is case-specific. *E.g.*, *PJM III*, 95 FERC at 62,186. As the Commission explained in *KeySpan III*, "[a]ny delivery of station power over local distribution facilities, and the compensation for such delivery, is a matter properly for the New York Commission and not for this Commission." 101 FERC at P 20, J.A. 148.

C. The Commission's Approval of New York Station Power Rules That Allow Netting Over One Month Is Consistent With Historical Industry Practice and Regulatory Policy

Petitioners attack the policy of allowing the netting of station power needs over a one-month period. They argue that any time a generator is out-of-service and takes its station power needs from the grid, it is receiving a retail service. *See*, *e.g*., TO Br. 5, 28-29 (example of generator outage for 29 days of the month); NYPSC Br. 19 (example of generator outage for one day of the month). They

argue that the Commission cannot allow merchant generators to employ a netting fiction to overcome the physical fact of retail service during the outage period.

To the extent that petitioners are challenging netting at all, this challenge is, as described above, an impermissible collateral attack on the Commission's decision in the *PJM* proceeding to allow station power netting in New York over a reasonable period of time. *E.g.*, *Nine Mile II*, 110 FERC at P 59, J.A. 564 (transmission owners' argument that "use of a monthly netting period (or any netting period) involves retail sales subject to exclusive state jurisdiction" is "a collateral attack on our earlier *PJM* orders"). The Commission, in *PJM*, did not mandate netting over a precise period in New York and other regions. Nevertheless, when presented with the New York ISO's proposal to net station power needs over one month, the Commission reasonably concluded that such a netting period is a reasonable period.

1. Station Power Netting Reflects Historical Utility Practice, Promotes Competition, and Avoids Undue Discrimination

In the very first case to consider the station power needs of merchant generators (*PJM II*), the Commission made the fundamental decision that netting over a reasonable time period is appropriate. There, the Commission was presented with evidence that New York utilities like Niagara Mohawk, like utilities in other states, historically and currently net the station power requirements of their own generating facilities against their gross output. *PJM II*, 94 FERC at 61,886,

61,890 n.56. Similarly, New York utilities historically and currently refrain from charging other utilities, located in their retail service territory, for needed station power service. *Id*.

The Commission concluded in *PJM II* that it was reasonable to allow merchant generators entering the New York market to enjoy the same "traditional practice of netting." *Id*. at 61,891. To conclude otherwise would be unfair; "a self-supplying generator cannot be required to purchase station power under a retail tariff simply because it is a merchant generator." *Id*. at 61,893. The same netting rules should apply, regardless of whether the netting utility is a vertically-integrated utility, an affiliate of a vertically-integrated utility, or a merchant generator. "If a generating facility netted its station power requirements against its gross output when it was owned by a vertically-integrated utility, the former owner cannot require the new owner to discontinue the practice of netting, and require the new owner to buy station power under a retail tariff, simply because the generating facility in question has changed owners." *Id*. Station power netting thus ensures comparable treatment and avoids undue discrimination, as required under the sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d-e. *Id*.; *see also PJM III*, 95 FERC at 62,189 (rejecting New York PSC argument that self-supplying merchant generators are less entitled to net their station power needs than other New York utilities).

The Commission's decision to allow netting also was grounded in practical considerations. The Commission has "never required that net output be measured on a real time or second-by-second basis." *Id*. at 61,892. Rather, it always has allowed net output to be "measured over a reasonable time period, so as to take into account fluctuations in electric production." *Id*. As long as net output is positive as measured over a reasonable time period, periodic instances of negative net output within that period do not produce retail transactions. *Id*.

In later orders, approving and enforcing specific station power rules in New York (and other regions), the Commission consistently has affirmed and applied the fundamental *PJM* finding that station power netting over a reasonable period of time is appropriate. In the first *KeySpan* order, which petitioners failed to challenge, the Commission, applying its *PJM* finding, directed the New York ISO to file tariff procedures that allow "self-supplying merchant generators to net station power against gross output over some reasonable time period. . . ." *KeySpan I*, 99 FERC at 61,680, J.A. 101. In later accepting the New York ISO tariff provision that permits netting, the Commission explained that, consistent with its *PJM* orders, the provision "eliminat[es] disparities between merchant generators" and other New York utilities. *KeySpan III*, 101 FERC at P 23, J.A. 149; *see also, e.g.*, *KeySpan IV*, 107 FERC at PP 27 (netting of station power over a reasonable period of time is a "fundamental principle of station power treatment

originally decided in the *PJM* orders") and 38 ("netting is simply the traditional accounting for station power as negative generation"), J.A. 535-36.

The fact that New York transmission owners have largely divested themselves of their generating assets, and are thus less integrated than before market restructuring in New York, is not dispositive. The Commission found that there remains some competition between merchant generators and the former owners of the divested generators, regardless of whether the latter "retain some of their generating capacity or purchase capacity and energy to resell." *Id*. at P 66, J.A. 542. In any event, merchant generators, when they entered the New York market, "had a reasonable expectation" that they, like all utilities up to that time, would not be charged for station power if they could supply it themselves. That expectation was, unfortunately, not met:

> The discrimination that we are aiming to forestall is between the former owners of the divested generating facilities and the current owners, who seek alternatives to the supply of station power solely from incumbent utilities so that they can more effectively compete for customer load with the incumbent utilities, to the ultimate benefit of ratepayers. This is consistent with our overarching goal of developing station power procurement and delivery rules that foster competition in electricity markets.

Id.

Thus, even if, as petitioners submit, there is little direct competition between the merchant generator and the divested utility, mandatory station power charges by the latter undermine the former's ability to pursue competitive, lower-priced

options, either through self-supply or third-party supply – in contravention of Order No. 888, *see supra* page 9, and the Commission's other pro-competitive initiatives. *See, e.g.*, *Nine Mile II*, 110 FERC at PP 56-57 (Commission is acting to "permit[] merchant generators to compete fairly with utilities for customer load, fostering competition in electricity markets"), J.A. 563; *AES II*, 110 FERC at PP 61-62 (same), J.A. 576-77.

2. One-Month Netting is a Reasonable Period of Netting

In *PJM IV*, the Commission accepted as reasonable PJM's proposal to allow station power netting over a one-month period. [11] The Commission did not, however, direct the New York ISO to make an identical filing. Rather, in *KeySpan I*, the Commission directed the New York to provide for station power netting "over some reasonable time period." 99 FERC at 61,680, J.A. 101. While "one time period may be reasonable to measure netting for PJM, another time period may or may not be appropriate for" New York. *Id*. [12]

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[11] PJM initially proposed netting over one hour. *See PJM II*, 94 FERC at 61,891-92. The Commission initially accepted a one-hour netting period as reasonable. *Id*. at 61,892. Nevertheless, the Commission indicated that "longer intervals . . . also would be reasonable time periods over which station power may be netted" and that it "would look favorably upon the use of a longer time period over which to measure netting." *Id*.

[12] Thus, the only netting issue presented to the Commission in the orders on review is whether the proposed one-month netting period is a reasonable netting period. The petitioners cannot make an impermissible collateral attack on the fundamental principle, announced in the *PJM* orders and *KeySpan I*, that New York merchant generators can net their station power needs over a reasonable time

Despite its grant of discretion, the New York ISO responded with the same one-month netting period adopted in *PJM*. The Commission accepted a one-month netting period as reasonable for New York, just as it previously had accepted a one-month netting period as reasonable for PJM. In support, the Commission agreed with the New York ISO that a one-month netting period "would prevent a seam between the two contiguous ISOs, merchant and utility-owned generators would be afforded similar treatment, and New York generators would not be artificially handicapped when competing with generators located in PJM." *KeySpan IV*, 107 FERC at P 53, J.A. 540; *see also KeySpan III*, 101 FERC at P 24 (monthly netting "promotes uniformity" of practice), J.A. 149.

Petitioners argue that, despite the identity between the PJM and New York netting periods, only a much shorter netting period, if any, would be reasonable for New York. *See* NYPSC Br. 34 ("the NYPSC does not disagree with netting *per se*"); TO Br. 25 ("netting for certain periods (*e.g.*, quarter-hourly or hourly) may be necessary to accommodate the technical and accounting impracticality of continuous instantaneous monitoring of energy flows"). In particular, they argue that a one-month netting period is unreasonable because it is longer than the hourly settlement of energy transactions by the New York ISO.

At best, all petitioners have accomplished is to demonstrate the potential

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period. *See, e.g.*, *KeySpan IV*, 107 FERC at P 21, J.A. 533. They can, however, litigate whether a one-month netting period is a reasonable netting period.

reasonableness of a shorter netting interval – something the Commission already had acknowledged in the earlier *PJM* and *KeySpan I* orders. *See, e.g.*, *Arkansas Electric Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002) (relevant inquiry on review is whether Commission's approach is reasonable, not whether another preferred approach is more reasonable). In any event, the Commission explained that monthly netting has no impact on hourly energy prices. *KeySpan IV*, 107 FERC at P 53, J.A. 540. Moreover, monthly netting, unlike hourly netting, corresponds to the New York ISO's billing and accounting practices. *KeySpan III*, 101 FERC at P 24, J.A. 149. "There is nothing inherently unreasonable about monthly netting." *Id*. (citing *PJM IV*, 95 FERC at 62,684-85).

At bottom, petitioners are insisting that no netting period can be reasonable beyond the smallest possible increment of time. If netting is permitted over a month, a generator may need to rely on the grid if it is out of service for a week. If netting is permitted over a week, a generator may need to rely on the grid if it is out of service for a day. If days, then hours; if hours, then quarter-hours; if quarter-hours, then minutes; and so on. Under petitioners' argument, there always will be a physical retail transaction, requiring state involvement and retail charges, whenever a generator is out-of-service for any duration of time.

But this argument does not reflect the historical and practical treatment of station power needs. Generating utilities, and regulatory policy, have long

tolerated "momentary instances of negative net output" and "fluctuations in electric production." *PJM II*, 94 FERC at 61,892. "The Commission has never required that net output be measured on a real time or second-by-second basis," but has taken a more "practical point of view." *Id.* "Simply because there may be momentary instances during the netting interval when a particular generating facility's output is negative does not mean that the facility's owner is buying station power at retail." *KeySpan IV*, 107 FERC at P 40, J.A. 537.

In these circumstances, petitioners have not demonstrated the unreasonableness of a particular netting period (here, one month) offered by the New York ISO and accepted by the Commission. The Commission is not, as petitioners argue (*see* TO Br. 27-29), creating a conflict by "dictating" to the states how to measure state-jurisdictional service. Rather, the Commission is resolving a conflict "in the most narrowly tailored and careful manner" by accepting a proposal that reasonably comports with the "decades-old practice of negative generation." *AES II*, 110 FERC at P 31, J.A. 571. Under petitioners' argument, if successful, the states would be dictating to the Commission how to determine the net output of a wholesale merchant generator and its transmission load, a determination that is "solely within the jurisdiction of the Commission." *Huntley II*, 111 FERC at P 22, J.A. 584.

D. The Commission's Approval of New York Station Power Rules That Allow Netting Over One Month Is Consistent With Its Precedent

Petitioners argue that the monthly netting of station power by self-supplying merchant generators is inconsistent with the Commission's Order No. 888 rulemaking, *see supra* page 9, promoting competition in wholesale energy markets. *See, e.g.*, NYPSC Br. 26-28 (FERC has "abandoned" and "reversed" limitations on federal authority over local distribution and stranded cost recovery); TO Br. 33-41 (FERC "deviated" from Order No. 888 provisions without explanation).

Order No. 888 does not deal with station power supply and netting. It issued at a time prior to significant generation divestment and the emergence of merchant generators. The Commission's leading precedent on the subject of the treatment of station power is, of course, the *PJM* orders discussed above. As the *KeySpan, Nine Mile, AES,* and *Huntley* orders all rely heavily on the *PJM* orders, the Commission would have been deviating from precedent if its decision had come out the other way. Petitioners are the ones who, by collaterally attacking the earlier *PJM* orders, seek to depart from station power precedent; the Commission, instead, sought to follow and apply that precedent.

In any event, the Commission's station power orders fully explain the consistency of its approach with Order No. 888. *See PJM III*, 95 FERC at 62,184-85; *KeySpan IV*, 107 FERC at PP 44-52, J.A. 538-40; *Nine Mile I*, 105 FERC at PP

31-37, J.A. 468-69; *Nine Mile II*, 110 FERC at PP 34-47, J.A. 559-62; *AES I*, 105 FERC at PP 38-47, J.A. 477-79; *AES II*, 110 FERC at PP 39-52, J.A. 572-75; *Huntley I*, 109 FERC at P 43, J.A. 550; *Huntley II*, 111 FERC at PP 29-42, J.A. 585-87. The Commission is not, as petitioners argue, undermining Order No. 888's respect for state-regulated retail sales and local distribution services. Rather, the Commission's station power policy seeks to determine when a merchant generator is, in fact, receiving a retail sale or local distribution service which it must pay for under retail tariffs.

As explained above, this determination depends on the specific circumstances of the transaction. A generator is entering into, and must pay for, a retail sales transaction if, as measured over the netting period, it purchases station power from another party. *E.g.*, *PJM II*, 94 FERC at 61,890-91. A generator may be receiving, and therefore must pay for, local distribution service if it requires such service to connect to the source of its station power. *E.g.*, *PJM III*, 95 FERC at 62,186. If, however, it neither makes a retail purchase nor takes local distribution, there is no "service" contemplated under Order No. 888 that is reserved to state authority. If there is no retail service, then the charges specified in the New York ISO Services Tariff and Open Access Transmission Tariff apply, to the exclusion of any retail tariff. *E.g.*, *KeySpan IV*, 107 FERC at P 47, J.A. 539; *see also, e.g.*, *Nine Mile I*, 105 FERC at P 28 (New York ISO's netting provision

"does not provide for either transmission or distribution charges, however, but merely determines whether or not a generator has self-supplied station power and the quantity of delivery service," if any), J.A. 468. [13]

As the Commission first explained in *PJM III*, its station power policy "does not in any way modify or reverse Order No. 888's jurisdictional findings, including [its] discussion of state jurisdiction over local distribution services." 95 FERC at 62,185. The stranded cost language from Order No. 888 on which the New York transmission owners and the New York PSC rely simply does not apply where a divesting utility sells its generating units to a merchant generator. *See, e.g.*, *Nine Mile I*, 105 FERC at PP 31-37 ("Interpretation of Order No. 888"), J.A. 468-69. Rather, it applies where a retail customer, taking advantage of open access, exits the utility's system or becomes a wholesale customer (a "retail-turned-wholesale" customer) of a competing supplier, and sunk costs associated with serving that customer in the past may otherwise not be recovered. *See id*. at P 35, J.A. 469. A merchant generator is not such a customer; it cannot be assigned stranded costs (or

[13] As the Commission is not asserting jurisdiction over any retail service, petitioners' reliance on *Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003), where the Commission improperly placed retail distribution service under a FERC tariff, is unfounded. *See*, *e.g.*, *Nine Mile II*, 110 FERC at P 32 (distinguishing *Detroit Edison*; "Nine Mile is not taking any state-jurisdictional, local distribution service from" either Niagara Mohawk or the New York ISO), J.A. 559.

any retail costs) if it is not taking a retail service subject to state regulation. [14] *E.g.*, *KeySpan IV*, 107 FERC at P 49, J.A. 539.

The purpose of Order No. 888 was to expand competitive supply options, not limit them. *See New York v. FERC*, 535 U.S. at 26. The Commission found that petitioners could not employ Order No. 888 to force a merchant generator to pay for services it does not want and that the divested utility is not providing. The New York station power procedures allow merchant generators to pursue alternative, lower cost options of procuring necessary station power; New York transmission owners and the New York PSC would thwart that ability by compelling the merchant generator to purchase station power solely from one source. As the Commission explained: "We have not undermined any critical assurances made in Order No. 888. We have only stated that Order No. 888 cannot be relied upon to justify the utilities' efforts to burden competing suppliers with additional, and unjustified, costs that would make them less competitive as compared to the utilities." *Nine Mile II*, 110 FERC at P 43, J.A. 561; *see also*, *e.g.*,

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[14] Indeed, the divesting utility could be receiving a "windfall" if it recovers stranded costs from a merchant generator that paid a premium over book value for the divested generation. *E.g.*, *Nine Mile I*, 105 FERC at P 35, J.A. 469. The New York ISO's station power procedures promote, rather than discourage, stranded cost recovery, as they explicitly exclude large industrial and commercial customers (who are the retail-turned-wholesale customers that Order No. 888 contemplates, and who are able to take retail service at high voltages without using local distribution facilities) from station power netting. *E.g.*, *Nine Mile II*, 110 FERC at P 45, J.A. 561.

AES I, 105 FERC at P 38 (efforts to prohibit generators from self-supplying their own station power needs are "inimical to competition" and contrary to the "pro-competitive goals of Order No. 888"), J.A. 477.

In these circumstances, the Commission was well justified in concluding that its Order No. 888 is not a bar to, and indeed is entirely consistent with, its approval and enforcement of New York station power rules. *See, e.g.*, *Sacramento Municipal Utility District v. FERC*, D.C. Cir. No. 04-1171 (Nov. 1, 2005), slip op. at 9 (Commission did not alter any aspect of Order No. 888; therefore, its orders did not effectively promulgate a new rule without notice and comment or apply a new rule retroactively); *Entergy Services, Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003) (Commission is entitled to deference in construing its own precedent).

E. The Commission's Approval of New York Station Power Rules Violated Neither the Filed Rate Doctrine Nor the Rule Against Retroactive Ratemaking

Petitioners' remaining argument – that the Commission has violated both the filed rate doctrine and the rule against retroactive ratemaking (*see* TO Br. 45-54) – is really nothing more than a variation on their other arguments. Petitioners presume that merchant generators are taking retail service but bypassing state jurisdictional charges, in violation of the "filed rate" embedded in the New York ISO transmission tariff.

As explained above, if, in individual circumstances, merchant generators are,

in fact, taking retail service, they are unable to bypass any state-imposed retail charges. When, however, merchant generators are able to self-supply their own station power needs, and do not need access to local distribution facilities, there is no retail service and, thus, no obligation to pay state-jurisdictional delivery charges. As the Commission explained in *AES II*, the fact that "retail delivery rates are incorporated by reference" in the New York ISO transmission tariff "is not relevant" if the merchant generator is not receiving any retail service. 110 FERC at P 68, J.A. 577; *see also, e.g.*, *id*. at P 19 ("At the heart of this case is the fact that Niagara Mohawk is seeking to charge AES for services that AES does not want and that Niagara Mohawk is not providing."), J.A. 568. Petitioners' argument that the transmission owners really are making a retail sale and providing local delivery service, *see* TO Br. 47, is simply an argument against monthly netting of station power.

In any event, the Commission's approval of the New York ISO's filing can hardly be viewed as a violation of the filed rate, as the Commission compelled the ISO to make the filing to carry out its responsibilities under the *PJM* orders. *See KeySpan I*, 99 FERC at 61,679-80 ("requir[ing] the [New York ISO] to file a proposed revised tariff to include transmission of station power"), J.A. 101. The fact that the Commission afforded the ISO some discretion – e.g., whether the netting period should be one-month as in PJM or some other period – and did not

dictate specific language does not mean that its filing was any less compulsory. What is important is the fact that the Commission, in *KeySpan I* (an order petitioners never challenged), found that station power practices in New York were unjust and unreasonable, and directed the New York ISO to provide a remedy in compliance with the fundamental station power findings made in the *PJM* proceeding. *KeySpan III*, 101 FERC at P 29, J.A. 150. The ISO's compliance filing was "comprehensive and reasonable;" there was no inconsistency with any of its tariff commitments. *Id*.

Nor has the New York ISO, with the Commission's permission, engaged in retroactive ratemaking. All the Commission has done is to exercise its enforcement authority to assure that New York transmission owners do not charge for service that New York merchant generators do not want and did not receive.

The Commission was not powerless to act on unwelcome charges for non-existent retail service invoiced prior to the April 2003 effective date of the New York ISO station power rules. Prior to that date, there was no "controlling rate schedule (either federal or state)" governing the procurement and netting of station power. *AES II*, 110 FERC at P 70, J.A. 578. Accordingly, the Commission was not "retroactively changing a filed rate schedule's term or condition or authorizing the charging of a rate other than a filed rate." *Id*.

Rather, the Commission was simply resolving a dispute among the parties as

to whether to use a one-month netting period (successfully argued by the merchant generators) or a shorter netting period (unsuccessfully argued by the New York transmission owners and New York PSC). *Id*.; *see also Huntley I*, 109 FERC at P 45 (permissible to apply fundamental station power principles to all times when generators had a positive net output and took no retail service from the transmission owners), J.A. 551; *Huntley II*, 111 FERC at P 48 (one-month netting period applied in PJM prior to April 2003 and reflected long-standing practice of New York utilities), J.A. 588. In these circumstances, the Commission's resolution of the parties' dispute was entirely within the scope of its authority. *See Entergy Services, Inc. v. FERC*, 400 F.3d 5, 7-8 (D.C. Cir. 2005) (Commission justified in ordering refunds when a utility improperly charged retail rates, ostensibly under a state-approved tariff, for a wholesale service subject to FERC jurisdiction).

CONCLUSION

For all the foregoing reasons, the petitions for review should be dismissed to the extent they make untimely collateral attacks on fundamental station power decisions made in earlier, final orders. The petitions should otherwise be denied on the merits.

Respectfully submitted,

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November 21, 2005 (Initial)
February 7, 2006 (Final)

Niagara Mohawk Power Corp., et al. v. FERC
D.C. Cir. Nos. 04-1227*, et al.*

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that the Brief of Respondent Federal Energy Regulatory Commission contains 12,982 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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February 7, 2006