

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

Nos. 05-1372 and 06-1360

**CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PETITIONER,**

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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**JANUARY 22, 2008
FINAL BRIEF: MARCH 12, 2008**

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici:

All parties appearing before the Court are listed in Petitioner's Rule 28(a)(1) certificate. There are no *amici*. The following parties appeared before the Commission:

1. *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*, FERC Docket No. EL05-47:

Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, KeySpan-Ravenswood, LLC, New York Independent System Operator, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Nine Mile Point Nuclear Station, LLC, Orange and Rockland Utilities, Inc., R.E. Ginna Nuclear Power Plant, LLC, Reliant Energy, Inc., and Rochester Gas and Electric Corporation

2. *New York Power Authority v. Consolidated Edison Co. of New York, Inc.*, FERC Docket No. EL05-123:

Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York Power Authority, New York State Electric & Gas Corporation, New York State Public Service Commission, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*, 110 FERC ¶ 61,312 (2005) (“Entergy Complaint Order”), JA 304, *order on reh’g*, 112 FERC ¶ 61,117 (2005) (“Entergy Rehearing Order”), JA 344.
2. *New York Power Authority v. Consolidated Edison Co. of New York, Inc.*, 112 FERC ¶ 61,304 (2005) (“NYPA Complaint Order”), JA 627, *order on reh’g*, 116 FERC ¶ 61,240 (2006) (“NYPA Rehearing Order”), JA 703.

C. Related Cases:

As explained on pages 22-28, this Court’s recent decision in *Niagara Mohawk Power Corp v. FERC*, 452 F.3d 822 (D.C. Cir. 2006) is directly related to certain issues raised in this case.

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March 12, 2008

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GLOSSARY

Br.	Petitioner Con Edison’s Brief
Clean Power Agreement	The Interconnection Agreement between Con Edison and the Power Authority of the State of New York (NYPA), dated Aug, 1, 2001, JA 439
Commission, FERC	Federal Energy Regulatory Commission
Con Edison	Petitioner Consolidated Edison Company of New York, Inc.
Entergy	Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC
Entergy Complaint Order	<i>Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.</i> , 110 FERC ¶ 61,312 (2005), JA 304
Entergy Rehearing Order	<i>Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.</i> , 112 FERC ¶ 61,117 (2005), JA 344
FPA	Federal Power Act
Interconnection Agreements	The Indian Point Continuing Site Agreement between Con Edison and Entergy Nuclear Indian Point 2, LLC, dated November 9, 2000, JA 55; and the Indian Point 3 Interconnection Agreement between Con Edison and Entergy Nuclear Indian Point 3, LLC, dated November 9, 2005, JA 107
JA	Joint Appendix
<i>Niagara Mohawk</i>	<i>Niagara Mohawk Power Corp. v. FERC</i> , 452 F.3d 822 (D.C. Cir. 2006), <i>cert denied</i> , 127 S. Ct. 2129 (2007)
NYISO	New York Independent System Operator, the operator of the electric transmission grid in New York

NYISO Services Tariff	The NYISO's Market Administration and Control Area Tariff
NYPA	New York Power Authority
NYPA Initial Order	<i>New York Power Authority v. Consolidated Edison Co. of New York, Inc.</i> , 112 FERC ¶ 61,304 (2005), JA 627
NYPA Rehearing Order	<i>New York Power Authority v. Consolidated Edison Co. of New York, Inc.</i> , 116 FERC ¶ 61,240 (2006), JA 703
P	Refers to the Paragraph number in Commission orders
PASNY No. 4 Tariff	Con Edison's Delivery Service Rate Schedule Implementing and Part of the Service Agreement between the Power Authority of the State of New York (PASNY) and Con Edison, dated Mar. 10, 1989, JA 605
PJM	Pennsylvania-New Jersey-Maryland Interconnection, the operator of the electric transmission grid in the mid-Atlantic region

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

For the second time in recent years, this Court is presented with objections by a New York electric utility to the Federal Energy Regulatory Commission's ("Commission" or "FERC") treatment of station power service in New York. *See Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 2129 (2007) ("*Niagara Mohawk*"). The precise question presented now is:

Whether certain contracts between Petitioner Consolidated Edison Company of New York, Inc. (“Con Edison”) and certain wholesale electric generators obligate the generators to pay for station power service that they do not want and that Con Edison is not providing.

COUNTERSTATEMENT OF JURISDICTION

Con Edison raises a number of arguments before this Court that were not first presented to the Commission on rehearing, and thus should be rejected pursuant to 16 U.S.C. § 825l(b).

The arguments now urged that were not raised by Con Edison on rehearing, or not raised with sufficient specificity, include:

- That certain contracts should apply to the services at issue regardless of the facilities used to provide such services. Br. at 14; *see infra* p. 35-36.
- That the definition “Station-Use Energy” in certain contracts requires a finding that the agreements are applicable to the service at issue. Br. at 14; *see infra* p. 36-37.
- That the parties’ course of performance under certain contracts overrides the language of the agreements. Br. at 23; *see infra* p. 37.
- That certain contracts should be read in view of the prevailing regulatory policy at the time the agreements were executed. Br. at 23; *see infra* p. 37-38.
- That the rule against retroactive ratemaking and section 206 of the Federal Power Act (“FPA”) prohibit the refunds required by the Commission. Br. at 25, 27, 40, 42; *see infra* p. 38-39, 44-45.

STATUTES AND REGULATIONS

The relevant statutes are contained in the Addendum to this brief.

INTRODUCTION

This case concerns the supply of “station power” in New York. Station power is the power that electricity generators need to operate electrical equipment, and to meet on-site heating, lighting and office needs. When utilities were vertically integrated, operating generation, transmission, and distribution facilities necessary to serve retail customers, station power was not an issue. It became an issue, however, after traditional utilities, responding to technological, competitive, and regulatory developments, began selling their generating assets to “merchant generators,” which lack transmission and distribution facilities or retail customers of their own.

This Court recently affirmed the Commission’s approach to station power in New York. In *Niagara Mohawk*, the Court affirmed eight Commission orders approving and enforcing the New York Independent System Operator’s (“NYISO”) Market Administration and Control Area Services Tariff (“NYISO Services Tariff”), allowing generators to self-supply station power from their own generation facilities. If generators do self-supply without using another’s facilities, and their output for the month is net positive, then there is no sale, wholesale or retail, and neither federal nor state regulation attaches. 452 F.3d at 823-24. The Court determined that the Commission did not encroach upon state jurisdiction over local distribution services and retail sales, and affirmed the Commission’s

approval of the monthly netting approach as reasonable. *Id.* at 828-30. Further, the Court rejected arguments that the Commission’s decision to allow self-supply and netting violated either the filed rate doctrine or the rule against retroactive ratemaking. *Id.* at 830 n.9. Con Edison, the petitioner here, was also a petitioner in the consolidated cases decided in *Niagara Mohawk*.

In this case, Con Edison challenges four more New York station power orders. Therein, the Commission granted two complaints filed by Con Edison customers, Entergy Nuclear Operations, Inc., Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC (collectively, “Entergy”) and the New York Power Authority (“NYPA”), and found that those customers may rely on the NYISO Services Tariff in order to self-supply and net station power. Three of the four orders on review here were issued prior to the Court’s decision in *Niagara Mohawk*, but the timing of the orders prevented consolidation with the *Niagara Mohawk* proceedings.

Before the Commission, Con Edison raised numerous factual and legal issues. Here, Con Edison has narrowed the issues it raises, but nevertheless raises anew certain issues just recently decided in *Niagara Mohawk*, including claims that the Commission exceeded its jurisdiction and violated the filed rate doctrine. The only new issues before the Court in this case are whether the Commission reasonably interpreted Con Edison’s interconnection agreements with Entergy and

NYPA when it found the agreements inapplicable to the service at issue, and certain related issues concerning refunds.

In the orders on review, the Commission acted to ensure that Con Edison may not charge Entergy and NYPA for station power services it is not providing. The Commission did not abrogate the interconnection agreements, but found that the agreements are not applicable to the services at issue. Acting to enforce the applicable filed rate, the NYISO Services Tariff, the Commission relieved Entergy of unpaid but assessed charges and directed Con Edison to issue refunds to NYPA.

STATEMENT OF FACTS

Statutory Framework

FPA section 201(b) confers on the Commission jurisdiction over the “transmission of electric energy in interstate commerce,” the “sale of electric energy at wholesale in interstate commerce,” and “all facilities for such transmission or sale.” 16 U.S.C. § 824(b)(1). *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., National Ass’n of Regulatory Util. Comm’rs*

v. FERC, 475 F.3d 1277, 1280-82 (D.C. Cir. 2007), *petition for cert. filed*, (U.S. Nov. 19, 2007) (No. 07-658) (explaining that the Commission does not lose jurisdiction when a local distribution facility is used in a FERC-jurisdictional transaction).

As for transactions within its jurisdiction, the Commission is empowered under FPA sections 205 and 206, 16 U.S.C. §§ 824d, 824e(a), to correct utility rates and practices that are unjust, unreasonable, or unduly discriminatory or preferential. *See, e.g., New York v. FERC*, 535 U.S. at 7.

Background

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 Util. Dist. No. 1 of Snohomish County 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. 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. 888¹ rulemaking, directed utilities to offer non-discriminatory, open access transmission service. To implement this directive, the Commission ordered the functional unbundling of wholesale generation and transmission services. *New York v. FERC*, 535 U.S. at 11. The Commission also encouraged, but did not direct, the development of independent system operators of regional, multi-system grids. *See* Order No. 888 at 31,730-32.²

¹ *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.

² Later, in Order No. 2000, the Commission directed all transmission owning utilities to make filings to either participate in a regional transmission organization or explain efforts to participate in one. *See Regional Transmission Organizations*, 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 Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607.

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 Consolidated Edison Co. of New York, Inc. v. FERC*, 2007 U.S. App. LEXIS 29213 (D.C. Cir. 2007) (price spikes in operating reserves markets); *Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003) (same); *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).

Going beyond the “functional unbundling” directive of Order No. 888, New York utilities have largely divested themselves of their generation facilities. *See, e.g., PJM Interconnection, LLC*, 95 FERC ¶ 61,333 at 62,189-90 (2001) (“*PJM III*”). These utilities, referred to as “transmission owners,” now operate primarily as the owners of the transmission and distribution facilities and providers of retail service. The purchasers of the divested generation facilities, referred to collectively as “merchant generators,” have no retail service obligation and sell

wholesale power at market-based rates under Commission-approved tariffs. *See, e.g., PJM Interconnection, LLC*, 94 FERC ¶ 61,251 at 61,883 n.12 (2001) (“*PJM II*”) (defining “merchant generator” as a “non-vertically integrated owner of generating facilities” that includes both independent and affiliated power producers).

The non-profit NYISO operates the bulk power transmission network in New York. As administrator of an Open Access Transmission Tariff (“NYISO Transmission Tariff”) approved by the FERC, the NYISO assures that all entities receive reliable, non-discriminatory access to the grid. The NYISO also administers several competitive, bid-based electricity markets under the NYISO Services Tariff approved by the Commission. *See, e.g., PSEG Energy*, 360 F.3d at 201; *Consolidated Edison*, 347 F.3d at 966-67.

Treatment of Station Power

The Commission’s approach to station power in New York was recently addressed by this Court in *Niagara Mohawk*, where the Court affirmed eight station power orders in which the Commission applied previously-adopted fundamental principles of station power treatment to New York. *See Niagara Mohawk*, 452 F.3d at 826 n.4.

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. There are generally three ways for a generator to acquire station power: 1) on-site self-supply; 2) remote self-supply; and 3) third-party supply. *Id.* at 61,890. With on-site self-supply and remote self-supply, a generator is using only its own generating resources.³ *Id.*

Utilities in the NYISO, the Pennsylvania-New Jersey-Maryland Interconnection ("PJM") 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. *See PJM II*, 94 FERC at 61,882, 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 historical manner employed by traditional utilities – by netting station power needs against gross

³ With on-site self-supply, an operating generator can self-supply all of its station power requirements from generation located "behind the meter." 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. With remote self-supply, when the generator is not operating or is not supplying enough energy to meet its 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.

output. *See PJM III*, 95 FERC at 62,189. Specifically, merchant generators sought the same opportunity to “self-supply” their own station power. 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.

As discussed in *Niagara Mohawk*, the orders on review therein followed shortly after a proceeding adopting the Commission’s fundamental approach to station power, there within PJM. *See Niagara Mohawk*, 452 F.3d at 825-26. In the earlier *PJM* proceeding, the Commission found that a merchant generator is entitled to the same competitive choices, and thus the same self-supply and netting practices, historically afforded other utilities. *PJM III*, 95 FERC at 62,189. Thus, the Commission permitted a generator to self-supply its own station power requirements when its monthly net output is positive, *i.e.* when its gross output exceeds or equals its station power requirements. *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). A generator denied the opportunity to self-supply, and forced to purchase its full station power requirements 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.

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)(1). 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. In contrast, “[w]hen a generator’s supply of station power is from a third party, then there is a sale for end-use” that the Commission does not regulate. *PJM III*, 95 FERC at 62,183.

As to delivery services, “a generator that is meeting its station power requirements through on-site self-supply generally would not be in need of either transmission or local distribution services.” *PJM III*, 95 FERC at 62,186.

However, a generator that uses remote self-supply or third-party supply and does not own or have right to use the grid that connects its facility to the source of the station power, will require either transmission or distribution service. *Id.*

Shortly after the PJM proceeding, acting on a complaint filed by a New York generator, the Commission held that “the fundamental questions about the appropriate treatment of station power were answered” in the *PJM* orders and required the NYISO to implement tariff provisions consistent with those principles. *KeySpan-Ravenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 99 FERC ¶ 61,167 at 61,679 (2002). The four pairs of orders challenged in *Niagara Mohawk* followed.

In the first pair of orders,⁴ the Commission approved NYISO Services Tariff provisions allowing, as relevant here, generators to self-supply their own station power, and to net station power use on a monthly basis, in order to enable all generators to procure station power competitively. *KeySpan IV*, 107 FERC at P 2, 5-6, 41. Consistent with the *PJM* orders, the Commission determined that no sale is involved with on-site self-supply when a generator consumes its own generation, and therefore no transmission and distribution charges may be assessed. *See id.* at P 29-36. 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 Commission-jurisdictional open access transmission tariff. *Id.* at P 52.

The other three pairs of orders,⁵ like those on review here, concerned implementation and enforcement of the NYISO Services Tariff station power procedures. In each, the Commission held that New York transmission owners

⁴ *KeySpan-Ravenswood, Inc. v. New York Independent System Operator, Inc.*, 101 FERC ¶ 61,230 (2002), *reh'g denied*, 107 FERC ¶ 61,142 (2004) (“*KeySpan IV*”).

⁵ *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,336 (2003) (“*Nine Mile I*”), *reh'g denied*, 110 FERC ¶ 61,033 (2005) (“*Nine Mile II*”); *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 (2003), *reh'g denied*, 110 FERC ¶ 61,032 (2005); and *Niagara Mohawk Power Corp. v. Huntley Power LLC*, 109 FERC ¶ 61,169 (2004), *reh'g denied*, 111 FERC ¶ 61,120 (2005).

may not rely on retail tariffs to compel merchant generators to pay for station power services that the generators do not want and the transmission owners are not actually providing. *See, e.g., Nine Mile II*, 110 FERC at P 16. With regard to the retail tariffs, the Commission found that to the extent those tariffs conflict with the NYISO Services Tariff station power procedures, the NYISO Services Tariff must prevail. *Id.* at P 16, 24.

As noted above, this Court affirmed these eight orders in *Niagara Mohawk*. Con Edison was a petitioner in *Niagara Mohawk* (*see* D.C. Cir. No. 04-1229). The petitioners in *Niagara Mohawk* challenged the Commission's jurisdiction under the FPA to approve and enforce the NYISO station power tariff provisions. Specifically, petitioners argued that the netting provisions of the NYISO Services Tariff "encroach[] upon state jurisdiction over local distribution services and retail sales." *Niagara Mohawk*, 452 F.2d at 827. The Court recognized that "in drawing the jurisdictional lines in this area, some practical accommodation is necessary." *Id.* at 828. Noting the petitioners' concurrence that the Commission has the authority to permit some netting, and thus to effectively eliminate some potential retail sales, the Court concluded that "if hourly netting is perfectly consistent with the statute, we see no principled reason why monthly netting violates the Act." *Id.* at 828. The Court went on to reject petitioners' arguments that Order No. 888 requires the Commission to recognize that a generator takes local distribution

service, and therefore can be charged for that service, “even if, in fact, it does not physically use a utility’s local distribution facilities.” *Id.* at 829. Finally, the Court rejected petitioners’ arguments that the Commission violated the filed rate doctrine and the rule against retroactive ratemaking by enforcing the NYISO Services Tariff. *Id.* at 830 n.9.

The Commission’s Proceeding Below and Orders on Review

Entergy Complaint

Entergy instituted this proceeding by filing a complaint with the Commission. Entergy alleged that Con Edison was unlawfully charging Entergy local distribution charges for deliveries of station power to Entergy’s Indian Point Energy Center Units 2 and 3, when Con Edison did not use Con Edison-owned local distribution facilities for such deliveries. Entergy Complaint, Docket No. EL05-46, at 1 (filed Dec. 20, 2004), JA 8. Entergy claimed that it was engaged in on-site self-supply under the NYISO Services Tariff and had, on that basis, ceased paying Con Edison’s assessments. Thus, Entergy sought to confirm it was not liable to Con Edison for local distribution charges as of April 1, 2003, the effective date of the NYISO Services Tariff provisions concerning station power. *Id.* at 1-2, JA 8-9; see *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*, 110 FERC ¶ 61,312 at P 4 (2005) (“Entergy Complaint Order”), JA 305. According to Entergy, Con Edison was improperly assessing local

distribution charges under the parties' Commission-jurisdictional Interconnection Agreements for the facilities, which incorporate rates for station power delivery by reference to Con Edison's state-approved retail tariff. Entergy Complaint at 4, JA 11; Entergy Complaint Order at P 2, 18, JA 305, 310.

Con Edison denied Entergy's allegations, arguing that the Commission lacks jurisdiction to hear the complaint, that the Interconnection Agreements require such claims to be brought in other venues, and that certain facilities used for the delivery of Entergy's self-supplied station power are in fact local distribution facilities. Entergy Complaint Order at P 10-12, JA 307-08.

In acting on the complaint, the Commission first noted that it has jurisdiction to determine whether the facilities on which the complaint centers are jurisdictional. Entergy Complaint Order at P 21, JA 310. The Commission went on to engage in a factual analysis of the facilities used for delivery of station power to Entergy's facilities, ultimately concluding that the facilities used are in fact Commission-jurisdictional transmission facilities. *Id.* at P 27-29, JA 312-13; *see also id* at P 27, JA 312 ("Entergy has met its burden of proof to demonstrate that no Con Edison-owned local distribution facilities are used to deliver station power" to Entergy's facilities). Having found that only transmission facilities are used to deliver station power to Entergy, the Commission concluded that the NYISO

Services Tariff, which governs the delivery of station power over transmission facilities within the NYISO, is controlling. *Id.* at P 31, JA 314.

Con Edison sought rehearing of the Entergy Complaint Order, which the Commission denied on July 25, 2005. *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*, 112 FERC ¶ 61,117 (2005) (“Entergy Rehearing Order”), JA 344. In denying rehearing, the Commission noted that many of Con Edison’s arguments are “collateral attacks” on findings by the Commission in earlier station power cases also involving Con Edison; nevertheless, the Commission again addressed those issues. Entergy Rehearing Order at P 12, JA 347-48 (citing the earlier *PJM* and *KeySpan* proceedings). As to jurisdiction, the Commission determined that it has the authority both to determine the scope of its jurisdiction and to interpret the Interconnection Agreements. *Id.* at P 22-24, JA 352-53 (citing, *e.g.*, *New York v. FERC*, 535 U.S. 1). Considering the Interconnection Agreements, the Commission determined that they “address only the situation where Entergy cannot meet its station power requirements (full or partial) via self-supply.” *Id.* at P 24, JA 353. Confirming its factual conclusion that Entergy’s self-supplied station power “is delivered to Entergy[] . . . over transmission facilities and not local distribution facilities” – a factual issue not raised by Con Edison on appeal – the Commission found that the “only tariff

applicable to such delivery is the NYISO's Services Tariff." *Id.* at P 24, 37, JA 353, 359-60.

NYPA Complaint

Following the Entergy Complaint Order, NYPA also submitted a complaint to the Commission alleging that Con Edison was interfering with its right to take station power delivery service under the terms of the NYISO Services Tariff.

NYPA sought refunds of all retail station power delivery charges from April 1, 2003, the effective date of the NYISO Services Tariff, to December 2003, when NYPA ceased paying the charges. NYPA Complaint, Docket No. EL05-123, at 1-2 (filed June 6, 2005), JA 374-75; *New York Power Authority v. Consolidated Edison Co. of New York, Inc.*, 112 FERC ¶ 61,304 at P 3-4 (2005) ("NYPA Complaint Order"), JA 628-29.

Con Edison denied NYPA's allegations, claiming that the interconnection agreement between the parties, the Clean Power Agreement, is a full requirements contract requiring NYPA to take all station power delivery services from Con Edison. NYPA Complaint Order at P 17, JA 632. Con Edison further argued that even if local distribution facilities are not used for station power delivery, local distribution charges should apply, although it acknowledged that the Commission concluded to the contrary in the Entergy proceeding. NYPA Complaint Order at P 21, JA 633.

The Commission granted the complaint, finding that the Agreement applies only to remotely self-supplied and third-party supplied station power and does not address or prohibit on-site self-supplied station power. NYPA Complaint Order at P 44-45, JA 638-39. The Commission directed Con Edison to issue refunds to NYPA for charges assessed from April 2003 to December 2003, concluding that neither restrictions on rate changes in the Clean Power Agreement, nor the filed rate doctrine or rule against retroactive ratemaking precluded such refunds. *Id.* at P 54-56, JA 641-43. However, the Commission allowed Con Edison to retain a credit for one month of services provided to NYPA's Pouch Terminal generating facility. *Id.* at P 54, JA 641-42. The Commission did not find it necessary to address the type of facilities used for station power deliveries. *Id.* at P 52, JA 641. Consequently, and also because the parties conceded that they were making the same arguments they made in the *Niagara Mohawk* proceeding, the Commission did not reach the associated jurisdictional issues. *Id.* at P 53, JA 641.

Con Edison sought rehearing and NYPA sought clarification, which the Commission denied and granted, respectively, by order issued September 12, 2006. *New York Power Authority v. Consolidated Edison Co. of New York, Inc.*, 116 FERC ¶ 61,240 (2006) ("NYPA Rehearing Order"), JA 703. The Commission observed that, in the interim, the Court in *Niagara Mohawk* had upheld the Commission's station power precedent. *Id.* at P 12-15, JA 707-08. Thus, the

Commission rejected Con Edison's arguments that the NYPA Complaint Order was based on "two 'untenable' assertions: that monthly netting of station power does not entail a retail sale; and that the application of congestion management pricing to station power withdrawals and injections is not evidence of that retail sale," as the Commission's findings to the contrary were affirmed in *Niagara Mohawk*. *Id.* at P 17 (citing, *e.g.*, *KeySpan IV*, 107 FERC at P 26-30, 40), JA 708-09. The Commission also rejected Con Edison's arguments that the Commission lacked jurisdiction to interpret the Clean Power Agreement, had abrogated the Agreements or violated the filed rate doctrine in finding the Agreements inapplicable to the service at issue. *Id.* at P 21-22, 26, JA 710, 711. With regard to the Pouch Terminal charges, the Commission granted NYPA's request for clarification, confirming that Con Edison could retain only the actual amount NYPA paid for Con Edison's services. *Id.* at P 31-32, JA 713.

SUMMARY OF ARGUMENT

In the orders on review, the Commission acted to ensure that Con Edison may not charge Entergy and NYPA for station power services it is not providing. Con Edison's jurisdictional and policy-based objections, raised only with regard to the Entergy proceeding, asserting that the Commission is regulating or otherwise interfering with state jurisdiction over local distribution services and retail power sales, were just recently rejected by this Court. *Niagara Mohawk*, 452 F.3d 822. *Niagara Mohawk* confirms that the Commission did not encroach upon state jurisdiction when it approved and enforced tariff provisions permitting a merchant generator to self-supply and net, and determined that, in such instances, no power sale, whether wholesale or retail, occurs. The Commission's action here enforces the NYISO Services Tariff in a manner similar to those orders affirmed in *Niagara Mohawk*. Accordingly, the Commission has jurisdiction to decide Entergy's complaint, and Con Edison's other jurisdictional and policy-based objections need not be relitigated here.

Con Edison no longer disputes that the only services at issue in this case are on-site self-supplied station power services. Here, the Commission reviewed both the NYISO Services Tariff and other interconnection agreements between the parties and determined that the interconnection agreements left a void that the NYISO Services Tariff fills. The Commission found that the interconnection

agreements, also Commission-jurisdictional agreements, neither prohibited nor addressed on-site self-supplied station power. Con Edison raises a number of objections, many of which are jurisdictionally barred because they were not first raised before the Commission. 16 U.S.C. § 825l(b). In any event, the Commission reasonably determined that its finding – that the other agreements are not applicable to the service at issue – neither abrogated nor modified those agreements. As in *Niagara Mohawk*, because the Commission did not modify an existing rate on file, its refund directives do not contravene prohibitions on retroactive ratemaking.

ARGUMENT

I. CON EDISON’S JURISDICTIONAL AND POLICY OBJECTIONS ALREADY HAVE BEEN ADDRESSED BY THIS COURT.

This proceeding concerns four of numerous station power orders the Commission has issued in recent years. Another eight Commission orders were recently reviewed by this Court in *Niagara Mohawk*, where the Court affirmed the Commission’s jurisdiction and its approach to station power in New York. In the *Entergy* proceeding, Con Edison attempts to raise anew a number of jurisdictional and policy-based objections to the Commission’s orders. Because these issues were addressed in earlier court decisions, including *Niagara Mohawk*, the only new issues raised in this case are discrete issues, discussed in sections II and III

infra, relating to the interpretation of the Entergy and NYPA agreements and certain refund-related issues.

Con Edison raises several variations on the argument that the Commission's station power rules, set forth in the NYISO Services Tariff, and its application of them here, intrude upon state jurisdiction. Con Edison disputes the Commission's authority to "require the use of local distribution facilities . . . in connection with Con Edison's bundled retail sales" and to "construe or nullify a contract for a retail power sale." Br. at 19. More generally, Con Edison questions the Commission's authority to determine the scope of its jurisdiction and the extent to which jurisdictional activities are occurring. Br. at 31 ("FERC argued that its authority to decide matters which were not at issue (transmission and wholesale sales) included authority to decide another matter which is beyond FERC's jurisdiction (*i.e.*, what facilities are required to establish a state-jurisdictional retail sale.")).

In *Niagara Mohawk*, the petitioners, including Con Edison, argued that the Commission's orders permitting monthly netting of self-supplied station power encroached upon state jurisdiction over local distribution service and retail power sales. 452 F.3d at 827. The Court recognized the Commission's determination that "no sale of *any kind* takes place when a generator takes power from the grid for station power service, so long as its netting is positive for the month." *Id.* at 828. Petitioners ultimately conceded that "it would be a valid policy judgment on

the part of FERC to determine that no retail sale occurred and that no local distribution service was utilized if a generator was net positive over an hour.” *Id.* Noting this concession, and further affirming the Commission’s finding that a generator may not be compelled to pay for local distribution service if it is not using local distribution facilities, the Court upheld the Commission’s orders. *Id.* at 828-30. Accordingly, *Niagara Mohawk* confirms that the Commission did not encroach upon state jurisdiction when it determined that if a generator self-supplies station power under the NYISO Services Tariff, there is no power sale, whether wholesale or retail.

As discussed below, Con Edison’s arguments are inconsistent with the Court’s *Niagara Mohawk* decision. At a minimum, the conclusions of *Niagara Mohawk* and the orders affirmed therein represent binding precedent. However, the Commission submits that this Court could properly apply the doctrine of issue preclusion, or *collateral estoppel*, to justify dismissal of Con Edison’s jurisdictional and policy objections. *See Chippewa & Flambeau Improvement Co. v. FERC*, 325 F.3d 353, 356 (D.C. Cir. 2003); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1079 (D.C. Cir. 1987) (en banc). Con Edison was a petitioner in *Niagara Mohawk*, and it now attempts to raise the same issues litigated and decided by both the Commission and this Court in that proceeding.

In the *Entergy* proceeding, notwithstanding the formulations of the issue requiring decision offered by Con Edison (*see* Br. at 29), the Commission determined that Entergy's complaint required it to decide whether the facilities used to deliver station power to Entergy's generating units "are transmission or local distribution facilities and thus whether they are subject to the Commission's jurisdiction." Entergy Complaint Order at P 21 (noting that "[t]his is the narrow issue to be decided in this case"), JA 310. The Commission found that only transmission facilities are used to deliver station power to Entergy's units when it self-supplies – a conclusion that Con Edison no longer disputes.⁶ Entergy Complaint Order at P 27, 30, JA 312, 314; Entergy Rehearing Order at P 36-41, JA 358-61. To the extent that Con Edison disputes, *see* Br. at 31, the Commission's "authority to determine the scope of [its] jurisdiction and to determine, specifically, whether any jurisdictional activities are occurring," its position cannot be reconciled with *Niagara Mohawk*. Entergy Rehearing Order at P 23 (citing *Nine Mile II*, 110 FERC ¶ 61,033 at P 30 & n.30, *aff'd*, *Niagara Mohawk*), JA 352; *see also New York v. FERC*, 535 U.S. at 22-23 (holding the Commission was within its

⁶ To the extent that Con Edison has, in its opening brief, declined to present some arguments that were raised below, it has waived these contentions on appeal. *See, e.g., Environmental Defense v. Env'tl. Prot. Agency*, 467 F.3d 1329, 1339 n.5 (D.C. Cir. 2006) ("[i]ssues may not be raised for the first time in a reply brief") (quoting *Rollins Env'tl. Services, Inc. v. Env'tl. Prot. Agency*, 937 F.2d 649, 653 n.2 (D.C. Cir. 1991)).

authority to establish a test to determine which facilities are local distribution, as opposed to transmission, facilities); *FPC v. Southern California Edison Co.*, 376 U.S. 205, 210 (1964) (finding that “[w]hether facilities are used in local distribution . . . involves a question of fact to be decided by the FPC,” the Commission’s predecessor agency).

Next, noting that “the facilities at issue here are transmission facilities,” the Commission held “that the delivery of station power is transmission service, and not local distribution service.” Entergy Complaint Order at P 31, JA 314; Entergy Rehearing Order at P 24, JA 352-53. “Thus,” the Commission found that “if any tariff applies to such delivery, it is the NYISO’s Services Tariff, provisions of which govern netting and rates for delivery of station power over transmission facilities.” Entergy Complaint Order at P 31, JA 314. Service over transmission facilities is subject to the Commission’s jurisdiction, whether wholesale or retail. Entergy Rehearing Order at P 27, JA 355-56 (citing Order No. 888 at 31,781, 31,966-69); *see also New York v. FERC*, 535 U.S. at 19-20. Accordingly, the Commission’s ruling relates only to transmission services and does not require the use of or otherwise attempt to regulate local distribution facilities. *Niagara Mohawk*, 452 F.3d at 827-28; *compare* Br. at 19, 27-31. In this regard, to the extent Con Edison is arguing that that the Commission may not restrict local distribution charges to instances where local distribution facilities are actually

used, Br. at 14, 19, it again takes a position inconsistent with *Niagara Mohawk*. 452 F.3d at 829 (affirming the Commission’s determination that Order No. 888 does not require a merchant generator to pay for “local distribution *service* even if, in fact, it does not physically use a utility’s local distribution facilities”). As in *Niagara Mohawk*, here the Commission again clarified that it is not “prohibiting a utility from collecting charges for stranded costs and benefits through retail, local distribution rates for providing a service over local distribution facilities.” Entergy Rehearing Order at P 26, JA 354.

Likewise, because the Commission found that Entergy is engaged in self-supply under the NYISO Services Tariff and, in accordance with *Niagara Mohawk*, because there is no retail power sale at issue here, the Commission is not regulating retail power sales. In particular, the Commission is not construing (and certainly is not nullifying) a contract for retail power sales, as Con Edison alleges. *See* Br. at 19, 29. Because there are no retail power sales at issue here, the fact that one provision of the Interconnection Agreements refers to retail service is irrelevant. Entergy Rehearing Order at P 22, JA 352. In applying the NYISO Services Tariff and finding the Interconnection Agreements inapplicable, the Commission is doing no more here than it did in the orders affirmed in *Niagara Mohawk*. *See also* *Western Mass. Electric Co.*, 61 FERC ¶ 61,182 at 61,661 (1992), *aff’d*, *Western Mass. Electric Co. v. FERC*, 165 F.3d 922, 926 (D.C. Cir.

1999) (concluding the Commission may examine contracts relating to transactions which may be subject to its jurisdiction prior to making its determination as to jurisdiction). In fact, the Commission's action here is arguably less intrusive than in the enforcement orders affirmed in *Niagara Mohawk*, where the Commission explicitly found that to the extent that the retail tariffs at issue conflicted with the NYISO Services Tariff, the Commission-jurisdictional NYISO Services Tariff must prevail. *See, e.g., Nine Mile II*, 110 FERC at P 26.

Similarly, because the Commission is acting only within its jurisdiction, *Midwest Generation, LLC v. Commonwealth Edison Co.*, 99 FERC ¶ 61,166 (2002), where the Commission dismissed a complaint related purely to state-jurisdictional retail service under a retail service agreement, which the complainant sought to abrogate, does not require the same result here. *See Br.* at 29-30.

Interconnection agreements, like those at issue here, filed as service agreements under an open access transmission tariff are unquestionably subject to the Commission's jurisdiction. Entergy Rehearing Order at P 22 & n.26, JA 352; *see also National Ass'n Of Regulatory Util. Comm'rs v. FERC*, 475 F.3d at 1282 (affirming Commission's interpretation of its jurisdictional scope as including interconnections with dual-use, *i.e.* transmission and local distribution, facilities). Here, the Commission's interpretation relied upon the language of the Interconnection Agreements, not the retail tariffs referenced therein.

Finally, Con Edison's argument that the Interconnection Agreements require all matters "arising out of" the Agreements to be brought in state or federal court does not further Con Edison's position. Br. at 30 (quoting Interconnection Agreement, § 5.12(a), JA 91-92). As above, under the FPA, the Commission has jurisdiction to decide the issue in this case – whether a Commission-jurisdictional activity is taking place – and to determine which Commission-jurisdictional agreement applies to any such activity. Entergy Rehearing Order at P 23, JA 352. The issue in this case could not have arisen out of the Interconnection Agreements because the Interconnection Agreements are not applicable to the service at issue here. Entergy Rehearing Order at P 24, JA 352-53. Con Edison's misunderstanding of the issue in this proceeding again proves to be the flaw in its argument.

THE COMMISSION REASONABLY INTERPRETED THE CONTRACTS IN LIGHT OF THE SERVICES AT ISSUE, AND REASONABLY CONCLUDED THAT THE CONTRACTS ARE NOT APPLICABLE.

Standard Of Review

The Court reviews Commission action under the Administrative Procedure Act, overturning the disputed orders only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also, e.g., Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Although "the Commission must be able to

demonstrate that it has made a reasoned decision based upon substantial evidence in the record,” the Court’s review is “highly deferential.” *Sithe/Independence*, 165 F.3d at 948 (internal quotation marks omitted).

In reviewing the Commission’s interpretation of a Commission-approved contract, this Court “employ[s] a variation of the now familiar ‘two-step’ first performed by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*” *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003) (affirming the Commission’s determination that the contract unambiguously prohibits Ameren from adjusting certain charges) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). “Thus, by analogy to the ‘first step’ inquiry as to whether a statute is ambiguous, [the Court] resolve[s] the equivalent question--whether the contract is ambiguous--*de novo*.” *Appalachian Power Co. v. FERC*, 101 F.3d 1432, 1435 (D.C. Cir. 1996) (citing, *e.g. Chevron*). “If so, the language of the agreement controls” *Ameren*, 330 F.3d at 494 (quoting *Chevron*, 467 U.S. at 843).

If the agreement is ambiguous, however, the Court “examine[s] the Commission’s interpretation of that agreement ‘under the deferential ‘reasonable’ standard.’” *Ameren*, 330 F.3d at 498 (quoting *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1136, 1137 (D.C. Cir. 1991) (finding agreement is ambiguous and remanding for the Commission “to place its own construction on the . . . ambiguity

– so long as it is reasonable’’)). An “agency to which Congress entrusted the protection and discharge of the public interest is entitled to just as much benefit of the doubt in interpreting such an agreement as it would in interpreting its own orders.” *Cajun*, 924 F.2d at 1135.

The Commission Properly Applied The NYISO Services Tariff To Entergy’s Self-Supply Of Station Power.

The Commission Reasonably Interpreted The Interconnection Agreements And Concluded That The Agreements Do Not Apply To Self-Supplied Station Power.

The Commission reasonably concluded that the NYISO Services Tariff, and not the Interconnection Agreements, is applicable to Entergy’s self-supplied station power. Importantly, Con Edison no longer disputes the Commission’s conclusion that “any . . . station power is delivered to Entergy’s [facilities] over transmission facilities and not local distribution facilities,” a central issue in the Commission’s proceedings and an important predicate for the Commission’s contract interpretation determination. Entergy Rehearing Order at P 24, JA 352-53. As the Commission explained, “this is why the provisions of the interconnection agreements pertaining to station power are not triggered and are not at issue in this proceeding.” *Id.*

The Commission properly rejected Con Edison’s claim that the Interconnection Agreements are unambiguously “full requirements” contracts that require Entergy to take all station power services under the Agreements and deny

Entergy the option to self-supply. Br. at 14-15. The pertinent provision of the Interconnection Agreements states:

Con Edison shall, at Generator's option, either (a) sell to Generator Station-Use Energy on a bundled basis or (b) provide to Generator unbundled delivery service for such Station-Use Energy if Generator purchases or otherwise obtains the energy from a person or entity other than Con Edison. Generator shall purchase either such bundled sales service or unbundled delivery service. Con Edison shall provide the bundled sales service under Con Edison's Schedule for Electricity Service, P.S.C. No. 9 – Electricity, and unbundled delivery service under Con Edison's Schedule for Retail Access, P.S.C. No. 2 – Retail Access, as the same may be revised or superseded from time to time.

Indian Point Energy Center Unit 3 Interconnection Agreement, § 3.14, JA 140 (emphasis added); *see* Indian Point Energy Center Unit 2 Interconnection Agreement, § 3.15, JA 82 (containing analogous language); *see also* Entergy Rehearing Order at P 24 n.28, JA 353.

The Commission's "reading of the interconnection agreements indicates that, *when Entergy is not self-supplying its station power needs*, the parties agreed that Con Edison would either sell bundled station power to Entergy or provide unbundled delivery service for any station power acquired from a third party supplier." Entergy Rehearing Order at P 24, JA 352-53 (emphasis added). The Commission concluded that the specification of two types of service, bundled service from Con Edison and unbundled delivery service for third-party supplied station power, does not "expressly or implicitly prohibit[] Entergy from self-

supplying its station power requirements.”⁷ *Id.*; compare Br. at 18 (claiming that “[t]he contracts *expressly prohibit* Entergy from self-supplying”) (emphasis added). Indeed, the Commission determined that “nothing in the interconnection agreements,” including the specification of two types of service, “limits Entergy’s right to self-supply station power, [but] only its choice of retail suppliers of station power when self-supply does not fully meet its station power needs.” *Id.* at P 25 n.30, JA 353-54. That is, if Entergy does not self-supply, it must either take bundled service from Con Edison or unbundled delivery service from Con Edison for station power purchased from a third party.

In light of the Commission’s determination that the Interconnection Agreements do not address on-site self-supply, the only service at issue in the complaint, Con Edison’s contention that the agreements expressly waive Entergy’s right to net station power is irrelevant. Br. at 15-16. Because the Interconnection Agreements do not apply to on-site self-supply, the only service at issue, any prohibition or condition on netting in the Interconnection Agreements would not apply to on-site self-supply.

⁷ Even if the Interconnection Agreements preclude self-supply, the Commission explained that, in the event of a conflict with the NYISO Services Tariff, the NYISO Services Tariff must prevail. Entergy Rehearing Order at P 32, JA 357; see, e.g., *Nine Mile II*, 110 FERC at P 24, *aff’d*, *Niagara Mohawk*.

Similarly, because the Interconnection Agreements are inapplicable, Con Edison's arguments that the Commission amended or abrogated the Interconnection Agreements, or did not satisfy contractual or other requirements for amending or abrogating the Agreements, are both inaccurate and unsupported. Br. at 20-21, 25-27. The Commission specifically found that its "interpretation does not abrogate the agreements . . . but rather determines which rate schedule . . . applies to the service at issue in this proceeding." Entergy Rehearing Order at P 24, JA 353. Indeed, Con Edison has acknowledged that Entergy did not seek to abrogate its contractual commitments in this proceeding. Con Edison Request for Rehearing at 3 n.5, JA 318; Entergy Rehearing Order at P 25, JA 353-54.

Moreover, the Commission's interpretation does not supersede the Interconnection Agreements. Entergy Rehearing Order at P 48, JA 364. The Commission noted that Entergy "has paid Con Edison all local distribution charges for deliveries of unbundled station power . . . when those deliveries use Con Edison's local distribution facilities." *Id.* at P 24, JA 353. Nor do the Commission's "holdings . . . disturb Entergy's obligation to pay such charges." *Id.*; *see also id.* at P 26, JA 354. As explained *supra* at pages 26-27, the Commission is not requiring the use of local distribution facilities; it simply found – and Con Edison does not dispute – that no local distribution facilities are used to deliver station power to Entergy. Entergy Rehearing Order at P 24, JA 352-53.

Accordingly, because the Commission did not modify or abrogate the Entergy Interconnection Agreements, Con Edison's arguments regarding Entergy's ability to seek changes and the applicability of the *Mobile-Sierra*⁸ public interest standard are irrelevant.

**Con Edison's New Arguments Regarding The Commission's
Contract Interpretation Are Jurisdictionally Barred.**

On appeal, Con Edison raises a number of new arguments concerning the interpretation and application of the Interconnection Agreements for the first time. As described in turn below, each of these arguments is jurisdictionally barred under 16 U.S.C. § 825l(b).

First, Con Edison's initial argument in its opening brief, that the Interconnection Agreements apply "regardless of the facilities that Con Edison uses," Br. at 14, 16, was not raised before the Commission on rehearing. In fact, Con Edison devoted much of its request for rehearing to disputing the Commission's determination that no Con Edison-owned local distribution facilities are used to deliver station power to Entergy, highlighting the determinative nature of the facilities at issue. *See* Entergy Complaint Order at P 27, JA 312; Con Edison Request for Rehearing at 13-18, JA 328-33. Because Con Edison failed to

⁸ *Mobile-Sierra* refers to the following cases: *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

raise this argument before the Commission on rehearing, it is not properly before this Court. 16 U.S.C. § 825l(b) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do.”). “Neither FERC nor this [C]ourt has authority to waive these statutory requirements.” *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989)). In any event, the Commission determined that the only tariff applicable to the delivery services associated with on-site self-supplied station power is the NYISO Services Tariff. Also, to the extent that Con Edison is attempting to argue that it may assess local distribution charges even if no local distribution facilities are used (an issue Con Edison *did* raise on rehearing), its contention is foreclosed by *Niagara Mohawk*. *See supra* pp. 26-27.

Next, Con Edison argues that the Interconnection Agreements’ definition of “Station-Use Energy” suggests that the Agreements require Entergy to “take either of two specified services for *all* station power” Entergy requires. Br. at 15. The Court lacks jurisdiction over this argument as well because Con Edison did not raise it and, in particular, did not address this section of the Agreements, on rehearing before the Commission. 16 U.S.C. § 825l(b); *see Consolidated Edison Co. of New York, Inc.*, 347 F.3d at 974 (finding argument not preserved when party

did not “point to the specific provision involved”). In any event, the definition does not support Con Edison’s assertion. “Station-Use Energy” includes only “energy that [Con Edison] delivers” to the facilities. Br. at 14-15 (quoting agreements). However, when Entergy uses on-site self-supplied station power, any delivery occurs over transmission facilities, all of which are under NYISO control. Entergy Rehearing Order at P 37, JA 359. Thus, because Con Edison does not deliver Entergy’s on-site self-supplied station power, “Station-Use Energy” cannot include such station power.

In addition, Con Edison now argues that the parties’ course of performance confirms that the Interconnection Agreements were intended to govern all of Entergy’s station power delivery needs. Br. at 23-24. Con Edison again did not raise this argument on rehearing with the required specificity. 16 U.S.C. § 825l(b); *Wabash Valley Power Ass’n v. FERC*, 268 F.3d 1105, 1114 (D.C. Cir. 2001). Regardless, however, because the Commission concluded that the language of the Interconnection Agreements neither “expressly [n]or implicitly prohibit[s] Entergy from self-supplying its station power requirements,” the Commission did not need to consider the parties’ course of performance. Entergy Rehearing Order at P 24, JA 353.

Finally, referencing Order No. 888 and certain station power orders pre-dating the orders affirmed in *Niagara Mohawk*, Con Edison implores the Court to

“read the agreement in light of the then existing regulatory framework.” Br. at 23. Once again, Con Edison failed to present this argument to the Commission on rehearing. Accordingly, the Court lacks jurisdiction over this argument. 16 U.S.C. § 825l(b). On rehearing, Con Edison argued that the Commission’s more recent station power orders – those affirmed in *Niagara Mohawk* – were incorrect, and noted that the appeal in *Niagara Mohawk* “will determine which of the Commission’s two resolutions . . . is correct,” but it did not request that the Commission apply what it calls “contemporaneous” policy to the Agreements. *See* Con Edison Request for Rehearing at 24, JA 339; *id.* at 21-23, JA 336-38. In any event, as Con Edison concedes, its suggested interpretation of then-prevailing law was rejected in *Niagara Mohawk* and the orders affirmed therein. Entergy Rehearing Order at P 26-27, JA 354-56; *KeySpan IV*, 107 FERC at P 44-49, *aff’d*, *Niagara Mohawk*, 452 F.3d at 829 (“Nor do we see anything in Order 888 that buttresses petitioners’ jurisdictional argument.”). Thus, as Con Edison correctly suggested on rehearing, *Niagara Mohawk* decided this issue.

**The Commission Did Not Violate The Rule Against Retroactive
Ratemaking Or FPA Section 206.**

Con Edison’s arguments that the Commission retroactively relieved Entergy of payment obligations in violation of the rule against retroactive ratemaking, Br. at 25, or FPA section 206 limitations, Br. at 27, are not properly before this Court. Con Edison did not object to the Commission’s orders on this basis on rehearing;

therefore, this argument is jurisdictionally barred. 16 U.S.C. § 825l(b). Other parties before the Commission, and not Con Edison, raised the rule against retroactive ratemaking, but this is insufficient to satisfy the statutory bar in 16 U.S.C. § 825l(b). See Entergy Rehearing Order at P 42, JA 361-62; *Platte River Whooping Crane Critical Habitat Maintenance Trust*, 876 F.2d at 113 (“Petitioners seeking review of FERC orders must first petition for rehearing of those orders and must *themselves* raise in that petition *all* of the objections urged on appeal.”).

In any event, to support these claims Con Edison relies on its arguments – refuted above – that the Interconnection Agreements govern the service at issue and the Commission modified or abrogated those agreements. As the Commission explained on rehearing in response to the other parties, “[w]hile tariffs are on file that reference rates in Con Edison’s retail tariff, we have found that no retail delivery service was in fact provided.” Entergy Rehearing Order at P 43, JA 362. “[T]he applicable filed rate was the rate in the NYISO’s . . . Tariff, not the retail tariff rates Our holdings in this proceeding do not alter the rate in any of these tariffs; thus, no filed rate has been modified in contravention of” the filed rate doctrine or the rule against retroactive ratemaking. *Id.* When confronted with the same arguments, the Court in *Niagara Mohawk* concurred that because there is no “preexisting relevant filed rate, there can be no retroactive alteration of it.”

Niagara Mohawk, 452 F.3d at 830 n.9 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)).

The Commission Properly Applied The NYISO Services Tariff To NYPA's On-Site Self-Supply Of Station Power.

The Commission Reasonably Interpreted The Clean Power Agreement And Concluded That It Does Not Apply To On-Site Self-Supplied Station Power.

As with the Commission's decision on the Entergy Interconnection Agreements, the Commission's interpretation of the NYPA Clean Power Agreement neither abrogated nor replaced it. Con Edison's arguments that the Commission's orders, finding that NYPA may take service under the NYISO Services Tariff, amended the Clean Power Agreement likewise fail because they are predicated on the applicability of the Agreement.

The Commission reasonably concluded that the Clean Power Agreement, and the Power Authority of the State of New York ("PASNY") No. 4 Tariff incorporated by reference therein, do not apply to NYPA's on-site self-supplied station power. Section 3.14 of the Clean Power Agreement provides:

Con Edison shall provide to Generator, and Generator shall pay for, unbundled delivery service for Station-Use Energy that *Generator acquires from a third-party or remotely self-provides it (i.e., provides it from another generator owned by Generator by use of the Transmission System)*.

Clean Power Agreement at § 3.14, JA 471 (emphasis added); NYPA Complaint Order at P 44, JA 638-39. The Commission explained that the Agreement

“applies, by its express terms, only to remotely self-supplied station power and station power purchased from third parties.”⁹ NYPA Complaint Order at P 44, JA 638; NYPA Rehearing Order at P 22, JA 710. Contrary to Con Edison’s arguments, the Agreement “does not address, much less prohibit on-site self-supply.” NYPA Complaint Order at P 44, JA 639.

The Commission found it “compelling in this regard that the parties in section 3.14 of the Clean Power [Agreement] used concepts and language that are clearly taken from the *PJM II* decision that the Commission had issued a few months before the [Agreement] was executed in August 2001.” *Id.* at P 45, JA 639; *see PJM II, supra* p. 10. The Clean Power Agreement “expressly refers to two of the three types of station power procurement that the Commission outlined and discussed in *PJM II*,” third-party supplied and remotely self-supplied, but not the third type, on-site self-supplied. *Id.* From this the Commission concluded that “when the parties agreed to limit delivery charges to remote self-supply and third-party supply, they meant exactly that.” *Id.* Thus, the Commission declined to infer from the Agreement’s silence either a waiver of NYPA’s right to on-site self-

⁹ Con Edison states that “[t]here is no dispute regarding the applicability of the contract demand provisions of the PASNY No. 4 Tariff to all of the station power for NYPA’s Clean Power Project prior to the effectuation of the Netting Tariff in April 2003.” Br. at 34. The Commission did not address the pre-April 2003 time period because NYPA’s Complaint sought relief only for the period after April 2003. NYPA Complaint Order at P 4, JA 628-29.

supply or an agreement to pay any delivery charges to Con Edison when NYPA self-supplies without using any of Con Edison's facilities. *Id.*

Con Edison's arguments that the Commission excused NYPA from various provisions of the PASNY No. 4 Tariff, as incorporated into the Clean Power Agreement by reference, are all predicated upon Con Edison's position that the Commission amended or abrogated the Agreement and the PASNY No. 4 Tariff.¹⁰ As the Commission explained, it acted under FPA section 206, 16 U.S.C. § 824e, to enforce the NYISO Services Tariff as the applicable filed rate. NYPA Rehearing Order at P 22, JA 710. In so doing, the Commission interpreted the Clean Power Agreement, finding that "NYPA is not obligated to pay delivery charges for station power that it self-supplies on site." *Id.* As the Commission confirmed, "this is contract interpretation, not contract abrogation or amendment." *Id.*

Likewise, Con Edison's arguments that the Commission violated or waived the provisions in the Clean Power Agreement requiring NYPA to pay the contract demand charge based on the maximum potential demand, and requiring a change-in-equipment to justify a reduction of the contract demand, are unpersuasive. Br.

¹⁰ Con Edison does not appear to dispute the Commission's determination that the Clean Power Agreement does not address or govern on-site self-supplied station power, as it did before the Commission. To the extent that Con Edison has, in its opening brief, declined to present some arguments that were raised below, it has waived these contentions on appeal. *See supra* n. 6.

at 35-37. Because the Commission found the Clean Power Agreement inapplicable to the only service at issue, on-site self-supplied station power, the Commission could not have violated or waived any provision of the Agreement. “The contract demand provision of PASNY No. 4 includes a ratchet under which the highest demand for the past 12 month period operates as a floor for the next period’s contract demand.” NYPA Complaint Order at P 55, n. 22, JA 642. Con Edison’s presumption that “[s]tation power that NYPA nets remains part of the maximum potential demand under the PASNY No. 4 Tariff,” Br. at 35, conflicts with the Commission’s determination that the Clean Power Agreement does not even address on-site self-supply that NYPA nets under the NYISO Services Tariff. NYPA Complaint Order at P 44, JA 638-39; NYPA Rehearing Order at P 22, JA 710. Permitting Con Edison to include on-site self-supplied station power in the calculation of the contract demand charge would effectively permit charges based upon the netted station power, in contravention of the Commission’s conclusion that “Con Edison cannot charge for any delivery services associated with on-site self-supply.” NYPA Complaint Order at P 44, JA 638-39.

The Commission Reasonably Determined That It Did Not Violate Constraints On Retroactivity In Finding the Clean Power Agreement Inapplicable To The Service At Issue And Directing Refunds.

As with the Entergy Interconnection Agreements, Con Edison’s arguments that the Commission violated provisions of the PASNY No. 4 Tariff, the filed rate

doctrine, the rule against retroactive ratemaking and FPA section 206, 16 U.S.C. § 824e, are premised upon Con Edison's inaccurate claim that the Clean Power Agreement, and therefore the PASNY No. 4 Tariff referenced therein, are applicable to on-site self-supplied station power. Br. at 39-42.

As an initial matter, this Court lacks jurisdiction over two of Con Edison's arguments regarding refunds. Con Edison failed to raise objections to the refunds on rehearing before the Commission based upon the rule against retroactive ratemaking, Br. at 40, and requirements under FPA section 206, 16 U.S.C. § 824e, concerning the refund effective date, Br. at 42. *See* 16 U.S.C. § 825l(b). There are no reasonable grounds for Con Edison's failure here, where other parties before the Commission raised similar claims in response to NYPA's Complaint. The Commission rejected these claims in the NYPA Complaint Order, and Con Edison failed to challenge the Commission's determination on rehearing. *See* NYPA Complaint Order at P 56 ("Finally, the [intervenors] claim that the relief requested by NYPA would violate the filed rate doctrine and the rule against retroactive ratemaking, and that NYPA's request for such retroactive relief is barred under FPA section 206."), JA 642. Further, Con Edison's claim on rehearing that "the Commission has not satisfied the procedural and substantive requirements of Section 206" was made in the context of arguments that the Commission abrogated the Clean Power Agreement and lacks sufficient specificity to satisfy the

requirements of 16 U.S.C. § 825l(b). Con Edison Request for Rehearing at 16-17, JA 669-70. *See, e.g., Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (under 16 U.S.C. § 825l(b), arguments to the Court must be raised with specificity to the agency).

In any event, Con Edison's claim that the Commission improperly ordered retroactive refunds lack merit. In directing Con Edison to refund amounts NYPA paid to Con Edison from April 2003 to December 2003, the Commission exercised its authority under FPA section 206 to enforce the filed rate. NYPA Rehearing Order at P 21, JA 710; NYPA Complaint Order at P 56, JA 642-43. Thus, the Commission is "not retroactively changing a rate on file, but rather . . . enforcing the rates, terms, and conditions of several filed rate schedules" including the NYISO Services Tariff, the Clean Power Agreement and the PASNY No. 4 Tariff. NYPA Complaint Order at P 56, JA 642-43; NYPA Rehearing Order at P 21, JA 710. As the Court explained in *Niagara Mohawk*, there is no "preexisting relevant filed rate;" therefore, "there can be no retroactive alteration of it." *Niagara Mohawk*, 452 F.3d at 830 n.9 (citing *Ark. La. Gas Co. v. Hall*, 453 U.S. at 578); *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 for a wholesale service subject to Commission jurisdiction).

Con Edison's argument that the Commission is precluded from retroactively directing refunds because the PASNY No. 4 Tariff prohibits retroactive adjustment of the contract demand level fails as well. Br. at 42. The Commission recognized that this provision is "a limitation on NYPA's right to make a downward adjustment to the contract demand it nominated during the period the contract demand is in effect." NYPA Complaint Order at P 55, JA 642. However, the Commission reasonably concluded that this "provision is not a limitation on the Commission's authority under section 206 of the FPA to order refunds or to enforce a rate on file." *Id.* Like Con Edison's other objections, this argument is premised upon the false assertion that the Clean Power Agreement is applicable to on-site self-supply, *i.e.* that on-site self-supply is part of the contract demand. It is not; therefore, the Commission has not retroactively adjusted the contract demand by enforcing the filed rate.

**The Commission Reasonably Determined That Con Edison
Should Retain Only The Amounts NYPA Actually Paid For
The October 2003 Pouch Terminal Services.**

Finally, Con Edison objects to the Commission's determination regarding the amount of the credit Con Edison should receive for delivery services provided when NYPA remotely self-supplied station power for the Pouch Terminal during October 2003. Br. at 37-39. Remote self-supply is governed by the Clean Power Agreement and the PASNY No. 4 Tariff; this is the only instance in this

proceeding where the NYISO Services Tariff does not address the service at issue.

The Commission explained that:

[D]uring each of the 24 months from April 2003 to March 2005, nine of the ten Clean Power Projects self-supplied on site their full station power requirements. The tenth project (the Pouch Terminal) self-supplied its station power requirements on site in 23 out of 24 months. In October 2003 (which falls within the refund period), NYPA states, it remotely self-supplied the Pouch Terminal with 12 net [megawatt hours] of station power.

NYPA Complaint Order at P 6, JA 629. Thus, when the Commission directed Con Edison to issue refunds to NYPA it excluded “the *revenues* associated with Con Edison’s delivery of the [station power] that NYPA remotely self-supplied to the Pouch Terminal in October 2003.” *Id.* at P 54, JA 641-42 (emphasis added). On rehearing, the Commission clarified that Con Edison should retain only “the *actual amount* of revenues that NYPA paid Con Edison for delivery service for the Pouch Terminal in October 2003.” NYPA Rehearing Order at P 31, JA 713 (emphasis added).

Con Edison argues that the ratchet and surcharge provisions of the PASNY No. 4 Tariff should be applied to increase the Pouch Terminal charges because, in directing Con Edison to refund charges Con Edison improperly assessed NYPA for delivery of on-site self-supplied station power, the Commission “reduced NYPA’s contract demand to zero as of April 2003.” Br. at 38. The ratchet and surcharge provisions impose additional charges on NYPA when its demand increases. *See*

Br. at 38. Considering this argument, the Commission noted that Con Edison's position is based on

certain assumptions, namely that: (1) Con Edison had allowed NYPA to net station power deliveries in October 2003; (2) NYPA had decreased the contract demand for the Pouch Terminal from 1900 [kilowatts ("kW")] to zero kW; and (3) NYPA had still remotely self-supplied 12 net [megawatt hours] to the Pouch Terminal in October 2003, with a peak demand of 1100 kW.

NYPA Rehearing Order at P 11, JA 707 (emphasis added) (discussing NYPA's objections). Referring to these assumptions, the Commission reasonably concluded "that Con Edison is proposing to retain a hypothetical amount based on *certain assumptions*, all of which we reject." NYPA Rehearing Order at P 32, JA 713 (emphasis added).

Con Edison failed to offer anything but assumptions and conjecture to support its claim that the ratchet and surcharge provisions should apply. Further, Con Edison again presumes that the PASNY No. 4 Tariff is applicable to NYPA's on-site self-supplied power, *i.e.* that NYPA's on-site self-supply was part of the contract demand and that the Commission changed the contract demand by reducing it to zero in the months preceding October 2003. This cannot be reconciled with the Commission's determination that the Clean Power Agreement does not even address on-site self-supply that NYPA nets under the NYISO Services Tariff and that "Con Edison cannot charge for any delivery services associated with on-site self-supply." NYPA Complaint Order at P 44, JA 639;

NYPA Rehearing Order at P 22, JA 710. Accordingly, the Commission reasonably determined that Con Edison should not retain anything more than the revenues NYPA has already paid. *See, e.g., Sithe/Independence*, 165 F.3d at 948; *East Kentucky Power Coop. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007) (noting that the Court is “particularly deferential” to the Commission’s rate determinations).

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

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