

94 FERC ¶ 61,251

UNITED STATES OF AMERICA
 FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
 William L. Massey, and Linda Breathitt.

PJM Interconnection, L.L.C.	Docket No. ER00-3513-000
New York State Electric & Gas Corporation	Docket No. EL99-86-000
Dunkirk Power, LLC, Huntley Power, LLC, and Oswego Harbor, LLC	Docket No. EL00-113-000

ORDER ON PETITIONS FOR DECLARATORY ORDER
 AND SUPPLEMENTAL ORDER ON RATE APPLICATION

(Issued March 14, 2001)

In Docket No. ER00-3513-000, PJM Interconnection, L.L.C. (PJM) submitted for filing amendments to Attachment K of the PJM Open Access Tariff (PJM Tariff) and to Schedule 1 of the Amended and Restated Operating Agreement (PJM Operating Agreement) to authorize the netting of station power¹ used at a generating station against certain wholesale sales from the generating station. In Docket No. EL99-86-000, New York State Electric & Gas Corporation (NYSEG) filed a petition for declaratory order requesting that the Commission disclaim jurisdiction over NYSEG's provision of station power as an unbundled retail sale of electricity. In Docket No. EL00-113-000, Dunkirk Power, LLC; Huntley Power, LLC; and Oswego Harbor, LLC (collectively, NRG) filed a petition for declaratory order requesting that the Commission find that the provision of station power is subject to this Commission's jurisdiction as a wholesale transaction.

In this order, we find that a generator may net its station power requirements against the generating facility's gross output whenever the generating facility's gross output exceeds or equals its station power requirements, that is, when the generator is self-supplying its station power requirements. However, when a generating facility's station power requirements exceed its gross output (such as during an extended outage),

¹We define "station power" in Section II.B.1 of this order.

FERC - DOCKETED
 MAR 14 2001

010316-0173-1

Docket No. ER00-3513-000, et al. - 2 -

and the source of the station power is a third party, the provision of station power generally is a sale of electric energy for end use that is not subject to this Commission's jurisdiction. We will require PJM to revise its proposed amendments to conform to these findings.

I. Background

A. Docket No. ER00-3513-000

1. PJM's Proposed Amendments

In Docket No. ER00-3513-000, PJM proposed to modify the PJM Tariff and PJM Operating Agreement to clarify that generation facilities located in the PJM control area may obtain from the PJM Interchange Energy Market² "station power," defined by PJM as energy consumed by a generation facility in the PJM control area (or by equipment or facilities located at the site of such generation facility) and used in the operation, maintenance, or repair of such generation facility, regardless of whether the facility is operating when the station power is consumed. As explained in our initial order in Docket No. ER00-3513-000,³ under the proposed revisions, a Market Seller, an entity that owns or operates a generation facility within the PJM control area, may buy such station power in the PJM Interchange Energy Market for that generation facility. The proposed revisions also provide that if and to the extent that a Market Seller obtains station power from the PJM Interchange Energy Market, it may net those purchases on an hourly basis against its wholesale sales into the PJM Interchange Energy Market.

In its transmittal letter, PJM notes that vertically-integrated utilities in the PJM control area traditionally have treated station power as "net generation" or "negative generation":

[E]nergy output of a generation facility typically was recorded as its gross output less the power consumed at the facility. Station power used during periods when the generator was not operating likewise was treated as negative generation. To the extent that a generation facility's station power needs were not met with on-site power production, the facility received the necessary energy from the utility's transmission and/or distribution

²The PJM Interchange Energy Market is a real-time balancing market that PJM administers for market participants within the PJM control area.

³PJM Interconnection, LLC, 93 FERC ¶ 61,061 (2000) (PJM I).

Docket No. ER00-3513-000, et al. - 3 -

facilities. In the case of an integrated utility, such energy typically was supplied by its other generation stations or, if the utility was part of a centrally dispatched power pool such as PJM, by the pool's then-available energy supplies.⁴

PJM notes that as formerly vertically-integrated utilities divest their generating assets to third parties, the question arises as to how these generators can meet their station power needs, particularly when the generator is not operating. The proposed amendments are the result of study and vote by the PJM stakeholders on this question. PJM states that the proposed amendments:

will simply continue and formalize the prevailing treatment of station power within the PJM region, as it existed historically, but modified to recognize the establishment of the PJM Interchange Energy Market. The tariff will permit, but not require, generators to obtain station power from the PJM grid as "negative generation," including when their generating facilities are not operating. This "negative generation" will constitute a purchase from the PJM Interchange Energy Market. Alternatively, at their option, generators may obtain station service from a local utility under retail tariffs or service agreements.⁵

In support of its proposal, PJM contends that station power service "is an appropriate adjunct" to the jurisdictional transmission service PJM provides to its interconnected generators.⁶ PJM maintains that its proposal is consistent with the Commission's treatment of restoration (or blackstart) service as an optional jurisdictional service.⁷

2. Comments Supporting PJM's Proposal

Supporters of PJM's proposal generally argue that vertically-integrated utilities, and this Commission, traditionally view station power as "net" or "negative generation"

⁴PJM Transmittal Letter at 2.

⁵Id. at 5 (footnote omitted).

⁶Id. at 6.

⁷Id. at 6-7.

Docket No. ER00-3513-000, et al. - 4 -

priced at wholesale energy rates, and not as a retail sale.⁸ Duke Energy North America, LLC (DENA) maintains that station power is an "integral and essential" service to the owners and operators of the facilities that "affects or relates to" the production and sale of energy at wholesale. DENA further asserts that it is good public policy to provide merchant generators with flexible arrangements for obtaining station power.⁹

Keyspan-Ravenswood, Inc. (Ravenswood) complains that to grant the host utilities' demands that the merchant owners of divested generation pay retail rates for station power would cause significant disparities in the rates paid by divested generation within and among markets, which in turn would lead to undue discrimination and possible inefficiencies in the dispatching of generators.¹⁰

3. Comments Opposing PJM's Proposal

The opponents of PJM's proposal generally argue that energy sold as station power is consumed for end use and therefore is not subject to the Commission's jurisdiction under the Federal Power Act (FPA). The opponents assert that the Commission has not previously taken issue with the characterization of the provision of station power as a retail transaction.¹¹

PECO Energy disputes PJM's claim that the proposed amendments simply continue historical practices. It claims that its own practice is to provide station power to merchant generators¹² under retail tariffs that allow a merchant generator to net its station power needs against its output when generating, but require the purchase of station power under special rate plans when the unit is not generating. PECO Energy states that it

⁸See, e.g., Independent Power Producers of New York, Inc. (IPPNY) at 4-5.

⁹DENA at 3-4.

¹⁰Ravenswood at 3-4.

¹¹E.g., PECO Energy at 3; Conectiv at 3-5.

¹²We use the term "merchant generator" in this order to denote a non-vertically integrated owner of generating facilities. A "merchant generator," as we use this term in this order, may include either an independent power producer or an affiliated power producer.

Docket No. ER00-3513-000, et al. - 5 -

intends to apply these same arrangements not only to new merchant generators, but also to generators it currently owns that it will divest to affiliates.¹³

PPL Electric Utilities Corporation, PPL EnergyPlus, LLC, and PPL Generation, LLC (collectively, PPL Companies) argue that some generators could use PJM's proposal to avoid payment of their share of state-imposed retail stranded costs recovered through their host utilities' retail station power rates.¹⁴ The PPL Companies accuse PJM of creating an exception to the rule that all end-use purchases are within the exclusive jurisdiction of the states. They fear that this exception might swallow the rule to the extent that industrial or commercial customers install distributed generation units or co-generate, which might make them indistinguishable from generators that are eligible to purchase station power in the PJM Energy Interchange Market under PJM's proposal.¹⁵

The New York Public Service Commission (New York Commission) objects to PJM's characterization of station power as a wholesale transaction and argues that station power is a type of "standby service," which it defines as including supplemental capacity and energy provided to customers whose on-site generation is insufficient to meet their loads. The New York Commission characterizes standby service as bundling transmission and distribution functions with such retail sales of electric energy and capacity. Thus, the New York Commission argues, standby service is a bundled retail sale made to an end user for its own consumption and is not within this Commission's jurisdiction.¹⁶

4. PJM I and Subsequent Filings

On October 25, 2000, in PJM I, we accepted PJM's proposed amendments for filing and suspended them for five months, to become effective, subject to refund, on March 24, 2000. We stated that because similar, if not identical, issues regarding station power had been raised in Docket Nos. EL00-113-000 and EL00-86-000, we would address the issues presented in the three cases at the same time.

¹³PECO Energy at 4-5.

¹⁴PPL Companies at 16-17.

¹⁵Id. at 17.

¹⁶New York Commission at 2-3; see also Virginia State Corporation Commission at 1-2 (agreeing with New York Commission that sales of station power are retail, not wholesale, transactions).

Docket No. ER00-3513-000, et al. - 6 -

Subsequent to the issuance of PJM I, on October 21, 2000, the New York Commission filed a motion to lodge decision and supplemental comments. NRG Energy, Inc., NRG Thermal Corporation, and NRG Power Marketing, Inc. filed an answer in opposition to the New York Commission's motion to lodge. The decision at issue is a Declaratory Order on Jurisdiction over Stand-by Service, issued on September 29, 2000 by the New York Commission (Declaratory Ruling).¹⁷ On March 2, 2001, the New York Commission filed a second motion to lodge decision and supplemental comments. The decision at issue is an Order Denying Rehearing (of the earlier Declaratory Ruling), issued on February 8, 2001 by the New York Commission. In addition, Edison Mission Energy and Edison Mission Marketing & Trading, Inc. (Edison Mission) filed comments and a motion to intervene out of time.

B. Docket Nos. EL99-86-000 and EL00-113-000

In these two proceedings, the applicants request that we determine whether the provision of station power is a retail transaction subject to state jurisdiction. Here we discuss the particular facts and arguments raised in each of the two petitions.

1. Docket No. EL99-86-000

a. NYSEG's Petition for Declaratory Order

In Docket No. EL99-86-000, NYSEG requests that the Commission disclaim jurisdiction over standby service provided as a bundled retail service. NYSEG explains that, pursuant to its retail rate schedule Service Classification No. 11 (SC-11), it provides qualifying facilities (QFs), industrial/commercial customers, and merchant generators in its franchise area with standby service. According to NYSEG, standby service is a bundled retail service consisting of three components: (1) supplemental service, (2) back-up service, and (3) maintenance service. SC-11 defines supplemental service as capacity and energy supplied to a customer "on a regular basis" to supplement the customer's power requirements in addition to that "ordinarily supplied" by the customer's on-site generation facilities; back-up service as capacity and energy supplied during an unscheduled outage of a customer's source of on-site generation; and maintenance service

¹⁷In brief, Consolidated Edison of New York, Inc. (Con Edison) had filed a petition for declaratory ruling with the New York Commission, requesting that the New York Commission find that Con Edison's sale of standby service to generators is a retail service subject to regulation by the New York Commission (Case No. 00-E-0757). In the decision at issue, the New York Commission held that it has jurisdiction over Con Edison's sales of standby power.

Docket No. ER00-3513-000, et al. - 7 -

as capacity and energy supplied to a customer during a scheduled outage of the customer's source of on-site generation to replace power ordinarily scheduled by the on-site generation facilities.¹⁸

NYSEG asserts:

All three component services [of standby service as defined in SC-11] are provided to generators interconnected to NYSEG's system when a generator's output level is below its station service requirement. Station service is end-use consumption of energy, including, but not limited to, energy to keep building structures lighted, air conditioned or heated. As a bundled retail service, which service consists of transmission and distribution bundled with retail sales of electric capacity and energy, standby service ensures that generators will have sufficient energy and capacity available in the event of scheduled or forced outages of their generation facilities.¹⁹

NYSEG argues that standby service, as a bundled retail service, is outside the Commission's jurisdiction under the FPA. NYSEG asserts that its position is consistent with the Commission's statement in Order No. 888 that "when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail. Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales."²⁰

Notice of NYSEG's petition was published in the Federal Register, 64 Fed. Reg. 47,497 (1999), with comments, protests and motions to intervene due on or before September 17, 1999. This date was later extended until December 17, 1999, September

¹⁸NYSEG Petition for Declaratory Order at 1-2.

¹⁹Id. at 2.

²⁰Id. at 5 (quoting Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,781 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), cert. granted, 69 U.S.L.W. 3574 (Nos. 00-568 (in part) and 00-809) and cert. denied, id. (No. 00-800) (U.S. Feb. 26, 2001)).

Docket No. ER00-3513-000, et al. - 8 -

12, 2000, and finally October 3, 2000. The New York Commission filed a notice of intervention and comments supporting NYSEG's petition for declaratory order. Timely motions to intervene and protests or comments opposing NYSEG's position were filed by AES NY, L.L.C (on behalf of AES Eastern Energy, L.P. and AES Creative Resources, L.P.); Ravenswood; Astoria Gas Turbine Power LLC, Arthur Kill Power LLC, Dunkirk Power LLC, Huntley Power LLC and Oswego Harbor LLC (collectively, NRG); and IPPNY. Orion Power New York GP Inc. (Orion) filed a timely motion to intervene and untimely protest opposing NYSEG's position. NYSEG filed a motion for leave to answer and an answer to the protests.

b. Comments Supporting NYSEG's Petition

In its supporting comments, the New York Commission explains that it sets NYSEG's standby service rates in conformance with the ratemaking principles it adopted in its Opinion No. 82-10. According to the New York Commission, those principles reflect the Public Utility Regulatory Policies Act of 1978 (PURPA) and implementing regulations,²¹ which entitle QFs to non-discriminatory rates for the supply of electricity when their facilities are off line. It explains that in Opinion No. 82-10, it adopted standby rates applicable to QFs and other customers that own generators, and specifically decided that it would not distinguish between QFs and other customers owning generators that wanted to purchase standby service.²²

c. Comments Opposing NYSEG's Petition

Opponents of NYSEG's request are predominantly merchant generators that have purchased generation facilities previously owned and operated by vertically-integrated utilities. These merchant generators argue that it is unduly discriminatory to allow vertically-integrated utilities to net their own station power requirements while requiring merchant generators to purchase their station power needs at state-regulated retail rates.²³

Ravenswood argues that the provision of station power is not retail in nature at all, but rather is incidental to a wholesale generator's business of supplying wholesale power

²¹ 16 U.S.C. § 825a-3(c) (1994); 18 C.F.R. § 292.305 (2000).

²² New York Commission at 3-4.

²³ E.g., IPPNY at 2-4.

Docket No. ER00-3513-000, et al. - 9 -

to an ISO grid, as reflected in the traditional treatment of station power as net or negative generation.²⁴

NRG emphasizes that generating facilities owned by a vertically-integrated utility typically take their station power needs from the utility's other generating stations or, if the utility is part of a tight power pool, from the pool's centrally-dispatched available energy supplies. In either case, station power is never priced at retail rates. NRG objects to NYSEG's deviation from this traditional practice simply because third parties (like NRG) now own these divested generating facilities.²⁵ Further, NRG argues that allowing station power service to be treated as a wholesale transaction will foster the creation of seamless trading areas across multiple regional markets, including ISOs, consistent with the goals of Order No. 2000. NRG contends that allowing NYSEG to require merchant generators to purchase station power under SC-11 would be inefficient, would put those generators at a competitive disadvantage vis-a-vis generators in PJM and New England (by limiting the former's access to low-cost supplies of station power), and would impede the development of workably competitive energy markets in the region.²⁶

d. NYSEG's Response to Opposing Comments

In its answer, NYSEG maintains that standby service is not akin to generation interconnection service because the former involves service to an end-user. NYSEG also argues that standby service is not similar to blackstart service because the latter is critical to the maintenance of transmission system integrity and the restoration of the entire transmission system subsequent to a system-wide blackout. In contrast, NYSEG argues, standby service provides for the load requirements of generation facilities within the provider's service area. NYSEG concludes:

Clearly, standby service provided as a bundled retail service and consumed by a customer in connection with unit-specific circumstances is substantially distinct from a service consumed for purposes of maintaining transmission system integrity. As with interconnection service, black-start

²⁴Ravenswood at 3-5.

²⁵NRG at 8-9.

²⁶Id. at 11-12.

Docket No. ER00-3513-000, et al. - 10 -

service is directly linked to the FERC-jurisdictional transmission of electricity in interstate commerce.²⁷⁾

2. Docket No. EL00-113-000

a. NRG's Petition for Declaratory Order

In Docket No. EL00-113-000, Dunkirk Power LLC, Huntley Power LLC, and Oswego Harbor LLC (collectively, NRG) request that the Commission find that NRG's electric generating facilities (recently purchased from Niagara Mohawk Power Corporation (Niagara Mohawk)) may purchase station power from sources other than Niagara Mohawk, regardless of whether a particular generating facility is operating, and can also net such station power against the facility's gross output. In addition, NRG requests that the Commission issue an order declaring that Niagara Mohawk cannot require any of NRG's generating facilities to purchase station power under a retail tariff and that Niagara Mohawk cannot rely on state law self-help procedures to bypass the Commission's jurisdiction over station power and to shut down any such generating facility.

NRG explains that in 1999, it purchased three generating facilities from Niagara Mohawk, which disposition received approval from this Commission and the New York Commission. Niagara Mohawk and NRG entered into a series of agreements ancillary to the disposition of the generating facilities and related transmission facilities, including agreements governing the interconnection of each generating facility to Niagara Mohawk's transmission system.²⁸ NRG relates that in late 1999, it received a bill from Niagara Mohawk purporting to reflect amounts due under Niagara Mohawk's retail tariff for the station power requirements of the Huntley and Dunkirk facilities for some indefinite period in 1999. Then, starting in early spring of 2000, NRG began receiving similar bills from Niagara Mohawk for station power requirements for all three of the generating facilities it had purchased from Niagara Mohawk. NRG states that its repeated requests for an explanation of the basis for the bills have gone unanswered, although Niagara Mohawk allegedly admitted to NRG that it continues to net the station power requirements of its retained (non-divested) generation facilities.²⁹

²⁷NYSEG Answer at 6-7.

²⁸NRG Petition for Declaratory Order, at 2-3.

²⁹Id. at 4.

Docket No. ER00-3513-000, et al. - 11 -

NRG argues that vertically-integrated utilities like Niagara Mohawk historically – and currently – net the station power requirements of their own generating facilities, and do not charge other vertically-integrated utilities for station power service when those other utilities' generating facilities are located in their retail service territory. NRG objects to these vertically-integrated utilities simultaneously charging the owners of divested generation for station power under retail tariffs.³⁰

As evidence of the historical practice in New York State of netting station power requirements, NRG notes that in 1972, Niagara Mohawk, Con Edison, and Central Hudson Gas & Electric Corporation (Central Hudson) entered into a start-up power agreement as joint owners of the Roseton generating facility (Roseton Agreement). Under the Roseton Agreement, the three joint owners agreed that start-up power (which NRG characterizes as a component of station power service) is to be netted against the gross output of the Roseton facility before the joint owners allocate net generation among themselves.³¹ As further evidence, NRG asserts that the 1991 New York Power Pool (NYPP) Agreement, to which Niagara Mohawk is a signatory and which is a wholesale rate schedule on file with the Commission, provides for the netting of station power for a member's generating facilities located in the retail service territories of other members.³²

NRG claims that the practice in PJM also is to net station power, citing to PJM's filing in Docket No. ER00-3513-000 and to the recent interconnection agreements between NRG and Conectiv's affiliates, which provide that a facility may net station power from gross output at no charge or, if the facility is not generating sufficient energy to meet its station power requirements, it may acquire such energy from an authorized supplier other than Conectiv's affiliates.³³

With regard to New England, NRG cites to certain New England Power Pool (NEPOOL) market rules on file at this Commission which, it maintains, demonstrate that the Commission has implicitly recognized station power as an optional wholesale service available to market participants. NRG further notes NEPOOL market rules authorize

³⁰Id. at 5.

³¹Id. at 5-6.

³²Id. at 6-7 & n.14. NRG also states that the NYPP Agreement uses the same definition of "net dependable capacity" as the North American Electric Reliability Council (NERC), which is the "maximum capacity a unit can sustain over a specified period . . . reduced by the capacity required for station service or auxiliaries." Id. at n.14.

³³Id. at 9-10.

Docket No. ER00-3513-000, et al. - 12 -

pumped storage hydroelectric facilities in the pumping mode to purchase energy at wholesale. NRG states that the treatment of energy purchased for pumped storage units in the pumping mode is similar to the netting of station power allowed other generators in NEPOOL, and contends that there is "not a substantial distinction between purchasing power at wholesale for pumping water and purchasing power at wholesale to power generating facilities, both of which result in the production of energy."³⁴

In support of its request that the Commission add station power in the form of negative generation to the scheduled services available under the *pro forma* tariff, NRG asserts the Commission has interpreted section 205(c) of the FPA as requiring the filing of rate schedules, contracts, and other documents that "affect or relate to" charges and rates for wholesale sales and transmission service, which is to be determined on a case-by-case basis.³⁵

Notice of NRG's petition was published in the Federal Register, 65 Fed. Reg. 60,184 (2000), with comments, protests, and motions to intervene due on or before October 20, 2000. The New York Commission filed a notice of intervention and comments opposing the petition. Timely motions to intervene raising no substantive comments were filed by Dynegy Power Marketing, Inc. and the New York Independent System Operator, Inc. Timely motions to intervene and comments supporting NRG's petition were filed by PG&E National Energy Group, Inc., PG&E Generating Company, and PG&E Energy Trading-Power, L.P. (collectively, PGE National Energy Companies); Electric Power Supply Association (EPSA); DENA; IPPNY.; Ravenswood; Orion; AES NY, L.L.C. (AES-NY); and Southern Energy Bowline, L.L.C., Southern Energy Lovett, L.L.C., and Southern Energy NY-Gen, L.L.C. (collectively, Southern Energy). Timely motions to intervene and protests or comments opposing NRG's petition were filed by NYSEG; Connecticut Light and Power Company (CL&P); and Niagara Mohawk. Untimely motions to intervene and protests or comments opposing NRG's petition were filed by Con Edison, Commonwealth Edison Company (Commonwealth Edison), and United Illuminating Company (United Illuminating). Midwest Generation, LLC (Midwest) filed an untimely motion to intervene and comments supporting NRG's petition, and Commonwealth Edison filed a motion for leave to respond to Midwest's motion to intervene out of time and answer to Midwest's comments. NRG filed a motion for leave to answer the protests and comments opposing its petition, and Niagara Mohawk filed an opposition to that motion and an answer to NRG's answer.

³⁴Id. at 10-11 & 15 n.21.

³⁵Id. at 14-15.

Docket No. ER00-3513-000, et al. - 13 -

b. Comments Supporting NRG's Petition

DENA complains that the current ambiguity about the jurisdictional nature of station power has led to a situation in which vertically-integrated utilities in the Northeast net their station power requirements while simultaneously forcing competing merchant generators to buy station power at retail prices. DENA argues that this disparate treatment distorts competitive market outcomes, interferes with economic efficiency (through the impact of station power costs on a generator's relative dispatch rate), and creates an unfair competitive advantage for those generators owned or affiliated with utilities who are selling higher-cost station power to competing generators.³⁶

DENA and other parties argue that the disparate treatment of station power between merchant generators and vertically-integrated utilities is a violation of Order No. 888's comparability standard, is unduly discriminatory, produces economic inefficiencies, sends incorrect price signals, and adversely affects the development of workably competitive energy markets and the achievement of the Order No. 2000's goal of fostering inter-regional coordination.³⁷ Finally, DENA argues that there is "a sufficiently strong nexus between the provision of station power and the production of electric power for wholesale use" for this Commission's jurisdiction to attach.³⁸

Midwest points out that vertically-integrated utilities generally recover their generating units' station power costs from non-affiliated customers. When that generation is divested, and its new owners are directly charged for station power, the utility is likely to be double recovering its costs. Midwest suggests that it may be more productive for the Commission not to make any jurisdictional findings with regard to station power, but rather to require that all public utilities with market-based rate authority demonstrate that they are providing station power to all generators, affiliated or non-affiliated, on a comparable basis, just as the Commission requires that public utilities with market-based rates whose affiliates control inputs to electricity (such as fuel supplies) demonstrate that their affiliates provide such inputs to affiliates and non-affiliates in a non unduly discriminatory manner.³⁹

³⁶DENA at 4-5.

³⁷E.g. IPPNY at 3-5; EPSA at 3; Ravenswood at 4; Orion at 5.

³⁸DENA at 8.

³⁹Midwest at 4-7.

Docket No. ER00-3513-000, et al. - 14 -

c. Comments Opposing NRG's Petition

Niagara Mohawk asserts that each of the three generating units that NRG purchased from it

is configured such that the electricity required to operate the facility ("station service") is supplied from distribution facilities owned by Niagara Mohawk even during periods when those generating facilities are producing electricity. When those facilities are not generating electricity, all electricity used by NRG in these facilities is supplied by Niagara Mohawk.⁴⁰⁾

Niagara Mohawk states that all of the electricity that it furnishes to NRG at the delivery points serving the three units is consumed by NRG in or at those facilities and that none of the electricity is resold by NRG to any third party. Thus, Niagara Mohawk asserts, this Commission has no jurisdiction under the FPA to regulate Niagara Mohawk's provision of station power service to NRG.⁴¹

Niagara Mohawk contends that the Commission's assertion of jurisdiction in various cases over generation interconnection, blackstart power, or auxiliary use when generating units are down does not aid NRG's position. Rather, Niagara Mohawk maintains, "each of these services may be either wholesale or retail in nature, depending on whether the transaction to which it relates involves service provided directly to the ultimate consumer or service provided to another market participant for resale."⁴²

Commonwealth Edison distinguishes between the situations when a generator nets its station power against its own output and when it is taking its station power requirements from an outside source. Commonwealth Edison states when a generating facility draws all of its station power requirements from on-site sources (main or auxiliary generators) that are "behind the meter" (that is, behind the facility's point of interconnection with the transmission provider's system), that facility is self-supplying its own station needs and, under Illinois law, is purchasing neither energy supply nor delivery service. However, when the facility is not producing energy or is producing less than its station power requirements, then it necessarily is taking energy from an outside source to meet its station power needs and is using the transmission and/or distribution

⁴⁰Niagara Mohawk at 3.

⁴¹Id. at 3-4.

⁴²Id. at 14.

Docket No. ER00-3513-000, et al. - 15 -

network to import the station power. Commonwealth Edison states that the questions then are "who supplies this power and under what terms and who delivers it and how they are compensated for these services."⁴³

Commonwealth Edison asserts that, with regard to their consumption of energy needed to meet their loads for lighting, heating, or air-conditioning, merchant generators are no different from industrial or commercial customers, and their consumption of energy for these loads should be similarly treated as a retail purchase. Commonwealth Edison rejects the argument that, because a merchant generator uses station power as an input in its own production of wholesale electricity, this turns the provision of station power into a wholesale transaction. According to Commonwealth Edison, "[o]ne might as well say that an aluminum plant was reselling electricity because electricity is a prime input of production."⁴⁴

According to Commonwealth Edison, Illinois state law specifies that a generator using station power is a retail customer entitled to purchase station power from the incumbent electric utility on either a bundled or an unbundled basis. The generator may also purchase station power on a competitive basis from any other qualified supplier, either utility or non-utility. If the generator chooses to purchase station power on an unbundled basis (or self-supplies from an affiliated remote generator), Illinois law requires that it take tariffed delivery service from the incumbent utility to deliver the station power to its facilities, according to Commonwealth Edison. Commonwealth Edison explains that the local distribution component of the delivery charge would be determined by the Illinois Commerce Commission, although Illinois law expressly recognizes that the transmission component would be the filed rate set by this Commission in the transmission provider's OATT. Under this scenario, Commonwealth Edison posits, merchant generators cannot complain that they are unduly restricted in their purchase options or being charged with costs in excess of those associated with the specific services they receive.⁴⁵

⁴³Commonwealth Edison at 3-4.

⁴⁴Id. at 4.

⁴⁵Id. at 10-12.

Docket No. ER00-3513-000, et al. - 16 -

II. Discussion

A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2000), the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding in which they sought intervention.⁴⁶

In Docket No. ER00-3513-000, we will grant the New York Commission's motion to lodge decision. We will grant Edison Mission's unopposed, untimely motion to intervene, given the early stage of the proceeding, the movant's interest in the proceeding, and the absence of any undue prejudice or delay.

In Docket No. EL99-86-000, we will grant Orion's motion to file its protest one day out of time and also grant NYSEG's request to file an answer to several protests. We find that these pleadings have assisted us in understanding the issues before us.

In Docket No. EL00-113-000, we will grant the unopposed, untimely motions to intervene of Con Edison, United Illuminated Company, and Com Ed, given the early stage of the proceeding, the movants' interests in the proceeding, and the absence of any undue prejudice or delay. We also will grant NRG's request to file an answer to several protests, and accept for filing Niagara Mohawk's reply to NRG's answer. We find that these pleadings have assisted us in understanding the issues before us.

B. Analysis

1. The Definition Of "Station Power" And The Statutory Framework For Determining Our Jurisdiction Over Its Provision

From our review of the pleadings in these proceedings, the parties do not seem to always agree on the definition of "station power," nor does any party cite to a standard definition. Accordingly, for the purposes of this order, we will define "station power" as 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.

⁴⁶We previously acted on motions to intervene in Docket No. ER00-3513-000 in PJM I.

Docket No. ER00-3513-000, et al. - 17 -

However, as we explain later in this order, we find that the provision of station power is distinguishable from restoration or blackstart service, as discussed in Order No. 888 and subsequent cases. Therefore, we expressly exclude from the definition of "station power" the provision of any energy associated with restoration or blackstart service, as we have defined that service in Order No. 888 and subsequent cases.⁴⁷ For this reason, the instant order should not be read as applying to (specifically, as reversing or modifying) any of our previous decisions regarding restoration or blackstart service, including our orders accepting for filing agreements providing for restoration service and/or allocating the costs of blackstart capability among wholesale transmission customers.

To determine whether we have jurisdiction over the provision of station power in the first instance, we must turn to section 201(b)(1) of the FPA. That section states, in pertinent part:

The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but . . . shall not apply to any other sale of electric energy⁴⁸⁾

The FPA further defines the phrase "sale of electric energy at wholesale" as "a sale of electric energy to any person for resale."⁴⁹ Thus, we do not have jurisdiction over the sale of electric energy for end use, which is a retail transaction.⁵⁰ Given this statutory

⁴⁷E.g. New England Power Pool and USGen New England, Inc., 92 FERC ¶ 61,020 at 61,040-41 (2000); Central Hudson Gas & Electric Corp., et al., 86 FERC ¶ 61,062 at 61,216-17 (1999); Carolina Power & Light, Co., 82 FERC ¶ 61,204 at 61,801-02 (1998); California ISO Corporation, et al., 82 FERC ¶ 61,180 at 61,671 (1998); Pacific Gas & Electric Co., et al., 81 FERC ¶ 61,122 at 61,498-99 (1997).

⁴⁸16 U.S.C. § 824(b)(1) (1994).

⁴⁹16 U.S.C. § 824(d) (1994).

⁵⁰See generally Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964), United States v. Public Utilities Commission of California, 345 U.S. 295 (1953). See also Order No. 888 at 31,781 ("Under the FPA, the Commission's jurisdiction over sales of electric energy extends only to wholesale sales.").

Docket No. ER00-3513-000, et al. - 18 -

framework, we must determine when the provision of station power involves the sale of electric energy for end use, and when it does not.⁵¹

2. A Generator's Self-Supply of Station Power Does Not Involve A Sale. However, The Third-Party Provision Of Station Power Generally Involves A Sale For End Use That Is Not Subject To Our Jurisdiction.

The first question that we must consider is when the provision of station power is a sale, in the sense that there is a transaction between two parties, with one party using resources of another party for some form of consideration. To that end, we must examine the varying circumstances under which station power is used, how it is provided, and what facilities are involved in its provision.

PJM's transmittal letter in Docket No. ER00-3513-000 contains a succinct description of the treatment of station power as net, or negative, generation:

In general, vertically-integrated utilities in the PJM control area historically have treated station power as "negative generation." That is, the energy output of a generation facility typically was recorded as its gross output less the power consumed at the facility. Station power used during periods when the generator was not operating likewise was treated as negative generation. To the extent that a generation facility's station power needs were not met with on-site power production, the facility received the necessary energy from the utility's transmission and/or distribution facilities. In the case of an integrated utility, such energy typically was supplied by its other generation stations or, if the utility was part of a centrally dispatched power pool such as PJM, by the pool's then available energy supplies.⁵²

⁵¹In the event that the provision of station power also involves the unbundled retail transmission of electric energy in interstate commerce in a retail choice state, we would have jurisdiction over such transmission.

⁵²PJM Transmittal Letter in Docket No. ER00-3513-000, at 2. In addition, net output is generally exclusive of line losses to the point of interconnection with the network. See Malacha Power Project, Inc., 41 FERC ¶ 61,350 (1987) (line losses to the point of interconnection with the grid are subtracted from gross generator output to determine net power production capacity of a qualifying facility). However, the treatment of losses is not relevant to the issues before us in these proceedings, and we
(continued...)

Docket No. ER00-3513-000, et al. - 19 -

Station power may be provided to a generating facility in a variety of ways. The simplest scenario is when the generator is on-line and producing sufficient energy from on-site equipment to satisfy its station power requirements. In this case, the generator self-supplies 100 percent of its station power requirements from generation located "behind the meter" (that is, the energy does not pass through the metering point between the generator's facility and the network to which it is interconnected). Here, the generator's gross output exceeds (or at least equals) its station power requirements, so that it has a positive net output (or zero net output).

The situation becomes slightly more complex when the generator is either off-line, or on-line but not supplying enough energy to fully meet its station power needs. Here, the generator's gross output would be less than its station power requirements, and thus it has a negative net output.⁵³ When a generator has negative net output, its station power requirements necessarily must be met with energy produced from an off-site source. This off-site source may be another (remote) generator owned by the same company⁵⁴ or it may be a generator owned by a third party (including an affiliate of the generator). As PJM notes in the passage quoted above, in a tight power pool, a generator with negative net output "leans" on the interconnected network and takes its station power requirements from any generating resource located on that network, without regard to ownership.

In sum, there generally are three possible ways in which a generator facility's station power requirements may be met: (1) on-site self-supply; (2) remote self-supply; or (3) third-party supply. In the first scenario, the generator's gross output equals or exceeds its station power requirements (positive net output), while in the second and third scenarios, the generator's gross output can be less than its station power requirement (negative net output).⁵⁵

⁵²(...continued)

will not further discuss losses herein.

⁵³In the passage quoted above, PJM refers to this as "negative generation."

⁵⁴This is how vertically-integrated utilities have traditionally supplied the station power needs of their off-line generators.

⁵⁵The exception would be a facility configured so that its station power requirements are always supplied from an off-site source through separate feeder lines. In this situation, the facility could sell gross, not net, output, because its configuration prevents it from on-site self-supply and it cannot net its station power requirements against gross output.

Docket No. ER00-3513-000, et al. - 20 -

For both on-site self-supply and remote self-supply, the generator is using only its own generating resources. It is not consuming another party's energy. The generator typically accounts for its self-supply of station power by netting station power requirements against gross output.⁵⁶

Because a self-supplying generator is not using another's generating facilities, 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. In other words, there is no sale (for end use or otherwise) between two different parties, but only one party using its own generating resources for the purposes of self-supply and accounting for such usage through the practice of netting.

The parties have not cited, and we are not aware of, an instance in which we have treated the self-supply of station power through netting as a sale. Also, we are not persuaded that any company is "selling itself" station power when its generators self-supply station power, through either on-site or remote facilities. For example, in a case involving how to measure a QF's net power production capacity, we held that:

the net output of the facility is its send out after subtraction of the power used to operate auxiliary equipment in the facility necessary for power generation (such as pumps, blowers, fuel preparation, machinery, and exciters) and for other essential electricity in the facility from the gross generator output.⁵⁷⁾

We have similarly characterized the station power "necessary to operate the facility and enable it to generate electricity [as] properly an internal cost of the facility, just as losses, boiler efficiencies, etc."⁵⁸

⁵⁶The parties to these proceedings have provided us with extensive evidence that the prevailing (if not exclusive) historical practice of vertically-integrated utilities is to net station power needs when measuring the output of a generator, both for on-site self-supply and for remote self-supply. E.g., NRG Petition at 6-15. But see PECO Energy at 4-5 (stating that it intends to require affiliated owners of generating facilities to pay separate charges for station power and will not permit netting).

⁵⁷Occidental Geothermal, Inc., 17 FERC ¶ 61,231 at 61,445 (1981).

⁵⁸Penntech Papers, 48 FERC at 61,432.

Docket No. ER00-3513-000, et al. - 21 -

So, too, in Power Developers, Inc., 32 FERC ¶ 61,101 at 61,276 (1985), reh'g denied, 34 FERC ¶ 61,136 (1986), the Commission found the qualifying capacity of a facility to be its net, not its gross, electric power production capacity. We reasoned that if a QF were to sell its gross output to a utility at the utility's avoided cost, while buying station power from the utility at a different price, it would in fact be selling more power than the facility, standing alone, is capable of delivering.⁵⁹

Thus, when a generator self-supplies its station power requirements and accounts for station power by netting its requirements against gross output, there is no sale (for end use or otherwise) in the first instance. In contrast, in the case of third-party supply, the source of the generator's station power requirements is other than its own generating facilities. Here, the generator is not self-supplying its own station power needs, but is using another party's generation facilities. Thus, the provision of station power under these circumstances involves a sale of energy by a third party that is not appropriately accounted for by netting. Moreover, the energy being sold is not sold for resale, and therefore it is not a transaction which we can regulate under the FPA (we discuss in more detail why this is so below).⁶⁰

⁵⁹In contrast, in Turners Falls, LP, 53 FERC ¶ 61,075 (1990), order on clarification, 55 FERC ¶ 61,487 (1991), a QF was configured so that it could not self-supply its station power requirements, but rather purchased them from a utility. (That is, the sale of station power to the facility was electrically isolated (via a separate feeder line) from the facility's sale of power to a third party.) The Commission noted that the only reason the facility could sell gross output was because it was purchasing its station power needs from another company.

⁶⁰We emphasize that while the third-party supply of station power generally is a sale for end use not subject to our jurisdiction, the delivery of this energy on an unbundled basis may involve the unbundled retail transmission of electric energy in interstate commerce, which is subject to our jurisdiction. This may also be the case for remote self-supply, if a third party owns the transmission grid interconnecting the off-line generator and the source of the station power. Here, we would expect the transmission provider and transmission customer to enter into appropriate arrangements for such jurisdictional service, typically under the transmission provider's open access transmission tariff. The delivery of station power may also involve the usage of local distribution facilities; this aspect of the transaction may be subject to regulation by a state regulatory authority.

In this regard, we note that in a retail choice state, an end user is still buying retail
(continued...)

Docket No. ER00-3513-000, et al. - 22 -

In short, we find that jurisdiction over the provision of station power depends on how it is supplied. When a generator self-supplies its station power requirements, the traditional practice of netting appropriately reflects the fact that there is no sale, whether for end use or otherwise. When a generator's supply of station power is from a third party, then there is a sale for end use that we do not regulate.

We emphasize that a generator may net against its gross output as measured over a specific time period, typically one hour, such as in the PJM amendments, even though there may be occasions during that one hour when gross output is less than station power requirements. As long as net output is positive as measured over the entire one hour, then netting is appropriate. Our approach here is consistent with our precedent for measuring a QF's net output. In American Ref-Fuel of Bergen County, 54 FERC ¶ 61,287 (1991), the Commission used a "rolling one-hour" period for measuring the size limitation (80 MW) applicable to qualifying small power production facilities. In that case, Ref-Fuel argued that because of the substantial variation in the heat content of solid waste, the net output of the facility would often exceed 80 MW, but that it would be able to use an automatic control system to lower the net output to 80 MW whenever it exceeded 80 MW. Thus, Ref-Fuel said that it could maintain the 80 MW net output level on average over a rolling one-hour period. The Commission agreed to this approach, recognizing that:

generation output fluctuates instantaneously and accordingly must be adjusted many times each hour to follow system load changes. System load or consumer demand typically is determined by averaging energy use over a period of time of 15 to 60 minutes.⁶¹

The Commission held that because a facility's generation output varies constantly, and the facility would have to compensate for over-production within the rolling 60-minute period by under-producing, a net output in excess of 80 MW would not automatically violate the size limitations of PURPA.⁶²

⁶⁰(...continued)

transmission service and unbundled power supply as separate purchases (not as a single bundled purchase) even when one supplier sells both services. Once services are unbundled, they cannot be treated as re-bundled simply because one supplier is involved.

⁶¹54 FERC at 61,817.

⁶²Id. Similarly, in a 1998 case, the Commission held that a facility's net output
(continued...)

Docket No. ER00-3513-000, et al. - 23 -

3. The Particular Filings At Issue Here.

With these distinctions in mind, we now turn to PJM's proposed amendments to the PJM Tariff and PJM Operating Agreement. First, PJM proposes to define "station power" as:

energy consumed in the PJM Control Area by: (1) a generation facility owned or operated by a Market Seller or (ii) [sic] equipment or structures at the generation facility site used to operate, maintain, or repair such generation facility, regardless of whether the generation facility is operating when such energy is consumed." (Emphasis added.)

Second, PJM proposes to add the following provision to the PJM Tariff and PJM Operating Agreement:

A Market Seller may purchase Station Power from the PJM Interchange Energy Market for a generation facility that it owns or operates within the PJM Control Area. To the extent that a Market Seller purchases Station Power from the PJM Interchange Energy Market, it may elect to net each hour such purchases against its sales to the PJM Interchange Energy Market.

We find that this language is overly broad. To the extent that the amendments continue the practice of allowing generators with positive net output to self-supply station power, then the amendments are acceptable. However, because the amendments define station power as including those instances when a generator has negative net output, and necessarily is obtaining its station power requirement through third-party supply, they encompass transactions involving sales for end use, which is not appropriate for a wholesale rate schedule. We therefore will direct PJM to modify its amendments to the PJM Tariff and PJM Operating Agreement to ensure that they do not accommodate

⁶²(...continued)

should be measured on a rolling one-hour period for purposes of measuring net production for compliance with the net/gross output rule: "We conclude that a facility's net output should be measured on a rolling one-hour period for purposes of determining whether the facility makes sales in excess of its net output. In other words, a facility cannot sell each hour more than its net output for the hour." Connecticut Valley Electric Co., Inc. v. Wheelabrator Claremont Co., L.P., 82 FERC ¶ 61,116 at 61,421, order on reh'g and reconsideration, 83 FERC ¶ 61,136 (1998).

Docket No. ER00-3513-000, et al. - 24 -

purchases of station power for end use by those generators who must obtain station power through third-party supply.⁶³

As we previously noted, we have never required that net output be measured on a real time or second-by-second basis, but rather have taken the practical point of view that net output should be measured over a reasonable time period, so as to take into account fluctuations in electric production. Thus, while a generator that is undergoing, for example, a two- or three-month scheduled outage could not obtain station power under PJM's proposed amendments during the outage, fluctuations in gross output or station power requirements that produce momentary instances of negative net output during an appropriate time period are acceptable, so long as net output measured over the entire time period is positive.

PJM has chosen a one-hour period over which to measure netting, which is reasonable, since prices in the PJM Interchange Energy Market are determined hourly. However, we do not think that one hour is the only time period that would be reasonable. Longer intervals, such as a day or a week, also would be reasonable time periods over which station power may be netted. We would look favorably upon the use of a longer time period over which to measure netting.

We turn now to the two petitions for declaratory orders. The parties to these proceedings have made clear that they are not so much concerned about whether this Commission or a state commission has jurisdiction over the third-party provision of station power as they are concerned that vertically-integrated utilities are allowing their own and affiliated generating facilities to continue to net station power, while requiring merchant generators to buy station power at retail rates. According to the merchant generators, this disparity in treatment makes them less competitive with retained or affiliated generation, since they are forced to bear costs that their competitors do not.

In response to this concern, we emphasize that all generators that are self-supplying station power may net their station power requirements against gross output, without regard to the form of corporate ownership. Thus, a self-supplying generator cannot be required to purchase station power under a retail tariff simply because it is a merchant generator. A self-supplying generator may account for its station power

⁶³However, any unbundled retail transmission service that may accompany the purchase of station power would be governed by the PJM Tariff and Operating Agreements. Our findings herein with regard to the sale of station power do not in any way reverse or modify our earlier findings in Order No. 888 with regard to unbundled retail transmission service.

Docket No. ER00-3513-000, et al. - 25 -

requirements through netting regardless of whether it is owned by 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.

We believe that this determination is consistent with the FPA, will better ensure comparable treatment, and will address the concerns of the merchant generators that some vertically-integrated utilities are favoring their own or affiliated generating facilities to the competitive disadvantage of merchant generators. It is true that vertically-integrated utilities, because they generally own more generating facilities than merchant generators do, may be able to self-supply more often than merchant generators and may never have to pay another utility's retail rates for third-party supply of station power. Also, because vertically-integrated utilities own transmission lines that interconnect their generating facilities, they may never have to pay a third party's transmission charges for the delivery of station power. This is an unavoidable consequence of vertical integration, which may gradually diminish if utilities continue to divest their generators to others, thereby reducing their ability to self-supply from remote resources.

Allowing self-supplying merchant generators to net will ensure that they do not bear a cost that has no relationship to any "service" purportedly being provided by another party. In this manner, we can limit if not fully eliminate disparities between merchant generators and vertically-integrated utilities.⁶⁴ As we have previously explained, when a generator is self-supplying, it is not using another party's generating resources, and there is no need to compensate that other party for that power sale.

In Docket No. EL99-86-000, NYSEG asserts that:

All component services [of standby service as defined in NYSEG's retail rate schedule SC-11] are provided to generators interconnected to NYSEG's

⁶⁴Some of the merchant generators object to paying retail rates for station power on the grounds that these rates recover stranded costs associated with the divested generators they now own. The proper rate level for station power sold for end use is, however, a matter for the states, and we have no jurisdiction under the FPA regardless of whether a state sets a rate level different from the rate level we might set.

Docket No. ER00-3513-000, et al. - 26 -

system when a generator's output level is below its station power requirement.^{65]}

NYSEG indicates that it is providing station power to merchant generators under SC-11 only when they have negative net output and cannot self-supply. This is consistent with our findings herein, because in these circumstances, the generators are purchasing station power for end use. However, NYSEG cannot require any merchant generator to buy station power under SC-11 (or any other retail rate schedule) when the generator is self-supplying station power from either on-site or remote generating resources, since in those circumstances, there is no energy sale (for end use or otherwise).

In Docket No. EL00-113-000, NRG complains that Niagara Mohawk is attempting to charge it for supplying station power to the generating facilities it purchased from Niagara Mohawk without regard to whether the facilities are operating and capable of netting their station power requirements against their gross output. Among other things, Niagara Mohawk responds that the three facilities in question are configured so that they always receive an amount of energy from Niagara Mohawk (through separate feeder lines) sufficient to meet their station power requirements even when they are generating. In other words, Niagara Mohawk claims that the three NRG facilities are physically incapable of ever self-supplying their station power needs.⁶⁶

To the extent that Niagara Mohawk is charging NRG for the provision of station power under a retail rate when NRG is in fact self-supplying its own station power requirements, this practice is not consistent with our findings herein. However, to the extent that the three facilities are in fact incapable of self-supplying station power under any circumstances (whether because of their particular configurations⁶⁷ or otherwise), then NRG would appear to be ineligible for self-supplying, and therefore must purchase station power under an appropriate retail tariff. This is a factual determination that we cannot make based on the pleadings before us.

⁶⁵NYSEG Petition for Declaratory Order at 2 (emphasis added).

⁶⁶Niagara Mohawk at 3.

⁶⁷It is not clear from the pleadings whether NRG currently can control the flow of electricity from the separate feeder lines into the facilities, or could install such equipment in the future.

Docket No. ER00-3513-000, et al. - 27 -

4. The Third-Party Provision Of Station Power Does Not "Affect Or Relate To" Wholesale Services Nor Is It Analogous To Other Wholesale Services.

In this section, we discuss, and explain why we reject, theories raised by the parties to these proceedings that this Commission has jurisdiction over the third-party provision of station power because it "affects or relates" to wholesale services or because it is comparable to other wholesale services.

Parties that believe that the provision of station power involves a sale for end use generally argue that this Commission never before has objected to the characterization of the provision of station power as a retail transaction, even in its own orders.⁶⁸ They also assert that the provision of station power to industrial customers, which no one argues is other than a sale for end use, is indistinguishable from the provision of station power to generators in PJM in that both industrial customers and generators wholly consume station power on site.

On the other hand, those parties that would have the Commission take jurisdiction over the provision of station power in all instances, including when station power is obtained through third-party supply, make two general types of argument. First, they maintain that there is a sufficient "nexus" between the provision of station power and wholesale transactions to justify this Commission's assertion of jurisdiction. DENA's discussion of this theory is typical of the parties who take this position. DENA states:

Generating facilities cannot operate – *period* – without station power. Pumps for water, fuel and oil require electric power, as do generator exciters, to identify some of the critical internal uses of electric power in a generating facility. While certain other uses of station power may be peripheral and nonessential, the core purpose and function of station power directly affects the production of electricity for wholesale service. Thus, station power is *integral* to the production of power and is not an independent, unrelated service which the generator can choose to buy. As such, the provision of station power "affects or relates" to the generator's production and sale of electric power. In other words, the provision of

⁶⁸Citing to, for example, Connecticut Valley Electric Co. v. Wheelabrator Claremont Co., 82 FERC ¶ 61,116 at 61,413 n.6 (1998), and New England Power Co., 70 FERC ¶ 61,152 at 61,453 (1995).

Docket No. ER00-3513-000, et al. - 28 -

station power to a generating facility is an integral and absolutely essential part of the interconnection and operation of a generator.⁶⁹⁾

Second, some parties argue that station power service is sufficiently analogous to restoration or blackstart service or generation interconnection, in that they all relate to jurisdictional transmission service, as to provide a basis for federal jurisdiction.

No party convincingly argues that station power does not involve energy that is consumed on site. The very definition of station power as the energy used to light, heat, and air-condition a power plant and to run electric equipment indicates that the energy used for station power is consumed and not resold. We do not accept the proposition that, simply because electricity is used by generators as an input for the production of wholesale energy, this somehow converts the provision of station power into a wholesale transaction subject to our jurisdiction. As Commonwealth Edison puts it, "[o]ne might as well argue that an aluminum plant was reselling electricity because electricity is a prime input of production."⁷⁰ To put it another way, the business of the company purchasing the station power from a third-party supplier does not affect the jurisdictional nature of such third-party supply of station power. The third-party supply of station power for end use is unaffected by whether the purchaser is a wholesale generator or an aluminum smelter.

Not only are we unconvinced that the third-party supply of station power is something other than a sale for end use, we also are unpersuaded by the parties' arguments that the third-party supply of station power is subject to our jurisdiction under

⁶⁹DENA at 7 (emphasis in original).

⁷⁰Parties opposed to the retail provision of station power (in the form of third-party supply) rely on Commission orders stating that "load is not served at a generating unit," citing to *Entergy Services, Inc.*, 91 FERC ¶ 61,151 at 61,565 (2000), and *Wisconsin Power & Light Co.*, 84 FERC ¶ 61,300 at 62,385 (1998). We did not make this statement in the context of determining whether the provision of station power is a sale for end use, but rather in the context of preventing a company from attempting to circumvent the requirements of the pro forma tariff for network service and also attempting to "cherry pick" between network service and point-to-point service to meet the same load by designating a fictional point of delivery. Also, in those cases, the customer was seeking delivery of an amount of energy equal to the capacity of the generator, not its station power requirements. This evidences that the provision of station power was not at issue in these cases.

Docket No. ER00-3513-000, et al. - 29 -

the FPA because it "affects or relates" to wholesale electric energy sales or transmission services, or by analogy to jurisdictional services. We discuss both theories in turn.

Section 205(a) of the FPA gives the Commission the authority to ensure that:

[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable.^[71]

In addition, Section 205(c) of the FPA requires that:

every public utility shall file with the Commission . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.^[72]

The Commission has noted that it has "considerable flexibility in determining what rates and practices are 'for or in connection with,' 'affecting,' 'pertaining' or 'relating to' jurisdictional services and, accordingly, must be filed for Commission review."⁷³ The Commission applies a "rule of reason" in making this determination. We recognize that:

There is an infinitude of practices affecting rates and service. The statutory directive must reasonably be read to require the recitation of only those practices that affect rates and services significantly, that are realistically susceptible of specification, and that are not so generally understood as to render recitation superfluous.^[74]

⁷¹16 U.S.C. § 824d(a) (1994).

⁷²16 U.S.C. § 824d(c) (1994). See also 18 C.F.R. § 35.1(a) (2000).

⁷³Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,987 (1993) (Prior Notice); see also Town of Easton, Maryland v. Delmarva Power & Light Company, 24 FERC ¶ 61,251 (1983).

⁷⁴Prior Notice, 64 FERC at 61,988 (quoting City of Cleveland v. FERC, 773 F.2d (continued...))

Docket No. ER00-3513-000, et al. - 30 -

We find that DENA and other parties supporting this theory misstate our "rule of reason" doctrine. This doctrine is a means by which the Commission decides whether to require the filing of a particular practice or contract. In earlier cases, we explained that, under the rule of reason, the Commission may exercise its discretion to allow utilities to forego filing particular practices or contracts.⁷⁵ However, we have no jurisdiction over sales for end use in the first instance, and the "rule of reason" does not allow us to assert jurisdiction over the provision of station power by third parties.⁷⁶ While it is true that station power may well be "integral and essential" to the production of electricity (to use DENA's phrase), that does not necessarily render it jurisdictional.

DENA opines that the situation the Commission today faces with regard to station power is similar to that the Commission faced, soon after the issuance of Order No. 436, with regard to rates for transportation over gathering facilities, as performed by natural gas pipelines in connection with interstate transportation. According to DENA, natural gas pipelines had argued that the Commission could not regulate such rates because section 1(b) of Natural Gas Act (NGA), 15 U.S.C. § 717(b) (1994), specifically exempts gathering facilities from the Commission's jurisdiction. However, DENA relates, the Commission was concerned that interstate natural gas pipelines that continued to sell gas might discriminate in the provision of gathering services to competitors in order to favor the pipelines' merchant function. In Northern Natural Gas Co. v. FERC, 929 F.2d 1261, 1273-74 (8th Cir.), cert. denied, 502 U.S. 856 (1991) (Northern Natural), DENA relates, the Court of Appeals affirmed the Commission's statutory authority to regulate rates for transportation on a natural gas pipeline's gathering facilities performed in connection with jurisdictional interstate natural gas transportation. Citing to this case, DENA urges the Commission to forestall similar incentives and opportunities for public utilities to price

⁷⁴(...continued)
1368, 1376 (D.C. Cir. 1985)).

⁷⁵See Public Service Company of Colorado, 67 FERC ¶ 61,371 at 62,267 (1994); Resale Group of Iowa, Inc. v. IES Utilities, Inc., 85 FERC ¶ 61,424 at 62,599 (1998).

⁷⁶While we do not have jurisdiction over the provision of station power by third parties, because that is a sale for end use, the cost of station power may be a component of the cost of electric energy sold at wholesale, over which we do have jurisdiction. Thus, we would have authority to require the filing of a contract for the third-party provision of station power to assist in our review of the subsequent wholesale rates that include, and flow through to wholesale purchasers, these costs.

Docket No. ER00-3513-000, et al. - 31 -

station power in a manner that would favor their own merchant function at the expense of rival merchant generators.⁷⁷

We find this case to be inapposite. In Northern Natural Gas, the court of appeals found that the Commission's regulation of rates for transportation over a natural gas pipeline's gathering facilities would not conflict with state regulation over the same matter. The court stated:

The power we recognize here granted by §§ 4 and 5 does not extend to the physical gathering process, including such matter as "physical activities, facilities, and properties used in the [production and] gathering of natural gas." Those activities are within the purview of the states; the exercise of Federal power would be unnecessary interference in the affairs of states and localities. This case, however, involves interstate rates for which no local interest attaches and to which the states could not constitutionally or practically exercise regulatory power. Therefore, no conflict with local authority exists.⁷⁸⁾

The same lack of conflict with state authority does not exist for the third-party supply of station power, which is in fact regulated by some states as a sale for end use, and which is expressly provided for in some retail rate schedules.

We turn now to the claim that the Commission could assert jurisdiction over the provision of station power in a manner analogous to its assertion of jurisdiction over generation interconnection⁷⁹ or restoration or blackstart service. For example, IPPNY contends that PJM's proposed treatment of station power is consistent with the Commission's treatment of the interconnection of generating facilities to the transmission system. IPPNY notes that in a recent case, the Commission ruled that the interconnection of generation facilities to the transmission system "is an element of transmission service" and analogizes that:

[j]ust as interconnection facilities allow generation facilities to deliver their output into the bulk power transmission system, so too does the provision

⁷⁷DENA at 8.

⁷⁸Northern Natural Gas, 929 F.2d at 1274 (footnote omitted and parenthetical in original).

⁷⁹See Tennessee Power Co., 90 FERC ¶ 61,238 (2000) (Tennessee Power).

Docket No. ER00-3513-000, et al. - 32 -

of station power allow generation facilities to deliver their output to the transmission system.⁸⁰⁾

Similarly, PJM argues that its proposal is consistent with the Commission's treatment of restoration or blackstart service. According to PJM:

In Order No. 888, the Commission defined restoration service as the provision of power to restart a generation facility after it has been out of service (usually in the case of an unplanned outage). Because it provides energy for consumption by a generation plant, restoration service is a type of station power service.⁸¹⁾

We are not persuaded that the third-party supply of station power is analogous to either service. As for generation interconnection, we reject the theory that station power and generation interconnection are analogous simply because they both are required in order to effectuate the delivery of output to the interconnected grid. Interconnection is not just some kind of necessary input to transmission, but rather, it is, as we stated in Tennessee Power, "an element of transmission service [that] is already required to be provided under our *pro forma* tariff".⁸²⁾

As for restoration service, we agree with those parties who assert that this service is critical to the maintenance of transmission system integrity and stability and the restoration of the entire interconnected transmission grid subsequent to the rare occasion of a system-wide blackout, while, in contrast, station power is local in nature, provided on a routine basis, and does not involve the restart of the entire transmission grid. As PECO Energy notes:

Restoration Service in the context of Order No. 888 and the subsequent case citations offered by PJM refers not to the simple and relatively frequent case in which a particular generator is off-line but to the drastic and one hopes never to be experienced case in which the entire electric grid and all its interconnected generators are shut down.⁸³⁾

⁸⁰⁾IPPNY at 4-5.

⁸¹⁾PJM Transmittal Letter at 6.

⁸²⁾90 FERC at 61,761.

⁸³⁾PECO Energy at 6.

Docket No. ER00-3513-000, et al. - 33 -

Restoration of the transmission grid generally commences by reliance on emergency generators, typically diesel-powered, which can be operated in the absence of any external electricity source. Electricity from these emergency generators is then used to restart larger generators. As these larger generators go back on line, the entire grid is re-energized.⁸⁴ This is obviously a very different scenario from the everyday lighting, heating, and air-conditioning needs or the routine internal equipment needs of a generating facility. Accordingly, we reject the theory that station power and restoration service are related, and that therefore the provision of station power must be jurisdictional because restoration service is.

The Commission orders:

(A) PJM is hereby directed to file revised rate sheets within 30 days of the date of this order, as discussed in the body of this order.

(B) NYSEG's and NRG's petitions for declaratory order are hereby denied in part and granted in part, as discussed in the body of this order.

(C) The New York Commission's motions to lodge decisions in Docket No. ER00-3513-000 are hereby granted.

(D) The motion to intervene out of time of Edison Mission Energy and Edison Mission Marketing & Trading, Inc. in Docket No. ER00-3513-000 is hereby granted.

(E) Orion's request for file a protest one day out of time in Docket No. EL99-86-000 is hereby granted.

(F) NYSEG's motion to file an answer to various protests in Docket No. EL99-86-000 is hereby granted.

(G) The motions to intervene out of time of Con Edison, United Illuminating Company, Midwest, and Commonwealth Edison Company in Docket No. EL00-113-000 are hereby granted.

(H) Niagara Mohawk's, Commonwealth Edison's, and NRG's motions to file answers in Docket No. EL00-113-000 are hereby granted.

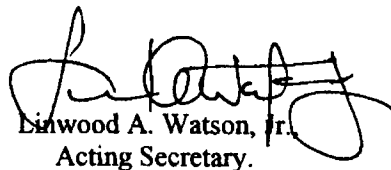
⁸⁴See Order No. 888 at 31,711.

Docket No. ER00-3513-000, et al. - 34 -

(1) NRG's request for an interim order pending resolution of Docket No. EL00-113-000 is hereby dismissed as moot.

By the Commission.

(S E A L)



Linwood A. Watson, Jr.
Acting Secretary.