

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, LLC ) Docket No. ER-00-3513

PETITION FOR CLARIFICATION OR REHEARING

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, the Public Service Commission of the State of New York (NYPSC) hereby submits its Petition for Clarification or Rehearing in the captioned proceeding.

Copies of all documents and correspondence should be sent to:

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In its March 14, 2001 Order in this proceeding,<sup>1</sup> the Commission found that it lacked jurisdiction over the station power provided to merchant generators by third parties.<sup>2</sup> Because

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<sup>1</sup> Docket No. ER00-3513-000, PJM Interconnection, LLC, 94 FERC ¶61,251 (March 14, 2001)(PJM Order).

<sup>2</sup> Station power is the electric energy used for the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility site, and for operating the electric equipment that is on the generating facility site.

such a sale of station power is a retail sale, it is subject to State jurisdiction.<sup>3</sup>

The Commission also decided, however, that generators could self-supply station power from another generator owned by the same entity at a "remote" location, in effect netting the station use against production at that remote location.<sup>4</sup> The Commission applied its remote netting concept to the PJM Interconnection, where many utilities remain fully integrated. It should clarify that this netting concept will not be extended to the New York Independent System Operator (NYISO), where utilities are no longer integrated. Since the Commission premised its remote netting finding on the presence of integrated utilities, and their potential competitive advantage over merchant generators, the basis for the finding evaporates where utilities have divested their generation and are no longer integrated.

Moreover, the Commission properly declined jurisdiction over the retail sale of station power to merchant generators, and properly found that there is no retail sale where generators are capable of netting station use against

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<sup>3</sup> 94 FERC ¶61,251, Slip Opinion, pp. 27-32.

<sup>4</sup> 94 FERC ¶61,251, Slip Opinion, pp. 19-21.

production when they are operating.<sup>5</sup> Notwithstanding the Commission's finding to the contrary, however, netting station use against production at remote locations is a retail delivery that falls under the State's retail jurisdiction. Accordingly, in the alternative to clarification, NYPSC requests that the Commission rehear the finding on netting against remote locations.

I. The Commission Should Clarify That Netting of Station Use Against Remote Locations is Not Appropriate For NYISO, Because Most of Its Utilities Are No Longer Integrated

In ruling that merchant generators could net station use, at an out-of-service generation facility against generation produced at another generator owned by that entity, without embarking upon a retail sale, the Commission reasoned that this netting of station use was analogous to self-supply. As a result, the Commission found there was no energy sale subject to retail jurisdiction. The Commission justified this analysis on the grounds that it was:

Consistent with the FPA, will better ensure comparable treatment, and will address the concerns of merchant generators that some vertically-integrated utilities are favoring their own or affiliated generating

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<sup>5</sup> In those instances, a generator, when it operates, self-supplies all of its electric energy needs from "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).

facilities to the competitive disadvantage of merchant generators.<sup>6</sup>

The Commission was concerned that integrated utilities may reduce costs for their affiliated generators by allowing them to net station use, while denying netting to merchant generators. The ruling on netting in PJM should not be extended to NYISO.

The potential for the form of competitive advantage the Commission envisions, if integrated utilities net while merchant generators cannot, is absent from the State-wide NYISO wholesale market. In contrast to the PJM wholesale market, where most utilities are vertically integrated, almost all of the formerly-integrated NYISO utilities have already sold most of their generating assets. The process for selling most of the few remaining significantly-sized generation assets continues. Unlike the PJM market, it does not appear that there is the potential in the overall NYISO market for competitive advantage that may arise if integrated utilities that reduce costs for their own generation through netting deny that mechanism to merchant generators.

Accordingly, the factual predicates present in PJM, supporting the Commission's determination to allow merchant generators to net station use against production at remote

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<sup>6</sup> 94 FERC ¶61,251, Slip Opinion, p. 25.

locations, do not exist in NYISO. As a result, the Commission should clarify that netting against remote locations, as described in the PJM Order, applies only to the PJM Interconnection, and will not be extended to NYISO, which is populated predominantly by utilities that have disaggregated through generation divestiture.

II. Netting of Station Use Against Remote Locations by Merchant Generators Requires Delivery Service Subject to Retail Jurisdiction

If the Commission declines to clarify the scope of the PJM Order, it should grant rehearing. The Commission properly decided that:

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 the sale for end use that we do not regulate.<sup>7</sup>

In dividing station use into these two categories, the Commission was correct. The creation of a third category -- station use "self-supplied" from remote locations - is not justified.

The Commission has acknowledged that the States have authority over the service of delivering electric energy to end

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<sup>7</sup> 94 FERC ¶61,251, Slip Opinion, p. 22.

users.<sup>8</sup> The Commission also decided in the BART Order that, even where there are no identifiable local distribution facilities, the States retain jurisdiction over the distribution of energy to end users, and so may assess separate charges for delivery service in addition to Commission-jurisdictional charges for transmission service.<sup>9</sup>

Creating a fictional category of self-supply from remote locations cannot stand in light of these pronouncements from the Commission. When generation is produced at one location and then is delivered to another remote location in an unbundled and disaggregated environment, there is a retail delivery. That retail delivery is subject to the State's jurisdiction over retail ratemaking, under Order No. 888 and the BART Order.

The PJM Order itself supports the conclusion that there is a delivery. As the Commission notes there, the transmission provider is expected to charge for the delivery of electricity "netted" between remote locations, under the

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<sup>8</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Docket No. RM-95-8-000, Order No. 888, 61 Fed. Reg. 21,540, ¶31,036 at 31,782. The United States Supreme Court has agreed to hear NYPSC's appeal of the Commission's assertion of jurisdiction in Order No. 888 over retail transmission. By this filing, NYPSC is not waiving its appeal of any jurisdictional issue in any proceeding.

<sup>9</sup> San Francisco Bay Area Rapid Transit District v. Pacific Gas & Electric Company, 87 FERC ¶61,255 (1999)(BART Order).

provider's open access transmission tariff.<sup>10</sup> As decided in the BART Order, once there is a transmission delivery for end-use, a State-jurisdictional retail delivery is also created. Station use is an end use. The retail delivery element of this end use is disregarded under the PJM Order's remote netting approach.

The Commission justifies merchant generator netting against production at remote locations by pointing to the netting practiced by some integrated utilities. There is no analogy between integrated utility netting practices and the Commission's proposal to allow remote netting for merchant generators. In the integrated environment, each integrated utility provides bundled services and is responsible for maintaining both generation and transmission system reliability. The integrated utilities own the facilities necessary to supply and deliver generation among various locations, for station use or otherwise. In that environment, unbundling one service, such as station use, made little sense.

Unbundling and disaggregating the provision of electric services, however, profoundly alters the electric service environment. Merchant generators owning generating facilities at multiple locations do not possess the transmission or distribution facilities necessary to connect those generating facilities to each other. The predicate for generator netting

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<sup>10</sup> 94 FERC ¶65,251, Slip Opinion, p. 27.

among remote locations, which flows only from the bundling of integrated services provided through facilities owned by an integrated utility, no longer exists.

In order to net among remote locations, merchant generators must use another entity's delivery facilities, thereby purchasing delivery services. Since station use is consumption for an end use, there is a retail service component in an unbundled environment. Just as with other retail services, the pricing is properly left to the State's jurisdiction over those services.

Accordingly, the Commission should grant rehearing and find that the production of generation supply at one location for use at another remote location requires retail delivery. That retail delivery service is subject to the State's jurisdiction, just as the delivery service described in the BART Order subsumed a retail element subject to the State's ratemaking authority.

#### CONCLUSION

The Commission's proposal, to allow merchant generators to net station use against other generation facilities owned at remote locations, should be clarified, by finding that it would not adhere in NYISO. In the alternative, the Commission should grant rehearing and find that station use

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supplied from a remote location is a retail service subject to the State's jurisdiction.

Respectfully submitted,

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Albany, New York