

# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: <http://www.dps.state.ny.us>



## PUBLIC SERVICE COMMISSION

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*Acting Secretary*

October 20, 2003

Honorable Magalie R. Salas, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Room 1-A209  
Washington, D.C. 20426

Re: Docket No. EL03-234-000 - Nine Mile Point Nuclear  
Station, LLC

Dear Secretary Salas:

For filing, please find the Notice of Intervention and Protest of the New York State Public Service Commission in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 473-7136.

Very truly yours,

Leonard Van Ryn  
Assistant Counsel

Attachment

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Nine Mile Point Nuclear Station LLC ) Docket No. EL03-234-000

**NOTICE OF INTERVENTION AND PROTEST**

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the Public Service Commission of the State of New York (NYPSC) hereby submits its Notice of Intervention and Protest in the captioned proceeding.

Copies of all documents and correspondence should be sent to:

Dawn Jablonski Ryman  
General Counsel  
Public Service Commission  
of the State of New York  
Three Empire State Plaza  
Albany, New York 12223-1350

Ronald Liberty, Director  
Federal Energy Intervention  
Office of Electricity  
and the Environment  
New York State Department  
of Public Service  
Three Empire State Plaza  
Albany, New York 12223-1350

In a complaint filed September 26, 2003, Nine Mile Point Nuclear Station, LLC (Nine Mile), the owner of a 1550 MW majority interest in two nuclear generation units located in Oswego, New York totaling 1,757 MW (the Nine Mile facilities), asks that the Commission preclude Niagara Mohawk Power Corporation (Niagara Mohawk) from charging for the retail standby electric services it supplies to the Nine Mile facilities. Nine Mile argues that the charges conflict with the

New York Independent System Operators' (NYISO) Station Power tariff,<sup>1</sup> and are otherwise discriminatory. Those arguments lack merit, because the Commission has recognized that States have the authority to charge for retail delivery services provided to customers like Nine Mile; retail energy services are subject to State jurisdiction in any event; and, there is no discrimination. To the extent Niagara Mohawk's charges might duplicate charges within the scope of the NYISO tariff, Nine Mile may participate in Case 03-E-1016, the ongoing NYPSC proceeding it references where that issue is under consideration.<sup>2</sup> Accordingly, NYPSC asks that the Commission reject the complaint.

#### BACKGROUND

Nine Mile was the winning bidder in the auction of the two Nine Mile facilities conducted in 2001 by Niagara Mohawk and other electric utility owners. The facilities, Nine Mile reports, deliver their output to the bulk transmission system through 345 kV facilities, while taking station use and standby

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<sup>1</sup> New York Independent System Operator, Inc., 101 FERC ¶61,230 (2002) (NYISO Station Use Order).

<sup>2</sup> Nine Mile Complaint, pp. 10-11. See NYPSC Case 03-E-1016, Niagara Mohawk Power Corporation - Reduced Delivery Rates for Standby Service for NYISO Station Service Customers (filed July 10, 2003 in Case 01-E-1847).

service through 115 kV lines, all owned by Niagara Mohawk. Nine Mile claims the utility may not charge for the standby retail electric services it provides through its facilities to the generating facilities.<sup>3</sup>

Nine Mile premises its claim on the NYISO Station Use tariff that took effect on April 1, 2003. According to Nine Mile, taking station power service under that tariff precludes State utility charges because the tariff encompasses all electric delivery service needs, through the Nine Mile facilities' transmission level interconnections, and all energy service needs, through netting of the facilities' energy usage against energy production, either on-site or remote, over a 30 day period.<sup>4</sup> Moreover, Nine Mile claims charging it for State retail services would be discriminatory because Niagara Mohawk did not charge itself for those services when the utility owned the Nine Mile facilities.

The Commission should deny the complaint. As the Commission has found, State retail charges can co-exist with

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<sup>3</sup> Standby service is the electric delivery and energy supplied to a customer that owns generation when its generator is out of service or otherwise does not meet all or a portion of the customer's load.

<sup>4</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.

Commission-jurisdictional transmission services charges.<sup>5</sup> To find otherwise would arbitrarily deviate from policies expressed in prior Orders,<sup>6</sup> where the Commission decided there is an element of local distribution service in any unbundled retail transaction, and that State jurisdiction over delivery service includes the authority to impose non-bypassable distribution or retail stranded cost charges.

Moreover, the energy a generator consumes when it is not operating is purchased at retail subject to State jurisdiction, and the netting of the cost of energy delivered to a generator at retail against the price for energy produced by that generator at wholesale is permissible only with the acquiescence of the State jurisdiction. In tolerating, to date, the NYISO netting arrangement, NYPSC in no way forgoes its jurisdiction to impose other retail energy charges, or to modify, in the future, netting arrangements affecting retail energy sales.

Finally, Nine Mile premises its discrimination claim on the character of service provided at a time it owned the facility, before the NYISO commenced operation and before

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<sup>5</sup> PJM Interconnection, LLC, 94 FERC ¶61,251 (2001) (PJM II).

<sup>6</sup> San Francisco Bay Area Rapid Transit District, 87 FERC ¶61,255 (1999) (BART Order) and 90 FERC ¶61,291 (2000) (BART Rehearing Order).

competition was introduced into New York's electric market. These prior circumstances are irrelevant to the competitive market that exists today in New York, and are not evidence of discrimination.<sup>7</sup>

ARGUMENT

I. The Commission Should Reject Nine Mile's Complaint, and Reaffirm Its Prior Policies Permitting States to Impose Retail Charges.

In its Order No. 888, the Commission found that "there is an element of local distribution service in any unbundled retail transaction,"<sup>8</sup> and State jurisdiction over delivery service includes the "authority to impose non-bypassable distribution or retail stranded cost charges."<sup>9</sup> Elaborating upon that principle, the Commission found in the BART Orders that, even where there are no identifiable local distribution

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<sup>7</sup> As Nine Mile points out, Nine Mile Complaint p. 11, similar issues regarding Niagara Mohawk's station power charges are pending before the Commission in two other complaint proceedings; NYPSC reiterates here the arguments it made in those proceedings. Docket No. EL03-204-000, AES Somerset LLC (complaint filed June 25, 2003); Docket No. EL03-27-000, Huntley Power LLC, et al. (complaint filed November 26, 2002).

<sup>8</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services By Public Utilities, Order No. 888, FERC Stats. & Regs. ¶31,036 (1996), at 31,783.

<sup>9</sup> Order No. 888 at 31,781-82.

facilities, states retain authority over retail delivery to end-users and so may assess separate charges for distribution service in addition to the Commission's jurisdictional charges for transmission service. This State authority over distribution service permits the use of suitably-developed retail rates for standby service, which may include non-bypassable customer or stranded cost charges, for customers taking delivery at either transmission or distribution levels.

To the extent Nine Mile relies upon the NYISO Station Use Order as establishing that states may not tariff standby charges for transmission level customers, that reliance is misplaced.<sup>10</sup> The Order does not address application of the principles established in Order No. 888 and the BART Orders to retail standby services furnished to customers at the transmission level, and so does not overrule those Orders.

In claiming that the State may not impose any charges for the standby services provided to it, Nine Mile ignores Order No. 888, and the BART Orders. Since those Orders provide that states may impose delivery charges on Nine Mile, it asks, in effect, that the Commission reverse its prior precedents without

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<sup>10</sup> NYPSC has petitioned for rehearing of the NYISO Netting Order, seeking clarification that it is not intended to reverse Order No. 888 or the BART Orders.

explanation. Since it has not justified such a reversal, its complaint is fatally flawed and should not be granted.

II. Netting Results In a Retail Sale Subject to State Jurisdiction.

When a generator is operating, and draws its electricity directly from its generating equipment, it self-supplies station power and there is no sale of energy. When a generator does not operate, however, its netting of the cost of the energy delivered to it against the price paid for its prior production is a retail sale, notwithstanding the net pricing arrangement under the NYISO station use tariff. While the Commission has jurisdiction to decide what is a wholesale sale, it concedes that none is present in station use;<sup>11</sup> once that determination is made, the Commission lacks the jurisdiction to rule that the energy consumed is not a retail sale.

Generators netting their energy costs most certainly do consume retail energy supply from the NYISO markets when their equipment is incapable of generating. Otherwise, they would not be able to operate their non-generation equipment or restart their generators. While netting may be a useful approach to accounting for that station use energy, it does not change the fact that the energy consumed is being purchased and

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<sup>11</sup> PJM II, at 61,894.

used at retail. For the Commission to expand its jurisdiction into the area of these retail energy sales would be ultra vires.

Indeed, the Commission recently found that there is a retail sale when a generator purchases its station use energy from an independent third party.<sup>12</sup> A purchase from the NYISO market through netting is a third-party retail purchase and sale just the same, even though the cost is accounted for through netting. Consequently,

Order No. 888 applies; there is a delivery of energy that is consumed by an end-user (in this case, a generator receiving station power), the transaction retains an element of state jurisdiction, and [a utility] may impose state-approved charges on such retail deliveries regardless of who provides the energy, or whether a sale of energy occurs, or whether the delivery uses no identifiable distribution facilities.<sup>13</sup>

Therefore, NYPSC does not lose jurisdiction over energy sales at retail. It may attach to those sales at retail appropriate charges for the services provided. Nine Mile premises its complaint upon the theory that no such charges may be imposed. Since that theory is without merit, the complaint must be rejected.

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<sup>12</sup> Northeast Utility Services Company, 101 FERC ¶61,327 (December 18, 2002).

<sup>13</sup> Northeast Utility Services Company, 101 FERC at 62,363.

III. Assessing State Retail Charges  
Against Nine Mile For Services  
Provided To It is Not Discriminatory.

As another justification for its complaint, Nine Mile maintains that it is discriminatory to charge it for standby service when it did not assess those charges against itself when it owned the Nine Mile facilities. This argument is not credible.

According to Nine Mile, discrimination exists because of the arrangements that were made for supplying station use energy to the Nine Mile facilities at the time before Nine Mile purchased them, before the NYISO entered operation, and before competition was introduced in New York via the NYISO. These prior circumstances are irrelevant. Niagara Mohawk has divested all of its generation, and other New York utilities have divested most of their generation as well. Consequently, there is no meaningful discrimination between utility ownership and non-utility ownership of generation facilities in New York.

Nine Mile argues that a discrimination finding may be premised on findings made in PJM II. Those circumstances, however, are not analogous to New York's. Unlike New York, in PJM, utilities continue to own generation in competition with independent generators. Since the type of discrimination allegedly present in PJM cannot exist in New York, Nine Mile's

discrimination argument allegedly present in PJM is factually unsustainable.

Moreover, when New York's utilities were integrated, they recovered the cost of their station use energy and its delivery in their bundled retail charges to their customers. They did not suggest that their generators failed to consume energy for station use when out-of-service. In its attempt to evade Niagara Mohawk's standby service charges, Nine Mile would disregard its consumption of energy when its generator is out-of-service.

Nine Mile's discrimination arguments do not justify the relief it seeks. Its complaint cannot be granted on the grounds that discrimination has occurred.

IV. Nine Mile Has Failed To Justify Its Claim that Niagara Mohawk Imposes Unreasonable Charges Through Its Standby Tariff.

Nine Mile argues that it is a transmission-level customer, and that the charges Niagara Mohawk would impose on it are unreasonable given the services it takes from NYISO through interconnection with NYISO-controlled transmission facilities. The Commission is not the proper forum for addressing this complaint.

NYPSC adopted standby tariffs for Niagara Mohawk after extensive proceedings.<sup>14</sup> Nine Mile never presented in those proceedings any argument that any of Niagara Mohawk's charges were unreasonable. Moreover, to the extent that Niagara Mohawk's standby charges arguably might duplicate NYISO charges, the issue is under consideration in NYPSC Case 03-E-1016, supra. The Commission should await NYPSC's decision there.

In that proceeding, NYPSC is examining allegations that Niagara Mohawk's standby charges are duplicative and are otherwise overstated. Comments making those allegations were timely submitted in the proceeding by the Independent Power Producers of New York, Inc. (IPPNY), the trade organization Nine Mile references in its complaint.<sup>15</sup> IPPNY's arguments will be carefully considered, and a decision will be rendered that eliminates the potential for overpayments that might occur from taking service under both Commission-jurisdictional station use and NYPSC-jurisdictional standby tariffs.

Instead of awaiting a NYPSC decision on duplicative State charges, however, Nine Mile claims that all State charges

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<sup>14</sup> Case 01-E-1847, Niagara Mohawk Power Corporation - Standby Service Rates, Order Approving Joint Proposal (issued June 21, 2002) and Order Denying Rehearing (issued October 4, 2002).

<sup>15</sup> Nine Mile Complaint, pp. 9-10.

are improper. For the reasons discussed above, this claim has no merit and requires rejection of Nine Mile's complaint, without prejudice to the adjustment of Niagara Mohawk's tariffs to prevent overcharges in NYPSC Case 03-E-1016.

CONCLUSION

The Commission should deny the complaint filed by Nine Mile because the relief it requests conflicts with Commission policies and is beyond Commission jurisdiction, and it has failed to establish that discrimination exists. To the extent that it complains that it is overcharged because it takes service under both Commission-jurisdictional and NYPSC-jurisdictional tariffs, it should be directed to await NYPSC's decision in the ongoing proceeding NYPSC has instituted to address that issue.

Respectfully submitted,

Dawn Jablonski Ryman  
General Counsel

Leonard Van Ryn  
Assistant Counsel  
Public Service Commission  
of the State of New York  
Three Empire State Plaza  
Albany, New York 12223-1350

Dated: October 20, 2003  
Albany, New York

CERTIFICATE OF SERVICE

I, Janet Burg, do hereby certify that I will serve on October 20, 2003 the foregoing Notice of Intervention and Comments of the Public Service Commission of the State of New York by depositing a copy thereof, first class postage prepaid, in the United States mail, properly addressed to each of the parties of record, indicated on the official service list compiled by the Secretary in this proceeding.

Date: October 20, 2003  
Albany, New York

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Janet Burg